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PROSECUTING CYBER-PEDOPHILES: HOW CAN INTENT BE SHOWN IN A VIRTUAL WORLD IN LIGHT OF THE FANTASY DEFENSE?

Donald S. Yamagami*

I. INTRODUCTION

Late one night, thirty-four-year-old Patrick Naughton, a former Infoseek executive, walked along the Santa Monica Pier to meet “KRISLA.” KRISLA was the handle of a supposed thirteen-year-old girl with whom he had a sexual correspondence for over nine months. The five-foot, blonde haired girl waited on the pier near the roller coaster, carrying a green backpack as instructed by Naughton. Naughton had written to her about love and sex and that he “wanted to get [her] alone in his hotel room and have [her] strip naked for him.”

However, the married Naughton, who had traveled from Seattle, alleged that he had no intention of having sex with KRISLA and that he did not even believe she was who she said she was. Naughton was correct in that this was all just

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2. “KRISLA” is a chat room “handle” which is a name that one uses to identify oneself. It could be a real name, a nickname, or a completely fictitious name.


6. His wife later filed for divorce. See Michelle Quinn, Dangerous Illusion, SAN JOSE MERCURY NEWS, Aug. 6, 2000 (SV MAGAZINE), at 22.

a "fantasy," since KRISLA was really an undercover FBI agent who was part of a six-month sting operation to catch Naughton.8

The FBI arrested Naughton and charged him with crossing state lines with the intent to have sex with a minor9 and using the Internet to try to arrange to have sex with a minor.10 Naughton argued that he thought the person he was meeting was a grown woman who shared his "daddy/daughter" fantasy and was "playing the part" of a young girl.11 Enough members of the jury believed his "fantasy defense" to acquit him of these charges.12

The Naughton case illustrates some of the dangers that the Internet has brought to society. The Internet medium is an ideal tool for pedophiles to lurk with virtual anonymity and to choose from tens of thousands of potential child victims.13 Recent cases include an arrest of a priest from Staten Island who traveled to a nearby city to allegedly have sex with a fifteen-year-old boy whom he had met online.14 The media has called another man the "World's Stupidest Pedophile" because the FBI caught him trying to buy an eight-year-old girl for sexual purposes over the Internet.15 A FBI agent in disguise convinced the man that her niece was for sale for $100.16 The FBI then arrested him when he went to the girl's house to make the purchase.17

This type of criminal solicitation over the Internet is growing each day.18 FBI agents, acting as child victims, have

8. See Affidavit of Bruce M. Applin, supra note 4.
10. See Marshall, supra note 7, at 28A; see also 18 U.S.C.A. § 2422b (West 1999).
12. See Bickel, supra note 11.
14. See id. The boy was actually an undercover FBI agent.
15. See id.
16. See id.
recently caught hundreds of cyber-pedophiles soliciting minors for sexual purposes on the Internet. This number will rise since the number of Internet users and the government’s enforcement against Internet crimes against children have dramatically increased.

The conviction rate for prosecuting these cases is a remarkable ninety-five percent. However, despite the high conviction rate, current laws designed to protect minors from pedophiles do not always protect the intended victim, as demonstrated by the Naughton case. Attorneys have multiple defenses to use in arguing their cases, such as entrapment, the unconstitutionality of existing Internet laws, and mistake of fact. The “fantasy defense” used in the Naughton case seems to be the latest defense, yet it has not been researched much since it is so new. However, since the closely watched Naughton fantasy defense was successful, defense lawyers are likely to use it to help future clients.

This comment analyzes the recent defenses used against federal and state laws designed to protect children from cyber-pedophiles. Part II discusses the background of the current problems facing parents with respect to pedophiles luring children for sex over the Internet. Recent cases illustrate that current laws have been successful to convict such offenders, but the Naughton case reveals a growing new defense against such laws. Part III identifies the growing problem of protecting society from cyber-pedophiles as exist-

19. The term “cyber-pedophile” refers to a person with the sexual orientation or preference to like children on the Internet, whereas the term “child molester” refers to a person who actually engages in the behavior. See Keith F. Durkin, Misuse of the Internet by Pedophiles: Implications for Law Enforcement and Probation Practice, 61 FED. PROBATION 14 (1997). More recently, the term “traveler” is used to describe a criminal who finds a child on the Internet and then tries to meet him or her for sex. See The Fantasy Defense (visited July 31, 2000) <http://cbsnews.cbs.com/now/story/0,1597,199192-412,00.shtml>.


22. See id.

23. See Bickel, supra note 13.


25. See infra Part IV.

26. See infra Part II.

27. See infra Part II.D.3-4.
ing laws are challenged by new defenses. Part IV analyzes why conviction rates were high in prosecuting cyber-pedophiles, and how and why recent cases show that unless there is a change to existing laws, the trend of successful prosecutions could decline. Finally, Part V proposes that the "fantasy defense," though helpful for the Naughton defense, is not without faults. Factors can change to aid successful prosecution of cyber-pedophiles as well as reduce the opportunities for potential cyber-pedophiles to access children. For example, training the FBI to execute successful sting operations, and better software to block out adult sites to minors, will reduce the likelihood that successful defenses will prevail in court.

II. BACKGROUND

Approximately eighty-three million Americans are currently online, and that number will grow to nearly ninety-five million in the next year. With the rise of Internet users, there is the drawback of an increase in cyber crimes. Unlike traditional crimes, Internet crimes do not confine a criminal to his own community, but can transcend his crimes to other parts of the country. This makes it especially difficult for law enforcement agencies to monitor and to apprehend Internet criminals because they cover areas of conflicting police jurisdictions. In response, the government increased its war chest to help catch Internet crimes directed against children by recently granting three million dollars to ten states and local law enforcement agencies to improve their efforts.

There has been a growing number of cases where adults have tried to solicit sex with minors over the Internet. Innocent Images, a FBI computer crimes unit that targets sexual

28. See infra Part III.
29. See infra Part IV.
30. See infra Part V.
31. See infra Part V.
32. See infra Part V.
34. See FBI Making it Safe for Children?, supra note 18.
35. See id.
36. See Marshall, supra note 7, at 28A.
37. See id.
predators and child pornographers on the Internet, has investigated over 400 such cases since its establishment in 1995.38
Most of these cases are similar to the Naughton case, where a FBI agent poses as a female minor in chat rooms known to attract pedophiles.39 The adult eventually propositions the undercover FBI agent for sex, and the FBI stands by to make the arrest.40

A. Source of Law Protecting Minors from Cyber-Pedophiles

1. Federal Statutes

Title 18, United States Code, section 2423(b), otherwise known as "Transportation for Illegal Sexual Activity and Related Crimes," became law in 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994.41 It states:

A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, for the purpose of engaging in any sexual act with a person under 18 years of age that would be in violation of Chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States shall be fined under this title, imprisoned not more than 10 years, or both.42

Title 18, United States Code, section 2422(b) states:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.43

39. See id. The average cyber-pedophile is a white, professional male between the age of 25-45. See Gullotta, supra note 21.
40. See infra Part II.B.
41. See United States v. Childress, 104 F.3d 47, 50 (4th Cir. 1996).
42. 18 U.S.C.A. § 2423b (West 1999).
43. 18 U.S.C.A § 2422b (West 1999) (emphasis added). This section includes the Internet.
2. California State Statute

Section 288.2(b) of the California Penal Code, otherwise known as “Harmful Matter Sent with Intent of Seduction of Minor,” states:

Every person who, with knowledge that a person is a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by electronic mail, the Internet, as defined in Section 17538 of the Business and Professions Code, or a commercial online service, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail.44

B. Recent Cases Involving Child Sex Offenders

1. Childress—Found Guilty by Jury

In April of 1996, James Childress, using the screen name “Sylliboy,” sent an insta-message45 to One4Fun4U (“Fun”) who was in a chat room labeled “X Little Girl Gift.”46 Although he was actually thirty-one years old, Sylliboy described himself as a twenty-five-year-old to Fun, who claimed to be a fourteen-year-old girl.47 During their conversation, Sylliboy continually asked Fun to meet with him offline.48 He wrote with graphic description of what sexual activities he wanted to do with Fun.49 The next day, Sylliboy again initiated contact with Fun and discussed meeting with her to have sex.50 Fun agreed to meet Sylliboy the next day at a mall located in Maryland.51 The next day, Childress left his Virginia apartment and waited at the designated place at the mall.52 FBI agents, as part of the undercover sting operation,

44. CAL. PENAL CODE § 288.2b (West 1999).
45. An insta-message is a private message that can only be viewed by the recipient.
46. See Childress, 104 F.3d at 48.
47. See id.
48. See id. at 49.
49. See id.
50. See id.
51. See id.
52. See Childress, 104 F.3d at 49.
“Innocent Images,” then arrested him. Fun was actually FBI agent Patricia Ferrante, whose investigations targeted adults sending child pornography over the Internet.

A jury in the District of Maryland found Childress guilty of traveling across state lines with the intent to engage in sexual acts with a juvenile. Childress filed pretrial motions to dismiss the indictment, including a statement that Agent Ferrante “improperly manufactured jurisdiction by, first, having determined that Childress lived in Virginia, then suggesting a meeting place in another state, Maryland.” The district court denied the motions as well as the alternate defense of entrapment and found Childress guilty by a jury verdict.

2. DeBeir—Pled Guilty

In a more recent case, Georges DeBeir, a fifty-eight-year-old male contacted “Kathy” in a “teensex” Internet chat room. In their first e-mail conversation, DeBeir, a former Belgian diplomat who had worked at the United Nations, told Kathy that he was “looking to meet a teenage girl very discreetly once in a while strictly for oral sex.” They exchanged numerous sexually explicit e-mail letters to each other, with DeBeir stressing to Kathy to keep the conversations secret. DeBeir knew of the consequences if he was caught, stating to Kathy that “if a man my age is caught in a motel room together with a fourteen-year-old girl . . . I’ll go to jail for many years . . . even at age fourteen, I’m sure you’re smart enough to know that.”

In May of 1998, DeBeir contacted Kathy and told her that
he would travel from New York to meet her at a downtown
Baltimore mall, and from there, proceed to a nearby hotel.64
They agreed upon the clothing they would wear to identify
each other and that they should check into the hotel sepa-
rately to avoid drawing attention to their meeting.65 Kathy
waited at the designated spot in the mall until DeBeir ap-
proached her and asked if they could take a walk.66 The FBI
agents then arrested DeBeir for violation of 18 U.S.C.A. §
2423(b).67
DeBeir, unlike Childress, pled guilty and was sentenced
to six months home detention and five years probation.68

3. Reed—Found Guilty by Judge

In 1994, Patrick Reed placed an advertisement in Swing
magazine looking for "a woman of any race, age or size to
keep up with his sexual appetite."69 A sheriff's detective
picked up on this advertisement because it referenced
"women of any age."70 He responded to Reed by playing the
role of a woman named "Helen Glenn," who was the mother of
"Rachel" and "Sandi," ages twelve and nine, respectively.71
The detective explained that Helen was looking for a man to
help with the "special education" of her children, stating that
leaving her girls' "education" to another child would be "a ter-
rible mistake."72 Reed responded back clarifying that he un-
derstood that she wanted him to teach the girls about the
facts of life, and that he had done this type of "teaching" in
the past with his step-nieces, ages thirteen and fourteen.73

64. See id. DeBeir told Kathy that he would go to AAA to get information
on hotels in downtown Baltimore. A list of area hotels with phone numbers was
later found in his pocket after his arrest. See id.
65. See id. at 565. At DeBeir's request, Kathy agreed to bring her school
uniform so they could "play a neat little game," which had Kathy dressing up in
her uniform without any underwear and DeBeir performing oral sex on her. See id.
66. See id.
67. See DeBeir, 186 F.3d at 564.
68. See Baker, supra note 20, at 51. The sentencing was overturned on ap-
peal when the Fourth Circuit held that the trial judge abused his discretion by
improperly deviating from the federal sentencing guidelines. See id.
69. People v. Reed, 61 Cal. Rptr. 2d 658, 659 (1997). The ad also had an at-
tached photo that showed a naked man having an erection. See id.
70. Id.
71. See id.
72. Id.
73. See id.
Reed later sent a letter to Helen telling her that he would not have intercourse with the girls until after they were comfortable with him, but he would use sex toys on them.\textsuperscript{74} Helen's letter explained that she would not be involved in these activities, but would be there for the first meeting to set things up.\textsuperscript{76} At the initial meeting at a hotel room, Reed and a female deputy acting as Helen discussed what he would do with the girls, which included sexual intercourse.\textsuperscript{76} Reed, who had brought sex toys, including "mini-vibrators" and dildos in different sizes, as well as some lubricating jelly, entered the adjoining room expecting to see the two girls.\textsuperscript{77} Instead, the detective arrested Reed and feigned the arrest of Helen.\textsuperscript{78}

C. Common Defenses Used for Sex Sting Operations

Unlike the eventual \textit{Naughton} defense, Reed argued the mainstream defenses of mistake of fact, entrapment, and lack of formation of intent for the attempt to commit child molestation.\textsuperscript{79} The following analysis of Reed's defenses is "typical" of the outcome in these types of FBI sting operation cases.\textsuperscript{80}

1. Mistake of Fact

The Reed court rejected the mistake of fact argument, that there can be no attempt to commit a crime where the victim was non-existent.\textsuperscript{81} The court stated that "persons who are charged with attempting to commit a crime cannot escape liability because the criminal act they attempted was not completed due to an impossibility which they did not foresee."\textsuperscript{82} Even though the defense argued that the intended victims were imaginary, the court said that this distinction made no difference because had the situation been what the defendant thought it would be, he would have found two girls

\textsuperscript{74} See id. He later described that they would like his alligator underwear and that the encounter would have "numerous sexual activities including touching of genitals, play with sex toys, oral sex, and intercourse." \textit{Id.}

\textsuperscript{75} See Reed, 61 Cal. Rptr. 2d at 659.

\textsuperscript{76} See id. at 660.

\textsuperscript{77} See id.

\textsuperscript{78} See id.

\textsuperscript{79} See id. at 658.


\textsuperscript{81} See Reed, 61 Cal. Rptr. 2d at 661.

\textsuperscript{82} Id.
under fourteen available to him for sex. The "defendant's failure to foresee that there would be no children waiting does not excuse him from the attempt to molest."

2. Preparation v. Attempt

Although it was Reed's most compelling defense, the court rejected the issue of whether his acts directly preceding his arrest represented preparation and not an actual attempt to commit the act. The law for attempt requires two elements: specific intent to commit the crime and a direct but ineffectual act done towards its commission. Mere acts in preparation of the crime do not constitute an attempt.

As in many FBI sting operations, the defendant and the undercover FBI agent plan a meeting. Usually the defendant tries to meet the intended child in a shopping mall or hotel. The defendant also usually carries with him or in his car, sex toys and lubricant, which helps to form the intent element of the crime. The police make the arrest as the defendant makes initial contact with the intended child.

Reed's defense against the attempt charge was that he had merely come to the hotel to meet with Helen, and that the correspondence and mention of children was just a "fantasy" that Helen wanted to play out with him. Reed denied that Helen had said anything about having children in the motel room, although he did admit that he had sex with his step-niece. When questioned about whether he would have had sex with the children if given the opportunity, Reed stated, "Maybe, maybe not."

The judge found that there was a reasonable inference that Reed had the intent to molest the children when he went

83. See id.
84. Id.
85. See id.
86. See id.
87. See Reed, 61 Cal. Rptr. 2d at 661.
88. See id. at 658; United States v. Childress, 104 F.3d 47 (4th Cir. 1996).
89. See Reed, 61 Cal. Rptr. 2d at 661.
90. See id. at 662.
91. See id; Childress, 104 F.3d 47; United States v. DeBeir, 186 F.3d 561 (4th Cir. 1999).
92. See Reed, 61 Cal. Rptr. 2d at 660.
93. See id. The step-niece was 17 at the time. See id.
94. Id.
to the motel room and entered the room. The sex toys geared toward seducing girls of that age, and his affirmative answer to the deputy that he “was ready to meet the girls,” were enough to support the judge’s decision that Reed had specific intent to commit the crime. The unequivocal act done toward the commission of the crime occurred when Reed walked with the undercover deputy into the room where he expected to meet the girls. The court’s decision went on to state that had the “real” children been rescued from the room while Reed was talking to a “real” mother, the court’s analysis would have been the same.

3. Entrapment

The final defense in a typical FBI sting operation against cyber-pedophiles is the defense of entrapment. Entrapment is the “act of officers or agents of the government in inducing a person to commit a crime not contemplated by him, for the purpose of instituting a criminal prosecution against him.”

Entrapment occurs when, for the purpose of obtaining evidence for a crime, an agent “originates the idea of the crime and then induces another person to engage in conduct constituting such a crime when the other person is not otherwise disposed to do so.”

In Reed’s case, he argued that the officers induced him to engage in the criminal attempt and that he would have never attempted to molest the children if not induced to do so. The judge found against this defense since Reed initiated the contact by placing an ad for sex soliciting a female of “any age.” The officer had repeatedly told Reed that the sex would be with two girls and not a woman, and Reed also had several opportunities to back out of the plan to have sex with the girls.

95. See id. at 662.
96. See id.
97. See id.
98. See Reed, 61 Cal. Rptr. 2d at 663. The court further stated that “the public has a duty to protect children from the predations of adults, and proper police activities in trying to locate and punish those bent on perpetrating sex crimes against children should not be discouraged.” Id.
100. Id.
101. See Reed, 61 Cal. Rptr. 2d at 663.
102. See id.
103. See id. Reed even stated that he felt “honored” by the “opportunity” to
The judge found that there was enough evidence to support the idea that the law enforcement officers merely provided the opportunity for Reed to attempt the molestation of the girls under the age of fourteen. Since there was no evidence that the officers "cajoled or importuned" Reed, the judge found that there was no entrapment. A trial without a jury eventually convicted Reed of one count of attempted molestation of a child under the age of fourteen.

However, in a recent case, the Ninth Circuit ruled that defendant, Mark Poehlman, was entrapped into a crime by undercover agents. The agents, in overstepping their bounds, offered the recently divorced transvestite via e-mails the possibility of a family if he agreed to teach three girls how to have sex. Judge Kozinski's majority opinion stated, "There is surely enough real crime in our society that it is unnecessary for our law enforcement officials to spend months luring an obviously lonely and confused individual to cross the line between fantasy and criminality."

D. Successful Defenses Recently Used

1. Act and Intent Needed

The guilty act and the guilty mind are both needed to establish a defendant's guilt in criminal law. Fantasizing about a crime is never enough, since there is a difference between fantasy and reality. Even explicit sexual language or words of violence do not necessarily lead to acts of violence; "if they did, Stephen King would be a man to worry about."

be the teacher of sex to the young girls. See id.

104. See id. at 664.
105. See id.
106. See id. at 663.
107. See United States v. Poehlman, 217 F.3d 692 (9th Cir. 2000).
108. Poehlman was divorced from his wife and discharged from the Air Force after serving 17 years because he could no longer keep his foot fetish and impulse to dress in women's clothes a secret. See Jason Hoppin, Feds' Online Sex Lure Ruled Entrapment, S.F. RECORDER, June 28, 2000, at 8.
109. See Poehlman, 217 F.3d at 695.
110. Id. at 705.
112. See id. A person who fantasizes about an act of violence, or sexual crime, will not necessarily act upon the stimulation. See id.
113. Id.
A case that demonstrates this legal notion is the "Computer Rape Case," in which a student, using the pseudonym "Jake Baker," posted his stories on the Internet.\textsuperscript{114} He wrote in detail about rape, torture, and murder of one of his classmates, even exchanging e-mail with an unknown person in which he described his violent fantasies.\textsuperscript{115} The prosecutors felt that the e-mails "evolved from shared fantasies to a firm plan of action," but the defense lawyers argued the protection of free speech of his fantasies.\textsuperscript{116} The federal district judge dismissed the charges stating that to "infer an intention to act upon the thoughts and dreams from this language would stray far beyond the bounds of the First Amendment, and would amount to punishing Baker for his thoughts and desires."\textsuperscript{117}

2. Constitutionality of State Laws

Since the conviction rate is high, it would appear that the laws protect society against cyber-pedophiles. However, questions remain as to whether state laws making it illegal to transmit material intended to arouse or seduce if one knows that the recipient is a minor\textsuperscript{118} can be constitutionally upheld under the First Amendment or the Commerce Clause.\textsuperscript{119}

Some lawyers believe that the law infringes on free speech, relying on a 1996 U.S. Supreme Court decision\textsuperscript{120} that held that the Communications Decency Act (CDA) was too restrictive as a means to regulate the Internet.\textsuperscript{121} The decision struck down a law that imposed criminal and civil penalties on Internet users who made indecent materials available to minors.\textsuperscript{122} Justice Stevens, writing for the majority, held that the provisions of the CDA prohibiting sending patently offensive communications through the use of an interactive computer service to minors was a "content-based blanket restric-
tion on speech." Also, the Court held that portions of the provision were "facially overbroad in violation of the First Amendment."

Attorneys also argue that state laws could violate the Commerce Clause of the U.S. Constitution. The Commerce Clause, which allows the federal government to legislate matters dealing with interstate commerce, would appear to apply to the Internet. The argument is that states should not regulate the Internet, since by its nature the Internet crosses traditional state and national borders.

The First Amendment and Commerce Clause arguments are the two main defenses that some attorneys have been using to defend their clients. In ACLU v. Johnson, the Court of Appeals for the Tenth Circuit held the New Mexico statute, which is similar to California's, unconstitutional on the basis of violations to the First Amendment and the Commerce Clause. The court held that the statute attempted to regulate interstate conduct occurring outside its state borders, "and thus was a per se violation of the Commerce Clause; even if the statute was limited to one-on-one e-mail communications."

3. Clancy—Emergence of Internet Fantasy

The Walnut Creek, California law firm of Clancy, Weisinger, and Associates has attacked the California law that makes it illegal for a person to transmit material intended to arouse or seduce, if they know that the recipient is a minor. The Clancy attorneys have used the two-pronged free speech and commerce clause arguments to defend their client against the charges since they feel many who are "getting hammered by the California law are not pedophiles and had no intention of molesting children." They have also used a defense that the Internet is all about role-playing and

124. Id.
125. U.S. CONST. art. I, § 8, cl. 3.
126. See ACLU v. Johnson, 194 F.3d 1149, 1162 (10th Cir. 1999).
127. See Giordani, supra note 119, at 1.
128. See infra Part II.D.3.
129. See Johnson, 194 F.3d 1149.
130. Id. at 1161.
132. Giordani, supra note 119, at 1.
that chat rooms are a "masquerade ball—a fantasy world where people go to play out their sexual fantasy roles under the cloak of anonymity."\(^{133}\)

A case in which they used these arguments pled out in the spring of 1999.\(^{134}\) However, currently they have another case pending in which their defendant allegedly sent pornographic images and explicit messages to a police officer who was posing as a young girl.\(^{135}\) The Superior Court Judge presiding over the case, Brenda Harbin-Forte, has already conceded that the law may have some problems.\(^{136}\)

4. Naughton—Fantasy Defense

The facts in the Patrick Naughton case\(^{137}\) appear very similar to other cyber-sex sting operations set up by law enforcement agencies. However, Naughton’s attorneys did not use the standard defenses of entrapment, mistake of fact, or attempt versus preparation, but they argued instead that their client did not have the intent necessary to commit the crimes.\(^{138}\)

Naughton’s defense to the charge of crossing state lines with the intent to have sex with a minor was that the entire cyber-relationship with KRISLA, including the meeting at the Santa Monica Pier, was pure fantasy.\(^{139}\) His lawyers argued that he never intended to have sex with a thirteen-year-old girl, nor did he even think that he was corresponding with a thirteen-year-old girl.\(^{140}\) Instead, he thought that KRISLA was a grown woman who just shared his “daddy/daughter” fantasy and that she was “playing the part” of a young girl.\(^{141}\) During the pretrial proceedings, Naughton’s attorney called chat rooms “a virtual world of fantasy” where role-playing is done.\(^{142}\)

\(^{133}\) Id. See generally Lawyer to Plead Net Intoxication, NAT'L L.J., Jan. 24, 2000, at A6 (discussing the “Internet Intoxication” defense of a teen-ager accused of making online threats against Columbine High School. “The more they go into the Internet, the more bizarre their role-playing becomes.”).

\(^{134}\) See Giordani, supra note 119, at 1.

\(^{135}\) See id.

\(^{136}\) See id.

\(^{137}\) See supra Part I.

\(^{138}\) See Bickel, supra note 11.

\(^{139}\) See id.

\(^{140}\) See id.

\(^{141}\) See id.

\(^{142}\) See Doubt Over Naughton Net-Addict Defense (visited Jan. 3, 2000)
a. New Internet Culture

Psychological studies about the Internet shed light on the fantasy defense. More importantly, the new psychological "Internet Culture" that is still developing plays a significant part in developing the fantasy defense. \(^{143}\)

"It has been argued that behavior on the Internet differs from similar behavior in the real world."\(^{144}\) This should not be surprising since the Internet is a vast new tool that enables millions of people worldwide to communicate with each other. \(^{145}\) The Internet protects the user's identity, thereby fostering relationships with people without ever meeting them. \(^{146}\) These on-line relationships are different than the traditional letters and phone call relationships in that the on-line relationships are governed by the new culture values of the Internet virtual communities. \(^{147}\) The on-line relationships have social norms that allow for, and even encourage contact with, relative strangers. \(^{148}\)

Anonymity is an important aspect of the Internet that has brought about these new social norms. \(^{149}\) It leaves open the possibility that certain aspects of a person's physical appearance, social characteristics or standing, or other details will be omitted, exaggerated, or falsified. \(^{150}\) For example, in one study a chat room user with the handle, "The Stud," told young females in the chat room that he was twenty-three years old, muscular, blonde-haired and blue-eyed. \(^{151}\) In real-

\(^{143}\) <http://www.2dnet.com/2dnn/stories/news/0,4586,2401841,00.html>.

\(^{144}\) See id.

\(^{145}\) Adam Joinson, Social Desirability, Anonymity, and Internet-Based Questionnaires, 31 BEHAV. RES. METHODS 433 (1999).

\(^{146}\) See Reno v. ACLU, 521 U.S. 844, 850 (1997).


\(^{148}\) See id.

\(^{149}\) In discussing spousal affairs, the Internet has been described as an "intoxicating parallel universe with real-world implications." Diane Anderson, Suspicion Confirmed, NEWSWEEK, Oct. 2, 2000, at 74T. Many people who, pre-Internet, would have never considered affairs are finding themselves in chat rooms falling into intimate cyberrelationships. See id.


ity, "The Stud" was a forty-nine-year-old, overweight and balding man, who used the false characteristics to attract women.\textsuperscript{152} There are hundreds of sexually explicit chat rooms where these fantasies can be played, including rooms entailing submission, dominance, incest, fetishes, and homosexual fantasies.\textsuperscript{153}

Anonymity has also led to role-playing, which is a significant aspect of the fantasy defense.\textsuperscript{154} Role-playing has existed in games for many years. The grandfather of all role-playing games is Dungeons and Dragons which started in 1973.\textsuperscript{155} These role-playing games have been almost addictive, especially to boys, but to adults too.\textsuperscript{156} "Role-playing isn't just for kids anymore . . . . [P]layers can step out of their own lives by role-playing . . . . [I]t allows everyone to become someone else for a while . . . and most of us need that break in our lives."\textsuperscript{157}

b. Men Versus Women on the Internet

Although Internet use by women has been increasing, men still dominate Internet usage.\textsuperscript{158} In Japan, the percentages are close to ninety-eight percent male Internet users, while in Europe the percentages are closer to ninety-one percent.\textsuperscript{159} Here in the United States, the number is about even at fifty percent,\textsuperscript{160} although males account for seventy-seven percent of total on-line time.\textsuperscript{161} Because of the disparity in Internet and computer use between men and women, a stereotypical masculine culture has developed around the computer.\textsuperscript{162} This stereotype has created a higher negative computer attitude among women than in men.\textsuperscript{163}

Even as children, young computer users are "socialized
into a highly gender-stereotyped culture . . . [in which] computer games and educational programs reflect gender biases and stereotypes.  Male dominated computer games are the vehicles by which children begin to acclimate to the culture of computers. Only 23-33% of computer games are sold to girls, which is not surprising since the male dominated programming industry designs computer games for boys. Most of the games reflect a male theme, with characters reflecting "exaggerated gender stereotypes of macho, dominant males and submissive or sexual females."

III. IDENTIFICATION OF THE PROBLEM

With the increased use of the Internet for cyber-sex crimes, society requires increased protection in the form of laws and government monitoring. Thus far, the government has been successful in catching and prosecuting Internet offenders who try to lure young girls for sex.

Recent cases in which the FBI has caught and then the government has prosecuted the offender have resulted in plea bargains in about ninety-five percent of these cases. In the other cases, the juries or judges have been able to find the intent of the defendant to have sex with the minor through their acts. However, the complexities of the Internet, especially the new Internet culture, make it more difficult to establish the intent. Because there is a strong argument that the Internet is a "fantasy world" where people role-play while hiding behind anonymity, some experts believe that the conviction rate of Internet sex offenders will be driven down.

The Naughton case and the defenses used by Clancy depict a new trend in which the laws trying to protect society against child sex offenders on the Internet appear to be

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164. Id. at 174.
165. See id. at 175.
166. See id.
167. Morahan-Martin, supra note 158, at 175.
168. See supra note 21.
169. See Marshall, supra note 7, at 28A.
170. Acts such as meeting the child at a mall or entering into the child's hotel room.
171. See Doubt Over Naughton Net-Addict Defense, supra note 142.
172. See Bickel, supra note 11.
The fantasy defense has appeared and, at least in the first round of cases, seems to have won. The defense is based on the argument that people using the Internet do not always believe the identities of those with whom they are communicating. The disbelief is premised on the idea that the Internet and the anonymity it allows encourage people to change their identities or role-play in order to socialize on the Internet. This role-playing makes it difficult to distinguish between fantasy and when the person is breaking the law by acting upon this fantasy. The direction of the courts and juries seems to indicate that it is more difficult to prove intent to have sex with a minor via the Internet and that the existing laws or the way in which FBI agents catch the defendants need to be changed.

These recent defenses raise the legal questions of whether the judges and juries in the future will validate the fantasy defense, and if so, what should be done to protect society?

IV. ANALYSIS

A. Why the Government Was Winning

The government has had a high success rate in prosecuting cyber-pedophiles since most defendants entered guilty pleas. The pleas were based on the notion that the courts were not responsive to the routine defenses of mistake of fact, attempt versus mere preparation, and entrapment. Also, since judges appeared to be reluctant to issue harsh sentences on defendants, most were willing to take the light sentence instead of having the burden of going to court.

The outcomes for accused cyber-pedophiles tended to be negative since these outcomes resulted from society's disgust towards adults who sexually abuse children. The "rights of suspected and convicted pedophiles are routinely violated and nobody cares. The rules of evidence are stretched . . . as a
parent, though... I'm okay with it." As seen in the Childress case, the grand jury indicted the defendant of traveling across state lines with the intent to engage in sex with a juvenile. Even though the facts of that case were very similar to the Naughton case, the Childress court declined to give an entrapment instruction.

The facts between the Childress and DeBeir cases are also very similar. Although both were found guilty, only DeBeir plead guilty, which had been the result of about ninety-five percent of these types of cases. Childress used the classic defense of entrapment, but was denied this defense by the court. This has been the trend in Internet related cases where adult males were caught trying to meet minor girls. However, the Reed case, although not an Internet case, differed slightly from the other cases in that it introduced a new form of defense, the "fantasy defense," which Patrick Naughton used to produce a hung jury.

Reed, using the classic defenses mentioned above, also stated that he only came to the motel to have sex with the mother Helen, and that he assumed that the children were just a "fantasy" that Helen wanted to play out with him. The judge did not agree with this defense, although the outcome would have probably been different if the correspondence was over the Internet, and the case was tried in front of a jury. Since the facts of the case seem to be so similar to

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181. See United States v. Childress, 104 F.3d 47, 47 (4th Cir. 1996).
182. Both used Internet chat rooms to arrange a meeting with supposed young girls. They were both explicit in their chatting that they knew the girls were underage, but still wanted to engage in sex with them. Then both were arrested by FBI agents once they arrived at the intended meeting places. See supra Parts I, II.B.1.
183. See Childress, 104 F.3d at 48.
184. Both were adult males who actively sought out teenage girls in Internet chat rooms frequented by teenagers. They both wrote about meeting near the teenager's home and explicitly wrote that they wanted to have sex with them. In meeting the girls, the men traveled interstate and met the undercover agent in a mall. The FBI then apprehended them. Both had other evidence of their intent to have sex, Childress having a "safe sex" kit in his car, and DeBeir having local hotel information and phone numbers in his pocket. See supra Part II.B.1-2.
185. See Marshall, supra note 7, at 28A.
186. See Childress, 104 F.3d at 48.
187. See supra Part II.B.3.
188. See People v. Reed, 61 Cal. Rptr. 2d 658, 660 (1997).
189. See id. at 658.
Naughton's, if the Internet had been used, a jury could have found the intent and Reed's fantasy defense to be credible.

Another reason for the high conviction rate was due to the relatively light sentences after the convictions. As in the DeBeir case, although the maximum sentence was ten years in prison, he was only sentenced to six months of home detention and five years of probation. Judges have been reluctant to give harsher sentences for various reasons. One reason is that federal sentencing guidelines allow for reduced jail time for first time convictions if the defendant feels remorse for his actions. Also, judges are more likely to give lighter sentences in these cases because there was no actual victim. In DeBeir's case the judge cited the "victimless" nature of the crime, and DeBeir's lack of a criminal history as justification for departing from the sentencing guidelines. A final factor for lenient sentencing is judges' views toward FBI investigations. Even though entrapment has not been found in many of these cases, many judges are wary of undercover agents acting as young girls and encouraging otherwise innocent people to commit crimes. As Maryland's chief assistant public defender stated, "Agents are likely to encourage, or at least continue, a conversation that turns sexual when an actual child likely would end it." Since most of the prosecutions against cyber-pedophiles are a result of FBI sting operations, judges are inclined to feel some sympathy towards the defendant for a possible "unfair snare" by law enforcement agencies.

Based on the successful prosecution in these cyber-pedophile cases, defense attorneys have developed new arguments on behalf of their clients. The latest arguments used

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190. Although Reed advertised in a magazine rather than the Internet and met at the hotel instead of a pier, both Reed and Naughton were very explicit about what they intended to do with the children. See supra Parts I, II.B.3.
191. See Baker, supra note 20, at 51.
192. See id.
193. See id. at 52.
194. See id. Although the case was overturned on appeal by the Fourth Circuit, the rationale of the district court judge was that "DeBeir was luring an FBI agent, not an actual child" and that there were no direct consequences as a result of his actions. Id.
195. See id. at 54.
196. See id.
197. See Baker, supra note 20, at 54.
198. See id.
199. See infra Part IV.B-C.
by Clancy and Naughton against cyber-pedophiles charges are gaining momentum and even acquittals.

B. *Do the Laws Apply to Cyberspace?*

The battle against cyber-pedophiles is one of growing concern to legislatures.\(^{200}\) Congresswoman Lofgren in a committee report stated, "Crimes against children, particularly those of a sexual nature, are among the most heinous and tragic that exist in our society. Children are, by their very nature, innocent and vulnerable and unable to protect themselves. It is our job to protect them."\(^{201}\) However, making clear laws against cyber-pedophiles is difficult since the Internet makes it impossible to know the identification of both parties as well as their true intent. It would be hard to argue that a "person showing up at an elementary school with a lollipop to talk to children doesn't know that he or she is dealing with minors. But a person chatting online with someone claiming to be a 23-year-old woman may really be talking to a 70-year-old man."\(^{202}\)

The difficulty in constructing a law to protect children from cyber-pedophiles was evident in the *Costello* case.\(^{203}\) The case illustrates the two-prong approach that Clancy's law firm used to argue that California's law was unconstitutional.\(^{204}\) They argued that the law does not apply to the Internet since the Internet is arguably part of interstate commerce, and also that the law violates free speech.\(^{205}\) The "state's ability to control or regulate the Internet activity may be difficult to accomplish in actuality since the Internet activities are not restricted to a single state. Many people subscribe to Internet servers outside their home state."\(^{206}\)

This plausible argument was not tested in the *Costello* case since the California prosecutors dropped the charges, stating that there was not enough to go on.\(^{207}\) That decision


\(^{201}\) Id.


\(^{203}\) See Giordani, supra note 119, at 1.

\(^{204}\) See id.

\(^{205}\) See id.

\(^{206}\) Id.

by the prosecution shows the possible vulnerability and flaws in the statute because it was the second time prosecutors have dropped charges against one of Clancy's clients.\textsuperscript{208} "If California courts follow what may be the emerging trend suggested by the published and unpublished authorities cited in the parties' briefs, the statute may be constitutionally vulnerable.\textsuperscript{209}

The emerging trend is that many courts have "found merit" in the defenses used by Clancy.\textsuperscript{210} Already a few state statutes similar to California's, such as those in New Mexico\textsuperscript{211} and New York, have been struck down by federal courts.\textsuperscript{212} These courts also saw the free speech issue and the Commerce Clause as the main arguments for unconstitutionality of the statute.\textsuperscript{213}

Also supporting the defense that state laws could be questionable are two federal court actions. The first is the Court of Appeals for the Third Circuit's preliminary injunction preventing the enforcement of Pennsylvania's Child Online Protection Act because it violated the First Amendment rights of adults.\textsuperscript{214} The second action was a U.S. district court in Michigan that stated that "no aspect of the Internet can feasibly be closed to users from another state" and that state laws "would subject the Internet to inconsistent regulations across the nation."\textsuperscript{215}

Finally, there has also been compelling arguments that the defense of entrapment needs to be modified for the Internet.\textsuperscript{216} The basic arguments are that both the objective and subjective tests for entrapment fail to protect the innocent in cyberspace, and that they do not control law enforcement officials in cyberspace.\textsuperscript{217} Therefore, many commentators recommend a reasonable-suspicion standard for entrapment on the

\footnotesize
\begin{itemize}
  \item \textsuperscript{208} See id.
  \item \textsuperscript{209} Giordani, supra note 119, at 1.
  \item \textsuperscript{210} See id.
  \item \textsuperscript{211} See ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999).
  \item \textsuperscript{212} See Giordani, supra note 119, at 1.
  \item \textsuperscript{213} See id. The cases held that "it is impossible to determine the age of the recipient of an Internet communication and that such laws violate citizens' right to free speech." Id.
  \item \textsuperscript{214} See id.
  \item \textsuperscript{215} Id.
  \item \textsuperscript{216} See Jarrod. S. Hanson, \textit{Entrapment in Cyberspace: A Renewed Call for Reasonable Suspicion}, 1996 U. CHI. LEGAL F. 535 (1996).
  \item \textsuperscript{217} See id.
\end{itemize}
C. Why Naughton Won

1. Fantasy Defense Leads to a Hung Jury

In the 1998 hit movie, "You've Got Mail," Kathleen Kelly, played by Meg Ryan, hid behind the computer screen to engage in a lengthy cyber-relationship with a stranger, Joe Fox, played by Tom Hanks. Although both players did not "lie" about who they were, they did not fully disclose who they actually were either. Answers to questions regarding Fox's age, looks, occupation, and marital status were unknown to Kelly, yet she had a desire to meet him. After planning to meet at a café, both were anxious as to what to expect. Joe ended up ducking out after seeing Kelly. This example, though a Hollywood story, does have some merit as to the way the current Internet population thinks. Meeting people on-line does occur, with cyber-relationships forming and eventual plans to meet. People are not always who they say they are. In fact, two-thirds of people use false identities in chat rooms, yet people are still curious to meet that person to see if their image of that person is correct.

This Internet fantasy game is the key to Naughton's defense. It is the belief that people do not represent themselves truthfully on the Internet. Although Naughton played along with the fantasy, he had no way of telling KRISLA's true age. In fact, Naughton argued that he thought that KRISLA was actually older than she stated by her style of writing, and that he was interested to see who he had been chatting with for the past seven months.

218. See id. at 536.
219. YOU'VE GOT MAIL (Warner Bros. 1998).
220. See id.
221. See id.
222. See id.
223. See id.
225. There are even matchmaking services online, see Match.com. (visited Feb. 8, 2001) <http://www.match.com>.
226. See Doubt Over Naughton Net-Addict Defense, supra note 142.
227. See Martin, supra note 207.
228. See id. Naughton thought KRISLA might have been a "nice confused 40-year-old woman from Encino." See Bowman, supra note 11.
This new fantasy Internet culture is getting more and more popular each day. The illusion of hiding with complete anonymity behind a computer screen is not only done by "techies," but by common people as well. People use the Internet as a tool, not only to gather information or send e-mails, but to fulfill role-playing games or seek fantasy identities. "An 80-year-old woman can go online and relive the loss of her virginity at sixteen and she could do it over and over again." These common uses of the Internet will make people and jurors even more sympathetic to a fantasy defense, since they themselves have probably engaged in it.

The problem arises when fantasy is reality, which the prosecutors in Naughton's case argued. The prosecution had compelling facts showing that Naughton stated in the chat room discussion with KRISLA that he was "totally" for real. "I don't do this for fantasy," he wrote. He told her they had to "be very careful" since he could go to jail, and that he wanted to make her "have an orgasm." Nevertheless, even with these statements, enough members of the jury believed that what is written on the Internet is not necessarily real. In other words, the jury found that these Internet conversations alone were not enough to form the necessary intent.

In the end, seven jurors voted to convict Naughton of crossing state lines with the intent to have sex with a minor, while five found him not guilty. Six jurors found him guilty of using the Internet to entice a minor to have sex, with five finding him not guilty. The judge declared a mistrial on the first two counts, but convicted Naughton for possession of child pornography.

229. See supra note 33.
231. See Affidavit of Bruce M. Applin, supra note 4.
232. Id.
233. Id.
234. See Matt Marshall, 'Fantasy' Defense Gets a Test Case, SAN JOSE MERCURY NEWS, Dec. 6, 1999, at 1E.
235. See Marshall, supra note 7, at 28A.
236. See id. One juror remained undecided. They voted at least five times with only once having a juror switch positions. See id.
237. See id. The issue of the possession of child pornography is outside the scope of this comment. However, it is interesting to note that soon after the jury's verdict in this case, the Ninth Circuit found parts of the Child Pornography Prevention Act to be unconstitutional to the extent that it "proscribes computer images that do not involve the use of real children in their production or dissemination." Free Speech Coalition v. Reno, S.F. RECORDER - CAL. DAILY
2. Men Believe in the New Cyber-Culture

The most interesting aspect of the jury vote in Naughton's case was that the jury was divided along gender lines, with men agreeing that Naughton was playing out an innocent fantasy, while women believed he had the intent to have sex with the minor. Even though women in general are more likely to convict than men, it appears that men are more likely to accept the fantasy defense.

One explanation as to why men seem to accept the fantasy defense is that men tend to be more knowledgeable about computer use and the Internet than women. From the beginning, the defense sought to pick "Internet-savvy people" to serve as jurors because Internet "savvy people would know what these chat rooms are like." By knowing the capabilities of the Internet and being experienced in the new Internet culture, some men on the jury put the blame on the FBI. One man on the jury stated that the FBI "screwed up," while the jury foreman said he did not think Naughton believed he was meeting a 13-year-old and that the FBI acted too soon by arresting Naughton before he actually met KRISLA down on the beach.

Women agreed with the prosecution. One woman said that "I went with my heart, I went with my conscious and I went with the evidence. That's why he was on the dad and daughter channel, if he wanted to meet a 40-year-old woman, you would go on the old maids, and old farts channel.

3. Still Based on Facts

Even though men found Naughton not guilty, the case turned on the facts. The Internet was the key factor for the

239. See J.E.B. v. Alabama, 511 U.S. 127, 148 (1994). Justice O'Connor's concurring opinion stated, "[O]ne need not be sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case." Id.
240. See supra Part II.D.4.b.
243. See id.
244. See Marshall, supra note 7, at 28A.
245. Id.
fantasy defense in this case and it is undoubtedly what set Naughton free. Also, the point in time when Naughton was arrested on the pier turned out in his favor. FBI agents captured Naughton shortly after meeting with KRISLA, but jury members thought this was too soon. The FBI made the mistake of not waiting until Naughton and the agent went down onto the beach to make sure that sex was his main purpose. Since the beach was where they had planned to have sex, the fact that they never made it there helped the defense prove there was no requisite intent.

Other facts that worked in his favor included the lack of a real victim, Naughton's standing as a successful businessman, a clinical psychologist's testimony that he did not have the characteristics of a child molester, and the fact that they planned to meet at the pier and not a hotel. Since Naughton did not touch her, and they were in a public place instead of a private room, it was harder to find intent than if he had grabbed her or he was about to enter her hotel room.

Finally, the actual chat room name where Naughton found KRISLA is important to note. The room they met in was titled “dad&daughtersex” which was supposed to be for adults only. Since the room attracts adults, and minors are not allowed, it “bolsters the role-playing defense” for Naughton. If the room was called “TeenBeat” instead, a room that is more likely to have teens chatting, then it would have been harder for Naughton to use a role-playing defense. “Naughton was conversing in a raunchy chatroom titled dad&daughtersex.log, a site where fantasy addicts are more likely to hang out than 13-year-olds.”

V. PROPOSAL

The recent Naughton case and other successful challenges to state statutes intended to protect against cyber-
pedophiles make way for the possibility of more acquittals in the future. Lawyers are already saying that it is "likely that defense attorneys around the country will attempt to copy the fantasy defense."\footnote{\textsuperscript{253}}

Even with the optimistic view towards this defense, its success will not be long-lived. The first round of cases was won by the prosecution\footnote{\textsuperscript{254}} with recent cases giving hope for the defense.\footnote{\textsuperscript{255}} The next stage is for the government to make the necessary counter-attacks to make the Internet safe from cyber-pedophiles.

\textbf{A. Further FBI Training}

In order to achieve the highest possible conviction rate, FBI training needs to ensure that sting operations focus on apprehending the suspect in a way that offers the best possible chances for convicting the alleged cyber-pedophile. Although FBI agents have always had to pass the rigorous FBI academy and go through specialized training on investigations of computer-related child exploitation crimes,\footnote{\textsuperscript{256}} the training must be more legally focused. The FBI has hundreds of cyber-pedophile cases,\footnote{\textsuperscript{257}} and most of these cases are being prosecuted under the same federal statute.\footnote{\textsuperscript{258}} The same defenses\footnote{\textsuperscript{259}} will be used by lawyers, but the facts in each case will vary with respect to how the FBI agents conducted the operation. Therefore, the FBI agents should know when to snare the defendant, such as waiting until the last possible moment to do so. Since there are no victims that may be harmed in sting operations, there is no harm in waiting at least until the defendant enters the hotel room or other meeting place where the sex is to take place. In the \textit{Naughton} case, the FBI had only to gain by waiting until Naughton went down to the beach, but instead "jumped the gun" and arrested him too early. Since the successful prosecution of these cases depends on the facts of each case, it helps to be as close as possible to the actual act of sex, which in many of

\begin{itemize}
\item \textsuperscript{253} Lindner, supra note 238, at M2.
\item \textsuperscript{254} See supra Part II.B.1-3.
\item \textsuperscript{255} See supra Part II.D.3-4.
\item \textsuperscript{256} See Affidavit of Bruce M. Applin, supra note 4. FBI agent Applin was also a former marine corps officer with electronic warfare training. See \textit{id}.
\item \textsuperscript{257} See supra note 38.
\item \textsuperscript{258} See supra Part II.A.1.
\item \textsuperscript{259} See supra Part II.C.
\end{itemize}
these cases means the point right before clothes are taken off.

B. Changing the Law

Since some states have already found similar cyber-pedophile laws to be unconstitutional, it is imperative that states such as California pass their cases to the federal jurisdiction for prosecution of the case. Trying to prosecute under a questionable state statute is too risky since recent circuit courts have said that the Internet is a medium requiring national regulations. As is the case with California, a questionable statute damages the chances of a successful prosecution. As seen in the Costello case, the prosecution has twice been unable to build a strong enough case to go up against the two-prong attack by the defense. Prosecutors and even the superior court judge trying the Costello case stated that the law might have some problems. Although the states might not want to turn over cases to the U.S. Attorney's office "where resources are already limited," this might be the only constitutionally correct way to prosecute.

Finally, the punishment needs to be tougher. As seen in DeBeir, where the guilty defendant only received six months of home detention and five years of probation, the lenient sentencing guidelines are not a deterrent. The alternative is to have tougher sentencing, although the conviction rates would go down since guilty defendants would no longer be better off admitting their guilt. Since the number of cyber-pedophile cases is increasing, the high conviction rate does not seem to be deterring violators. "The action of pedophiles have far out-paced the ability of the law enforcement community to respond effectively." However, harsher punishment, such as longer jail sentences, would make a would-be criminal think twice about luring kids on the Internet. Along with

260. See Giordani, supra note 119, at 1.
261. See ACLU v. Johnson, 194 F.3d 1149, 1162 (10th Cir. 1999).
262. See CAL. PENAL CODE § 288.2b (West 1999).
263. See Giordani, supra note 119, at 1.
264. See id.
265. Id.
266. Congress is considering legislation mandating a five-year sentence for anyone convicted of crossing state lines with the intent to have sex with a minor. See Quinn, supra note 6, at 14.
267. See supra Part II.B.2.
268. See Marshall, supra note 7, at 28A.
269. Durkin, supra note 19, at 16.
longer sentences, the access to computers for convicted child sex offenders who are on probation should also be denied since the Internet would give them such easy access to young children. Judges should prohibit access to the Internet to cyber-pedophiles, just as they have done to computer hackers.

C. Internet Education

Law enforcement agencies will be more adept at detecting Internet misuse by pedophiles through searches of computer files and hard drives. Whether it is recovering deleted files or having more information about which chat rooms cyber-pedophiles are lurking in, law enforcement agencies will be more familiar with Internet technology.

Also, parents need to become more educated about steps they can take to protect their children from being victimized. These steps could include making sure children surf anonymously on the web and having parents closely monitor their children's computer activities and instruct them not to give out any personal information or meet people they have spoken to over the Internet in person.

D. Better Software

Closely connected to education is the use of computer software that enables parents to block their child's access to adult sites. Currently there are plenty of software programs designed for this purpose. These programs allow a parent to keep track of how long their kids are spending online and which sites they have visited, as well as allowing parents to block out sites not otherwise blocked by the program's default. Other features include a way to prevent children

270. See id. at 14.
271. See Most Wanted Hacker Released from Prison (visited Jan. 23, 2000) <http://www.usatoday.com/news/nswri01.htm>. For the next three years the convicted hacker cannot touch computers, software, modems, cell-phones, Internet TVs, or other electronic devices giving him Internet access. See id.
274. Some examples are: Cyber Patrol, CyberSitter, SurfWatch, and Net Nanny.
275. See Internet Filtering Software (visited Jan. 23, 2000)
from keying in offensive words and the ability to block out access to certain services altogether, such as chat rooms. The problem is that these software programs cost about forty dollars, plus additional fees for updates. Since protecting children has become such an important national issue, the government should subsidize the cost of these programs as well as help to advance their technology. The government, by helping to make these software programs inexpensive and accessible to everyone, can eliminate many of the problems of children meeting adults on the Internet.

VI. CONCLUSION

The Internet is a unique tool that has both positive and negative aspects. Combating the Internet's negative aspects, such as cyber-pedophiles, deserves national attention since it involves possible and grave harm to children. The government is doing more to police the Internet, and by its conviction rates appears to be successful. However, the latest line of defenses have cast doubt as to whether the laws will continue to put cyber-pedophiles in jail.

The latest defenses against the state laws have challenged the constitutionality of the law using a two-prong Commerce Clause and freedom of speech argument. This has been successful in overturning statutes in New York and New Mexico and has helped lawyers in California successfully defend their clients.

The fantasy defense that Patrick Naughton used successfully in his case is a unique defense that uses the new culture of the Internet to defeat the intent portion of a crime. It argues that the Internet chat rooms are a playground for fan-
tasy and that no one really is who he says he is. It is a world in which a “gorgeous 19-year-old girl in a chat room is almost always a 14-year-old pimply boy goofing on the other participants.”

Nonetheless, there is a gray area between fantasy and reality. In the *Naughton* case, men on the jury found that he was fantasizing, but this does not mean that the fantasy defense will always work. The defense is based on not only the composition of the jury, but more importantly, on the facts of the case. Naughton was apprehended “too early,” at the point in time before going down to the beach where the sex was supposed to occur. This mistake by the FBI caused members of the jury to believe that Naughton had not formed the necessary intent to have sex with the minor.

The future will see the fantasy defense become less novel and less successful. Better FBI training and more information about how the Internet works will make future jurors more educated about the laws and culture of the Internet. This will lead to greater prevention through both changes in the existing laws and through the use of software programs that will help deter the cyber-pedophile.

As for Patrick Naughton, the jury found him guilty of possessing child pornography. In the courtroom after the verdict was read, Naughton began to lose his composure, clenching his jaw and blinking repeatedly. He shook his lawyers’ hands, gave his Rolex watch, cell phone, cuff links, wallet, tie, and belt to his brother, and was then escorted out of the courtroom by U.S. Marshals.

Naughton had lost his freedom, his $183,000 a year job, $15 million in stock options, his reputation, and his wife. Luckily, he had a deal with the FBI. In exchange for techni-

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283. *See* Marshall, *supra* note 7, at 28A. One jury member stated, “He didn’t touch her. He didn’t do nothing.” *Id.*
284. Since state statutes are vulnerable to constitutional challenges, cyber-pedophiles should be prosecuted under federal statute.
285. His conviction was put on hold since an appeals court, in a separate case, found that in child pornography cases, the images must be real. *See* Quinn, *supra* note 6, at 21.
287. *See id.; see also* Quinn, *supra* note 6, at 21.
288. *See* Quinn, *supra* note 6, at 12.
cal assistance including writing software, he would receive a lighter sentence. He ended up serving no prison time for his felony.

289. He created a few programs including a framework for a software program that will allow the FBI to remotely access and search someone's computer and also software to log chat sessions. See Michelle Quinn, *Naughton Helps FBI to Fashion Software Tools*, SAN JOSE MERCURY NEWS, Aug. 12, 2000, at 1C.

290. He pled guilty to crossing state lines to have sex with a minor days before the re-trial. See Michelle Quinn, *Tech Exec May Get No Time in Prison*, SAN JOSE MERCURY NEWS, Aug. 4, 2000, at 1A. Naughton was sentenced to five years probation and nine months of home detention in which he will have to wear an electronic monitor. See Michelle Quinn, *Naughton Looks to Start Anew*, SAN JOSE MERCURY NEWS, Aug. 10, 2000, at 1C.