

HEINONLINE

Citation:

Kimberly Wingteung Seto, How Should Legislation Deal with Children as the Victims and Perpetrators of Cyberstalking, 9 Cardozo Women's L.J. 67 (2002)

Content downloaded/printed from [HeinOnline](#)

Tue Jan 22 21:08:48 2019

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

HOW SHOULD LEGISLATION DEAL WITH CHILDREN AS THE VICTIMS AND PERPETRATORS OF CYBERSTALKING?

KIMBERLY WINGTEUNG SETO*

I. INTRODUCTION

The Internet has provided a new venue for stalking.¹ In particular, cyberstalking “refers to the use of the Internet, e-mail, or other electronic communication devices to stalk another person.”² Cyberstalking is a growing problem,³ and federal and state legislation are ill-equipped to deal with this crime. Many state statutes have language that requires evidence demonstrating that the stalker make a credible threat of violence against the victim, which is often difficult to prove.⁴ Establishing that there was a credible threat of violence in cyberstalking cases is even more difficult because the stalker may be located far away from the victim and the threat may not be considered credible. In addition, the cyberstalker may engage in harassing behavior that does not rise to the level of threatening bodily injury, since most of this behavior occurs in cyberspace and not in the real world.⁵

State legislatures have failed to keep pace and update current stalking statutes to include stalking conducted by electronic means, which is increasing due to the easy access to, and affordability of, the personal computer. For example, in 1999, Christian Hunold, a Missouri resident, was caught sending threatening e-mail⁶ and pornographic images to students in

*J.D. Candidate, 2003, Benjamin N. Cardozo School of Law, Yeshiva University.

¹ U.S. DEP’T OF JUSTICE, *1999 Rpt. on Cyberstalking: A New Challenge for Law Enforcement and Indus.*, at <http://www.usdoj.gov/criminal/cybercrime/cyberstalking.htm>. The U.S. Department of Justice defines stalking as repetitive, threatening and/or harassing behavior by an individual generally as a means to control his or her victim. *Id.* Stalking consists of a course of conduct that is directed at the victim in order to cause the victim fear, injury or death, and where a reasonable person would experience the same or similar fear, and where the perpetrator must know, or should know, that his behavior would cause the victim such fear. *Id.*

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Susan W. Brenner, *Cybercrime Investigation and Prosecution: The Role of Penal and Procedural Law*, 8 MURDOCH U. ELECTRONIC J.L. 2, ¶ 20 (June 2001), at <http://www/murdoch.edu.au/pub/elaw/issues/v8n2/brenner82.html>.

⁶ “E-mail” is short for electronic mail, which is a message sent over the Internet from one computer to another computer over the Internet. Joseph C. Merschman, *The Dark Side of the*

Townsend High School in Massachusetts.⁷ However, Massachusetts Superior Court Judge Peter M. Lauriat dismissed the child pornography charges against Hunold because the state statutes did not criminalize the dissemination of child pornography through the computer.⁸ The Massachusetts State Senate did not update the Commonwealth's anti-terrorism legislation to include threats sent by electronic means until 2001.⁹

Most scholarship on cyberstalking has focused on women as the victims. This note will instead examine how federal and various state legislatures deal with children as the victims and perpetrators of cyberstalking. The Internet provides just as many opportunities and threats to children, especially in the form of on-line sexual predators. On the one hand, the Internet provides children with another venue for recreation and education, but on the other, it also provides opportunities for children to send threatening or harassing e-mails as a prank.¹⁰ How should legislation handle the prosecution of children for these types of crimes? How can legislation adequately protect children from on-line sexual predators? This note will address these issues.

Part II will provide background on the conventional means of stalking and the perpetrators of such offenses. Part III will discuss cyberstalking and how it differs from traditional stalking, focusing on the actors and the conduct involved. Part IV will examine how children fit into the context of cyberstalking. Part V will discuss current legislation dealing with cyberstalking. Part VI will suggest possible solutions to the inadequacies of current legislation with respect to children.

II. CONVENTIONAL STALKING

Stalking is defined as a pattern of repeated, unsolicited actions directed at the victim such that the victim may feel threatened.¹¹ Examples of this type of behavior may include following the victim, appearing at the victim's home or work place, making harassing telephone calls, leaving messages or objects, vandalizing the victim's property or threatening the victim's family members or pet.¹² Although some of this conduct may appear only to be a

Web: Cyberstalking and the Need for Contemporary Legislation, 24 HARV. WOMEN'S L.J. 255, 275 (2001).

⁷ Michele Kurtz, *The "Stalker" Who Stayed at Home, A Town Terrorized Over the Internet*, BOSTON GLOBE, Sept. 2, 2001, at A1. Hunold was prosecuted in Missouri on child pornography charges. *Id.*; see Jeremiah W. Nixon, *Smithville Man Given 15-Year Prison Sentence in Case of Harassment, Child Pornography Over the Internet*, OFFICE OF MISSOURI ATTORNEY GENERAL, Oct. 6, 2000, available at <http://www.ago.state.mo.us.102600.html>.

⁸ Yvonne Abraham, *Loophole Clears Net Porn Charges*, BOSTON GLOBE, Feb. 9, 2001, at B1.

⁹ *State's Terrorism Law Advances*, TELEGRAM & GAZETTE (WORCESTER, MA), Sept. 26, 2001, available at LEXIS, News Library, News Group File, Most Recent Two Years.

¹⁰ Kurtz, *supra* note 7.

¹¹ Carol E. Jordan et al., *Stalking: Cultural, Clinical and Legal Considerations*, 318 BRANDEIS L.J. 513, 517 (2000).

¹² Merschman, *supra* note 6, at 260.

nuisance, it may be a prelude to stalking and violence.¹³ In most stalking cases, the victims are women¹⁴ and most stalkers are male.¹⁵ Accordingly, references to stalkers in this paper will assume the gender is male.

Stalkers are usually classified by their relationship to the victim. Various types of stalker include the (former) intimate stalker, acquaintance stalker, and stranger stalker.¹⁶ The intimate or former intimate stalker may be married to or divorced from the victim, a co-habitant, or a sexual partner.¹⁷ The acquaintance stalker knows the victim causally.¹⁸ He may be a neighbor, the deli clerk, or a classmate.¹⁹ The stranger stalker does not know the victim at all. These cases usually involve celebrities and other public figures.²⁰

Generally, a stalker is "intellectually or socially disabled or simply awkward [and] may use stalking in an attempt to form a relationship with the victim."²¹ For instance, in the Christian Hunold's case, Hunold was an honor roll student and soccer athlete until he became paralyzed from a car accident and confined to a wheelchair. Depressed and lonely, "Hunold turned to the

¹³ U.S. DEP'T OF JUSTICE, *supra* note 1.

¹⁴ Merschman, *supra* note 6, at 261.

¹⁵ Merschman, *supra* note 6, at 264. Four of five stalking victims are women. NAT'L VICTIM ASSISTANCE ACAD. ("NVAA"), *NVAA 2000 Text Ch. 22, Section 2, Stalking*, at <http://www.ojp.usdoj.gov/ovc/assist/navaa2000/academy/V-22-2ST.htm> [hereinafter NVAA Text 2000-Section 2]. However, there are instances of female stalkers. For example, in December 2001, Robin Kelly, a former Las Vegas topless dancer stalked her ex-lover by creating a website with sexually explicit photographs of him. Tracy Wilson, *Dancer Faces Trial in Stalking; Crime: The Simi Valley Woman, 43, is Accused of Setting Up a Web Site Showing Explicit Photographs of Her Former Love*, L.A. TIMES, Dec. 20, 2001, at 1, available at LEXIS, News Library News Group File. The website also contained photographs of the man's car, home, and gave directions to his house. *Id.* Kelly threatened and harassed the man and his wife after he ended their affair. *Id.* Kelly also made annoying phone calls to the house and left envelopes containing sexually explicit photos in his neighborhood and at his children's school. *Id.* A better-known stalking case involving a male victim is the harassment of George Stephanopoulos by a former White House Intern, Tangelia Burhart. Christopher Francescani, *Stalker has Groom-to-be Scared Death*, N.Y. POST, Aug. 5, 2001, available at LEXIS, News Group File. In 1997, Burhart was dismissed from the White House intern program after she supposedly stole a copy of President Clinton's schedule. *Id.* She also allegedly followed Stephanopoulos around. *Id.*

¹⁶ There is no uniform categorization of a stalker. See, e.g., Jordan, *supra* note 11, at 554-62; Amy C. Radosevich, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today's Stalker?*, 2000 U. ILL. L. REV. 1371, 1374 (2000). Black's Law Dictionary defines stalking as:

1. The act or an instance of following another by stealth.
2. The offense of following that person or committing a further crime such as assault or battery. Some statutory definitions include an element that the person being stalked must reasonably feel harassed, alarmed, or distressed about personal safety or the safety of one or more persons for whom that person is responsible. And some definitions that acts such as telephoning another and remaining silent during the call amount to stalking.

BLACK'S LAW DICTIONARY 1412 (7th ed. 1999).

¹⁷ Merschman, *supra* note 6, at 261.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See, e.g., *People v. Norman*, 89 Cal. Rptr. 2d 806 (Cal. Ct. App. 1999).

²¹ Merschman, *supra* note 6, at 262.

family computer for company.”²² “With a few key strokes, he could assume a new identity: Someone physically strong In the cyberworld, no one would know the difference.”²³ Some stalkers may be expressing humiliation from repeated rejection as rage and anger.²⁴ Some stalkers may suffer from a mental illness called Erotomania,²⁵ in which the stalker has a delusional belief that his victim loves him. An example of Erotomania is the 1990 murder of actress Rebecca Schaeffer by Robert Bardo.²⁶ Bardo became obsessed with Schaeffer from watching her on a television show and convinced himself that she was interested in him.²⁷ Bardo located Schaeffer at her home address and shot her on her doorstep.²⁸

Schaeffer's murder alerted lawmakers to the crime of stalking. California, the state in which Schaeffer was murdered, was the first state to criminalize stalking after her death.²⁹ Other states soon followed suit and by 1995, most states had some type of stalking statute.³⁰ New York was the last state to enact a statute specifically criminalizing stalking.³¹ New York finally passed the Clinic Access and Anti-Stalking Act of 1999 on October 4, of that year.³² While some state statutes require different types of behavior to be demonstrated by the stalker, all of the statutes require some conduct that is directed at the victim.³³ In 1996, Congress enacted the Interstate Stalking Punishment and Prevention Act.³⁴ This federal statute only applies to a stalker who physically crosses a state line to commit a crime.³⁵ This statute

²² Kurtz, *supra* note 7.

²³ *Id.*

²⁴ Merschman, *supra* note 6, at 262.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *Stalking*, at <http://www.silencewhispers.com/stalking.htm> (last visited Mar. 25, 2002); Nancy Hooper, *Celebrities at Risk*, RISK MANAGEMENT MAGAZINE, available at <http://www.infoinc.com/rims/rmmag/celebrities.html> (last visited Mar. 25, 2002).

²⁹ Merschman, *supra* note 6, at 266. See CAL. PEN. CODE § 646.9 (West 1999). In September of this year, a bill was recently passed to amend the statute by removing the requirement that only “a pattern of conduct” may be considered as evidence to prove a credible threat. S. 1320, 2002 Leg., Reg. Sess. (Cal. 2002), available at WL, ca-legis file. Instead, any conduct, alone or in combination with stated or written threats, will be sufficient to make a credible threat. *Id.*

³⁰ Merschman, *supra* note 6, at 266.

³¹ Demetra M. Pappas, *Essay: Stopping New Yorkers' Stalkers: An Anti-Stalking Law for the Millennium*, 27 FORDHAM URD. L.J. 945, 945-46 (2000).

³² *Id.* at 946.

³³ Merschman, *supra* note 6, at 266.

³⁴ 18 U.S.C.A. § 2261A (West 2000). See discussion *infra* Part V.B and accompanying notes.

³⁵ The Interstate Stalking Punishment and Prevention Act provides:

Whoever travels across a State line or within the special maritime and territorial jurisdiction of the United States with the intent to injure or harass another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury (as defined in section 1365(g)(3) of this title) to, that person or a

provides one particular benefit in fighting stalking—large resources. The FBI has more resources to gather evidence compared to local law enforcement.³⁶ They possess greater monetary resources to hire manpower and can buy or develop technology that may be useful in performing research and investigations.³⁷ The statute does not, however, provide a cause of action for a victim who is being harassed with telephone calls, mail, gifts or e-mails.

Stalking statutes have limitations that make prosecuting a stalker problematic.³⁸ Some statutes require the perpetrator to display a credible threat before any law enforcement agency may take action.³⁹ “[S]talking places great focus upon the victim, not merely upon the defendant. Such scrutiny of the victim contrasts sharply with other crimes, such as robbery for example, where all the statute requires is that the defendant commits the predicate act (theft) with the use of threat or the immediate use of force.”⁴⁰ Prosecution in robbery cases does not have to show that the victim handed the robber what was demanded because the victim was placed in fear by the robber’s threats.⁴¹ On the other hand, the prosecution in stalking cases must show that the stalker’s behavior caused the victim to feel fear of death or injury that a reasonable person would also fear in similar circumstances.⁴² In Massachusetts, the prosecution must show that the perpetrator caused the victim imminent fear of death or bodily injury.⁴³ However, stalkers do not always make explicit threats against their victims.⁴⁴ Stalkers often pursue a course of conduct that causes fear in a reasonable person when considered in the aggregate, but does not rise to the level of an explicit threat,⁴⁵ such as bombarding the victim with gifts and love letters. The behavior may not rise to the level of threatening or frightening, but may simply be undesired.⁴⁶ Thus a statute with broader language, such as Nebraska’s,⁴⁷ facilitates the prosecution of stalkers since it does not require a credible threat to be

member of that person’s immediate family (as defined in section 115 of this title) shall be punished as provided in section 2261 of this title.

³⁶ Merschman, *supra* note 6, at 270-71.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Jordan, *supra* note 11, at 552.

⁴¹ *Id.*

⁴² *Id.* at 551.

⁴³ MASS. ANN. LAWS ch. 265, § 43(a)(2) (West 2000). An individual who “makes a threat with the intent to place the person in imminent fear of death or bodily injury, shall be guilty of stalking.” *Id.*

⁴⁴ Merschman, *supra* note 6, at 267.

⁴⁵ *Id.*

⁴⁶ Jordan, *supra* note 11, at 518.

⁴⁷ See N.E. REV. STAT. § 28-311.03 (West 2001). “Any person who willfully harasses another person with the intent to injure, terrify, threaten, or intimidate commits the offense of stalking.” *Id.*

displayed by the stalker.

Stalking statutes may also face constitutional challenges. Since stalking consists of various types of conduct, the statute must be broad enough to be effective.⁴⁸ The downside to this statutory construction is that stalking statutes may be deemed unconstitutional if they are overbroad in criminalizing conduct protected by the First Amendment.⁴⁹ For instance, the defendant may argue that the statute infringes on his rights of freedom of association and freedom of movement guaranteed by the First Amendment.⁵⁰ However, many state courts and the United States Supreme Court⁵¹ have generally held that a government may criminalize threats of violence without violating the First Amendment's protection against overbroad statutes.⁵²

Stalking statutes must also be sufficiently finite so that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement,"⁵³ otherwise the statutes would violate the Due Process Clause of the Fourteenth Amendment.⁵⁴ Thus the statute drafters must craft language that is broad enough to cover various types of behavior displayed by the stalker and narrow enough so that it is not struck down by courts as too vague.

⁴⁸ Merschman, *supra* note 6, at 259-60.

⁴⁹ See U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*; see also, Merschman, *supra* note 6, at 271.

⁵⁰ Merschman, *supra* note 6, at 272 (citing Salt Lake City v. Lopez, 935 P.2d 1259 (Utah Ct. App. 1997)).

⁵¹ *Watts v. United States*, 394 U.S. 705, 707 (1969). *Watts* was convicted for threatening the life of the President of the United States, pursuant to 18 U.S.C. § 871(a). *Id.* at 705-06. The statute prohibits any person from "knowingly and willfully deposit[ing] for conveyance in the mail . . . any letter, writing, print, missive of document containing any threat to take the life of or inflict bodily injury upon the President of the United States." *Id.* at 705 (citation omitted). *Watts*, an eighteen-year-old, joined a public rally protesting police brutality and allegedly made the following statement:

They always holler at us to get an education. And now I have already received my draft classification as 1—A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.' 'They are not going to make me kill my black brothers.

Id. at 706. The United States Supreme Court held that defendant's alleged statement did not amount to a threat against the life of the President of the United States. *Id.* at 708.

⁵² Merschman, *supra* note 6, at 273.

⁵³ *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Edward Lawson was arrested and convicted for violating a California statute that required people who loitered on the streets to provide "credible and reliable" identification and to explain their presence when requested by a police officer. *Id.* at 354-55. Lawson brought an action challenging the statute's constitutionality. *Id.* at 354. The District Court held the statute unconstitutional. *Id.* The United States Court of Appeals for the Ninth Circuit affirmed and California officials appealed. *Id.* at 355. The Supreme Court held that the statute was unconstitutionally vague because it did not clarify what was meant by the requirement that a suspect provide a "credible and reliable" identification. *Id.* at 361.

⁵⁴ "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

III. CYBERSTALKING

“‘[C]ybercrime’ is really just an exploitation of a new technology to commit old crimes in a new way.”⁵⁵ The cyberstalker commits stalking through computer communication.⁵⁶ Cyberstalking differs significantly from traditional stalking. The victims usually are “Internet novices—females, children, and the emotionally unstable.”⁵⁷ Traditional stalkers are generally in the same geographic area as his or her victim while a cyberstalker may be living right next door to the victim or as far away as in another state⁵⁸ or country.⁵⁹

There appears to be more incidents reported of cyberstalking than traditional stalking. The pervasiveness of cyberstalking is hotly debated.⁶⁰ It has been difficult to quantify the amount of stalking that actually occurs on the Internet.⁶¹ The Department of Justice (“DOJ”) Report concluded that cyberstalking is a real problem and occurrences of it will increase.⁶² The report extrapolated the statistics of traditional stalking to the “90 million persons on the Internet and concluded that a fraction of the proportion suggest that there are potentially ‘tens or even hundreds of thousands of victims of recent cyberstalking.’”⁶³

The novelty of the crime and the lack of Internet savvy on the part of law enforcement officials have allowed cyberstalkers to elude capture.⁶⁴ A cyberstalker may send a message directly to his victim. The severity of the harassment or threats may also be heightened in cyberstalking because the cyberstalker does not confront his victim physically.⁶⁵ The distance allows the cyberstalker to lower his or her inhibitions.⁶⁶ The cyberstalker may harass the victim in a live chat room by flooding the Internet channel to disrupt the victim’s conversation.⁶⁷ The stalker may send viruses or electronic junk mail, known as “spamming,”⁶⁸ or e-mail bombs.⁶⁹

⁵⁵ Brenner, *supra* note 5, at ¶ 14.

⁵⁶ *Id.* at ¶ 21.

⁵⁷ Shonah Jefferson, *A Survey of Cyberstalking Legislation*, 32 UWLA L. REV. 323, 324 (2001).

⁵⁸ U.S. DEP’T OF JUSTICE, *supra* note 1.

⁵⁹ Brenner, *supra* note 5 at ¶ 2. “[C]ybercrime is often transnational in character.” *Id.*

⁶⁰ Jefferson, *supra* note 57, at 326.

⁶¹ *Id.*; see also U.S. DEP’T OF JUSTICE, *supra* note 1.

⁶² U.S. DEP’T OF JUSTICE, *supra* note 1.

⁶³ Jefferson, *supra* note 58, at 325-26.

⁶⁴ *Id.*

⁶⁵ U.S. DEP’T OF JUSTICE, *supra* note 1.

⁶⁶ *Id.*

⁶⁷ See NVAA Text 2000-Section 2, *supra* note 15.

⁶⁸ See *id.*

⁶⁹ See, e.g., Dave Wedge, *Principal Accused in Tickle Terror Web*, BOSTON HERALD, Apr. 14, 2001, available at 2001 WL 3798346. An example of e-mail bombing is the cyberstalking incident in which David D’Amato, a New York assistant principal, sent thousands of e-mails to Suffolk, James Madison, and Drexel University students at school accounts, causing damage to the

Cyberstalkers can also deceive other Internet users into harassing or threatening victims.⁷⁰ For example, a cyberstalker may impersonate the victim and send provoking messages in chatrooms, causing other users to respond with threatening messages.⁷¹ Alternatively, the stalker may set up a website about the victim with personal or fictitious information, so as to sully the victim's reputation or encourage unwanted contacts from others.⁷² In one California case, the stalker, Gary Dellapenta, impersonated the women on-line who did not return his romantic interest.⁷³ Dellapenta posted web messages indicating that these women wanted to be raped and provided those who responded with the women's names and home addresses.⁷⁴

The Internet is especially attractive to stalkers because it is easily accessible and affordable.⁷⁵ The stalker can conduct most of his criminal activity from his home and spend little money or effort to harass or intimidate his victim.⁷⁶ A mere push of a button on the keyboard is all it takes to contact his victim. The Internet also facilitates stalking because it allows the stalker to maintain anonymity.⁷⁷ Anonymity makes it difficult for law enforcement to identify and apprehend the cyberstalker.⁷⁸ The cyberstalker can easily sign up for a number of free e-mail accounts, with companies such as Hotmail or Yahoo, use a fictitious name and provide false personal information to conceal his or her true identity.⁷⁹ Internet Service

computer system and at times, shutting it down. *Id.* Cyberstalker may also subscribe to magazines under the victim's name. *See, e.g., A Case of Cyberstalking, available at* <http://www.cnn.com/2000/tech/computing/05/31/cybrstalking.idg/index.html> (victim received subscriptions to Playboy, Penthouse, Playgirl, Bride, and Seventeen magazines, none of which she ordered).

⁷⁰ *See* Radosevich, *supra* note 16, at 1387; U.S. DEP'T of Justice, *supra* note 1.

⁷¹ U.S. DEP'T OF JUSTICE, *supra* note 1.

⁷² *See* NVAA Text 2000-Section 2, *supra* note 15.

⁷³ *See, e.g., Cyberstalking Law Invoked*, Wire News (Jan. 25, 1999), at <http://www.wired.com/news/politics/0,1283,17504,00.html> (last visited Mar. 25, 2002).

⁷⁴ *Id.*

⁷⁵ Merschman, *supra* note 6, at 276.

⁷⁶ *Id.*

⁷⁷ Susan Brenner, *Defining Cybercrime: A Review of Federal and State Law*, in *CYBERCRIME: THE INVESTIGATION, PROSECUTION, AND DEFENSE OF A COMPUTER RELATED CRIME* 50 (Ralph D. Clifford ed., 2001). Some scholars distinguish two types of anonymity: true anonymity and pseudo-anonymity. George F. du Pont, *The Criminalization of True Anonymity in Cyberspace*, 7 *MICH. TELECOMM. TECH. L. REV.* 191, 195 (2001). True anonymity is where the communication is untraceable and the identity of the person cannot be discovered despite diligent effort. *Id.* at 196. Pseudo-anonymity is where the identity of the person communicating is discoverable. *Id.* The Internet has made truly anonymous communication much easier and cheaper. *Id.* For instance, in order for a letter to be truly anonymous, it would have to be without "fingerprints or other traceable materials such as regional dirt, glue, paper, and ink." *Id.* at 197. A cyberstalker can be truly anonymous by using "anonymous re-mailers," which is a service that receives an e-mail, removes the true sender's identifying information and sends the message to the victim. *Id.* at 198.

⁷⁸ *Id.*; *see* Brenner, *supra* note 77, at 50.

⁷⁹ Merschman, *supra* note 6, at 276.

Providers (“ISP”) seldom verify this information.⁸⁰ While the victim may attempt to stop the harassment by informing the ISP to terminate the stalker’s account, the stalker can simply open a new account by using other fictitious personal information.⁸¹

IV. CYBERSTALKING AND CHILDREN

The Internet exposes children⁸² to new threats from sexual predators. Trafficking of children is the third most profitable industry in the world.⁸³ One scholar advises that as the use and development of the Internet increases, “accessing and distributing pornographic material is easier and quicker than ever.”⁸⁴ As the sheer number of people with access to the Internet increases, so too may the number of incidents of child pornography and other kinds of sexual crimes against children.⁸⁵ Research has shown that this prediction is accurate. According to a survey in the *Journal of the American Medical Association*, one of every five children in the United States who use the Internet on a regular basis was solicited for sex in the year 2000.⁸⁶ Only ten percent of the incidents were reported to service providers, police or authorities.⁸⁷ Parry Aftab, a lawyer and executive director of Cyberangels, a New York City-based watchdog group, alleges that: “The classic victim of a child molester or Internet predator is suburban or rural, but generally suburban, between the ages of 12 and 15 Both parents are frequently not at home, and the children may be lonely.”⁸⁸ Some of these

⁸⁰ Radosevich, *supra* note 16, at 1387.

⁸¹ *Id.*

⁸² A child is “one who [h]as not reached the age of consent.” Ashley A. Halfman, *Giving Offenders What They Deserve: Amendments to Federal Sentencing Guidelines Section 2G2.2, Addressing Child Pornography Distribution*, 36 GA. L. REV. 219, 225 (2001); *cf.*, N.Y. PENAL CODE § 120.55 (McKinney 2002) (defining child as individual under the age of fourteen for purposes stalking in the second degree); S.D. CODIFIED LAWS § 22-22-30.1 (Michie 1999) (defining child as under the age of thirteen years for purposes of criminal pedophilia); DEL. CODE ANN. tit. 11 § 9002 (2) (2001) (defining child as any unmarried individual under the age of eighteen years); FLA. STAT. ANN. Title V, § 39.01 (2002) (defining child as any individual under the age of eighteen years who has not been emancipated by court order); L.A. REV. STAT. ANN. § 14:40.2 (West 1997) (defining child as twelve years or younger); MO. ANN. STAT. § 455.501 (West 1997) (defining child as individual under the age of eighteen years); N.J. STAT. ANN. 2C:12-10.2 (West 2002) (defining child as individual under the age of eighteen years for purposes of stalking).

⁸³ Halfman, *supra* note 82, at 220. Guns and drugs are the top two most profitable illegal activities. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Kimberly Atkins, *Children Victimized Online Study Suggests 1 in 5 is Targeted*, THE BOSTON GLOBE, June 20, 2001, available at 2001 WL 3938929.

⁸⁷ *Id.*

⁸⁸ Allan Richter, *Setting Traps to Snare Online Predators*, N.Y. TIMES, Oct. 7, 2001, available at LEXIS, News Library, News Group File (internal quotation marks omitted). Detectives often prefer not involving the child victim in the investigation because some of the children do not believe they have been a victim of a crime and actually impede the investigation by warning the cyberstalker of investigation. *Id.* Some girl victims believe that they are in love with the

predators contact children in chatrooms to establish a relationship with them. After gaining their trust, the predators attempt to meet with them to engage in criminal sexual activity.⁸⁹ These victims of pedophiles often suffer serious psychological injuries. Children may become cynical and frightened, feel "guilt, betrayal, rage, and worthlessness" and may "become bitter toward adults."⁹⁰

In response to this problem, federal, state, and local law enforcement authorities have taken measures to prevent and stop online crimes against children. The Federal Bureau of Investigation ("FBI") has established an undercover initiative called Innocent Images in 1995.⁹¹ An example of a sting operation is the case of *Hatch v. People*.⁹² To catch adult pedophiles, Jennifer Hersey, a twenty-year-old woman, posed as a thirteen-year-old girl and chatted online with adults who sought sexual encounters with under-aged women. Hersey described these adults as "people [who] were basically stalking children on the Internet."⁹³ Despite the establishment of undercover operations, law enforcement agencies still require further training on how to investigate these types of crimes.⁹⁴

In addition, even though these sting operations result in the prosecution of ninety-five percent of the cyber-adult pedophiles,⁹⁵ current laws do not protect the victim, the child, adequately.⁹⁶ "Attorneys have multiple defenses to use in arguing these cases, such as mistake of fact,⁹⁷ the unconstitutionality of existing Internet laws,⁹⁸ and entrapment."⁹⁹ One

cyberstalker or are responsible for the crime because they sought the attention. *Id.*

⁸⁹ U.S. DEP'T OF JUSTICE, *supra* note 1; *see, e.g., Crime: Girl Raped as Result of Internet Friendships*, NAT'L J. TECH. DAILY, Oct. 21, 2001, available at LEXIS, News Library, News Group File. Predators may employ child pornography to "lower children's inhibitions in order to pressure them into engaging in sexual activity. Pictures of other children who seem to be enjoying sexual activities may help convince the child that such behavior is socially acceptable." Halfman, *supra* note 82, at 226.

⁹⁰ Halfman, *supra* note 82, at 226.

⁹¹ U.S. DEP'T OF JUSTICE, *supra* note 1.

⁹² 94 Cal. Rptr. 2d 453, 460 (Cal. Ct. App. 2000).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Donald S. Yamagami, *Prosecuting Cyber-Pedophiles: How Can Intent be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 SANTA CLARA L. REV. 547, 548 (2001).

⁹⁶ *Id.* at 549.

⁹⁷ *Id.* at 555; *see also* *People v. Reed*, 61 Cal. Rptr. 2d 658 (App. Ct. 1996). The defendant placed an advertisement in a magazine soliciting the company of women of "any race, age or size." *Id.* at 659. This advertisement attracted the attention of a local detective trained to investigate crimes against children because it referred to women of any age, which might include children. *Id.* The detective, posing as "Helen," a woman with two minor daughters, began a correspondence with the defendant. *Id.* The defendant told "Helen" that he wanted to have sex with her daughters. *Id.* The defendant agreed to meet with "Helen" and her daughters at a motel, where he was eventually arrested. *Id.* at 660. The defendant argued that "there can be no attempt to commit child molestation where the victim is imaginary because the appellant could not fulfill the elements of the offense." *Id.* The court rejected this argument, holding that guilt is determined based on how the defendant *perceived* the facts. *Id.*

⁹⁸ Yamagami, *supra* note 95, at 559-60; *see also* *Reno v. ACLU*, 521 U.S. 844 (1997) (holding

particular defense, the “fantasy defense” was utilized by Patrick Naughton, a former InfoSeek executive, who was arrested by FBI agents for meeting an FBI agent posing as a thirteen-year-old girl for sex.¹⁰⁰ In his defense, he 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.’”¹⁰¹ Naughton’s contention was persuasive enough to convince the jury to acquit him.¹⁰² Since 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.”¹⁰³ Thus, with role-playing, it becomes a more difficult task for law enforcement and the courts to differentiate between fantasy and when the individual is violating the law by acting on his fantasy.¹⁰⁴ This new fantasy culture is growing ever more popular, making people and juries more sympathetic with the fantasy defense.¹⁰⁵

In the case of *Hatch v. People*, the threat posed by the cyberstalker was evident.¹⁰⁶ Hersey recorded all of her encounters with the defendant as evidence of his intent to engage in criminal activity.¹⁰⁷ However, the issue of a threat becomes complicated when the threat is really a prank. “Many

that the Communications Decency Act’s provisions to regulate the Internet were too broad and violated the First Amendment.)

⁹⁹ Yamagami, *supra* note 95, at 557. 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 criminal prosecution against him.” BLACK’S LAW DICTIONARY 1601 (7th ed. 1999).

¹⁰⁰ Keith Alexander, *Arrest Threatens Career of Net Star*, USA TODAY, Sept. 21, 1999, at <http://www.usatoday.com/life/cyber/tech/ctg194.htm>. FBI documented Naughton, who went under the name of “hotseattle,” chatting online with the undercover agent, stating that he wanted to “get naked and explore” and that he “was going to be very careful since he could go to jail.” *Id.* In a separate chat session, the agent said that Naughton “wanted to get me alone in his hotel room and have me strip naked.” *Id.* As part of the sting operation, the agent agreed to meet Naughton at a roller rink near the pier, where she would be waiting for him with a green bookbag. *Id.* Naughton was arrested and charged with interstate travel with the intention to have sex with a minor.

¹⁰¹ Yamagami, *supra* note 95, at 548.

¹⁰² *Id.*

¹⁰³ *Id.* at 564.

¹⁰⁴ *Id.* at 565; *see generally*, D. Ian Hopper, *Authorities Tell Faux-Stalker to Tone It Down*, at <http://www.cnn.com/2000/tech/computing/03/17/julie.folo/index.html> (last visited Mar. 23, 2002). Law enforcement agents from the Computer Crimes Division of the L.A. County Sheriff’s Department “strongly suggested” that Tim Street take down his fake stalker website, FortheloveofJulie.com, or make his disclaimer that this was a fictional site more conspicuous. *Id.* The website features a fictional video clerk who follows “Julie” (also fictional) home and to work and takes videos of her. *Id.* Sergeant Larry Balich commented that the website was a little too realistic and could impede investigations of real crimes. *Id.*

¹⁰⁵ Yamagami, *supra* note 95, at 571. Interestingly, in the *Naughton* case, the men on the jury believed that Naughton was playing out a fantasy whereas the women believed that he intended to have sex with a minor. *Id.* at 572; *see also* Charles L. Lidner, *The Law Separating Internet Fantasy from Reality*, L.A. TIMES, Jan. 9, 2000, at M2. Men may be more computer savvy than women. Yamagami, *supra* note 95, at 572.

¹⁰⁶ *Hatch*, 94 Cal. Rptr. 2d 453.

¹⁰⁷ *Id.* at 460.

Internet users are young kids seeking bravado and joking around."¹⁰⁸ In that situation, it may be difficult to assess the seriousness of comments made over the Internet in comparison to those made in person.¹⁰⁹ Susan Brenner, a professor at the University of Dayton School of Law, comments, "If the kids are just talking, you don't want to prosecute just anybody who says anything in a chat room."¹¹⁰ Prosecuting these children would be a waste of administrative resources, such as time, money, and manpower, that could be allocated to more serious cases of cyberstalking.

Children, however, have indeed been convicted for sending threatening messages over the Internet. Patrick Andrew Smith, an eighteen-year-old teenager residing in Walkersville, Maryland, sent messages to two teenage girls in California after a fatal school shooting there.¹¹¹ In one of Smith's e-mails, he wrote that he "would 'try to finish what [the shooter] didn't complete."¹¹² In this case, the e-mails sent posed an imminent threat of death or physical harm upon which a federal law enforcement official could act. Smith was sentenced to six months in jail.¹¹³

Another cyberstalking incident, which was intended as a prank, involved a fifteen-year-old boy sending e-mails to his friend, threatening to shoot their high school classmates.¹¹⁴ Although the community felt the boy was not serious about carrying out the threat, it felt that he still should be punished, in light of the other school shootings occurring in the U.S. during that time.¹¹⁵ The boy pleaded guilty to a misdemeanor charge of disorderly conduct and was sentenced to fifty hours of public service and one year of probation and counseling.¹¹⁶ In this case, there was no real harm, physical or psychological, to the intended victims, but the issue as to whether children who send threatening e-mails as pranks should be prosecuted, and how they should be punished when there is such harm, remains unresolved. Other questions that may also need to be considered are whether there should be an age threshold for holding children liable for their actions. Should we expect a twelve-year-old to know that sending threatening or harassing messages could cause another individual harm?

Even with stalking statutes in place, cyberstalkers are not deterred since

¹⁰⁸ Kurtz, *supra* note 7 at A23.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See, e.g., Teen Sentenced for Sending Violent E-mail*, MILWAUKEE JOURNAL SENTINEL, INC., Aug. 25, 2001, available at LEXIS, News Library, News Group File; *see also, Teen Takes Punishment for Prank*, CHICAGO DAILY HERALD (ARLINGTON HEIGHTS, IL), July 20, 2000, available at LEXIS, News Library, News Group File.

¹¹² *Teen Sentenced for Sending Violent E-mail*, *supra* note 111.

¹¹³ *Id.*

¹¹⁴ *Teen Takes Punishment for Prank*, *supra* note 111.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

the consequences are not severe. Courts are reluctant to impose stiff sentences on cyberstalkers because many of them are “highly educated and financially successful white men.”¹¹⁷ Many offenders are eligible for reduced sentences because they generally have no prior criminal record and tend to take responsibility for their actions.¹¹⁸ Courts also are more likely to give lighter sentences since there is a perception that there is no real victim in these cases.¹¹⁹ Furthermore, courts look upon entrapment prosecutions with more sympathy, resulting in more lenient sentences.¹²⁰ Judges are uneasy about those prosecutions based on undercover agents posing as underage children and forcing otherwise innocent people to commit crimes.

Such leniency undermines the efforts of undercover operations targeting cyberstalkers. In defense of his light sentencing of Georges Debeir,¹²¹ a Belgian diplomat soliciting sex via the Internet from an undercover agent posing as a fourteen-year-old girl, United States District Court Judge William Nickerson stated that no real harm occurred.¹²² Nickerson’s comment demonstrates acutely how the judicial system does not completely comprehend the dangers posed by cyberstalking.¹²³

However, courts may be changing their lenient attitude in sentencing as cyberstalking of children becomes a growing public concern. For instance, in August 2001, United States District Court Judge Frederic N. Smalkin sentenced Geoffrey C. Stewart to two years in prison for soliciting a fourteen-year-old girl to have sex in a sting operation.¹²⁴ Judge Smalkin rejected the defense counsel’s arguments to allow Stewart to be placed on probation and to enroll in a private, residential treatment program for sex offenders.¹²⁵ The prosecutor successfully persuaded Judge Smalkin that Stewart would receive equal, if not better treatment at the correctional facility, where officials have treated more than 200 sex offenders who faced cybercrime charges similar to Stewart’s.¹²⁶ While it may be true that Stewart

¹¹⁷ Debra Baker, *When Cyberstalkers Walk*, 85 A.B.A.J. 50, 50 (Dec. 1999).

¹¹⁸ *Id.* at 117; see also Yamagami, *supra* note 95, at 567.

¹¹⁹ Baker, *supra* note 117; see also Yamagami, *supra* note 95, at 567.

¹²⁰ Baker, *supra* note 117; see also Yamagami, *supra* note 95, at 567.

¹²¹ Debeir was sentenced to six month’s home detention and five years of probation. Baker, *supra* note 117.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Gail Gibson and Brendan Kearney, ‘Lengthy Term to be Sought for Ex-Gilman Dean Today,’ THE BALTIMORE SUN, Aug. 2, 2001, available at 2001 WL 6166248.

¹²⁵ *Id.* Smalkin’s sentence was influenced by information showing that Stewart had sex the day before he was arrested with a sixteen-year-old girl and had attempted sexual contact with two other teenage girls on-line. *Id.* In addition, Stewart had pleaded guilty to using an interstate commerce facility to solicit sex from a minor in April earlier that year. Smalkin stated that this information demonstrated a “pattern of behavior that was not just opportunistic and spur of the moment.” *Id.* See also Brenda Kearney, *Former Gillman Dean Gets 2-year term in Net Sex Sting*, THE BALTIMORE SUN, Aug. 3, 2001.

¹²⁶ *Id.*

may have suffered from a psychological compulsive disorder,¹²⁷ granting Stewart's request for lenient sentencing to a treatment center would diminish the social stigma associated with Stewart's actions, and would not have had a significant deterrent effect on other offenders.

V. CURRENT LEGISLATION ON CYBERSTALKING

A. *On The International Level*

Because the Internet is accessible in almost every country, cyberstalkers can be located outside of the United States¹²⁸ and their victims within.¹²⁹ In fact, some believe that most cyberstalking originates overseas.¹³⁰ Consequently, prosecuting a cyberstalker for stalking an American victim may be extremely complicated when there is a conflict of laws or if the foreign country hosting the cyberstalker does not have laws criminalizing

¹²⁷ *Id.* Investigators and psychologists believe that many cyberstalkers are like Stewart, i.e., professional men who are not predisposed to sexual deviant behavior, but who become compulsive about their online fantasies. *Id.*

¹²⁸ The United States appears to be comparatively better informed and equipped to combat stalking in general. For instance, Canada, a First World Western nation, does not have nationally representative data on the criminal harassment within its border. Sanjeev Anand, *Stopping Stalking: A Search for Solutions, a Blueprint for Effective Change*, 64 SASK. L. REV. 397, 398 (2001). Canada's 1993 stalking legislation, Criminal Code section 264 was strongly influenced by the research data supplied by the United States' FBI. *Id.* Section 264 provides:

(1) No person shall without, lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of repeatedly following from place to place the other person or anyone known to them; repeatedly communicating with, either directly or indirectly, the other person or anyone known to them; besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happened to be; or engaging in threatening conduct directed at the other person or any member of their family.

Id.

Australia, in contrast to the United States, is more concerned with regulating information that is available on the Internet. See Meghan A. Wharton, *Pornography and the International Internet: Internet Content Regulation in Australia and the United States*, 23 HASTINGS COMM. & ENT. L.J. 121, 155 (2000). "People in the United States were very concerned about 'cyber-stalkers.' . . . Due to concerns about 'cyber-stalkers,' Congress included regulation of both e-mails and chat rooms in the CDA." *Id.*

¹²⁹ See, e.g., *Woman Stabbed During Bar Fight*, THE AUGUSTA CHRONICLE, Feb. 25, 2002, available at LEXIS, News Library, News Group File. A woman from Augusta, Georgia met a British man on the Internet. *Id.* When she ended the relationship, he continued to send her e-mails, call her at work and at home. *Id.* In some e-mails, he threatened to continue calling her until he talked to her or until he took a flight over to the United States to see her. *Id.* Augusta police forwarded her complaint and their reports to the United Kingdom. *Id.*

¹³⁰ Edith Bevin, *Police Target Net Porn*, SUNDAY TERRITORIAN, Feb. 24, 2002, available at LEXIS, News Library, News Group File.

such behavior.¹³¹ There is also an issue regarding conflicting procedural requirements—specifically, which nation has jurisdiction over the cyberstalker.¹³² It is unclear how many nations have adequate laws for prosecuting cybercrime or cyberstalking in particular.¹³³

The inadequacy of cybercrime laws impedes the extradition of cybercriminals for punishment by countries whose nationals are victimized. Extradition is defined as the “surrendering of a criminal or accused criminal by one sovereign to another.”¹³⁴ Treaties are the main instruments that govern extradition.¹³⁵ As is international custom, the United States requires formal extradition treaties and has over 100 treaties with other countries. Despite the existence of these treaties, the lack of uniform national laws on computer crimes and the different attitudes towards these issues, make extradition of cybercriminals difficult and expensive.¹³⁶ There is a general consensus in the international community that certain Internet crimes should be illegal and that they should be severely punished.¹³⁷ Examples of such crimes are child pornography and pedophilia¹³⁸. It is estimated that children under the age of eighteen are forced into the sex trade.¹³⁹ In developed nations, the Internet has facilitated the exploitation of children.¹⁴⁰ Extradition for these crimes usually occurs with little difficulty.¹⁴¹ However, extradition is complicated when these types of crimes are committed over the Internet.

While cyberstalking has been recognized by some nations as illegal, there is disagreement as to how severely it should be punished and how it should be regulated.¹⁴² The United States has enacted some legislation specifically applicable to cyberstalking, but most other countries seem “to extend the application of existing laws to cyberspace.”¹⁴³ For example, in the

¹³¹ Brenner, *supra* note 5, at ¶ 9.

¹³² *Id.* at ¶ 8.

¹³³ *Id.* at ¶ 10.

¹³⁴ John T. Soma, *Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?*, 34 HAR. J. ON LEGIS. 317, 318 (1997).

¹³⁵ *Id.* at 319.

¹³⁶ *Id.* at 333. Adult pornography and dangerous speech is not criminalized in all nations. *Id.* at 340.

¹³⁷ *Id.* at 333.

¹³⁸ *Id.* at 333-39.

¹³⁹ James Brooke, *Sex Web Spun Worldwide Traps Children*, N.Y. TIMES MAGAZINE, Dec. 23, 2001, available at www.nytimes.com (last visited Mar. 25, 2002).

¹⁴⁰ Children born in Third World nations are even more vulnerable to sexual exploitation because their births are usually not registered. *Id.*

¹⁴¹ Soma, *supra* note 134, at 333.

¹⁴² *Id.* at 339.

¹⁴³ *Id.* at 355. Cyberstalking is still rare in Asia. Kristie Lu Stout, *Law Catching Up with Online Sex Crimes*, available at <http://www.cnn.com/2001/business/asiap/east/04/20/hongkong.cyberstalking/index/html> (last visited Mar. 25, 2002). “Still, [Asian] investigators say virtual stalking and other online sex offense will likely increase as Internet usage in the region

United Kingdom, the Home Office issued a statement that computer stalking would be subject to the same laws as any other type of stalking.¹⁴⁴ Current extradition treaties are also outdated and with the increase in Internet crimes, countries have manipulated extradition laws in order to punish criminals outside of their jurisdiction.¹⁴⁵

Another issue that arises with the prosecution of a cyberstalker on the international level is which country has jurisdiction. The venue for prosecuting cyberstalking may not center only on the physical location of the cyberstalker.¹⁴⁶ Possibilities for the venue include the location where the cyberstalking began and the various sites that the harassing messages may have passed through.¹⁴⁷ American courts traditionally consider two factors in determining jurisdiction over a criminal who acts outside of the United States.¹⁴⁸ The courts look at the relevant criminal statute to determine the legislative intent in providing for extraterritorial application.¹⁴⁹ They also look at the international bases of jurisdiction and whether they are justified under the principles of territoriality, nationality, passive personality, universality, or the protective principle.¹⁵⁰

The principles of territoriality and nationality, or active personality, are the two preferred theories of exercising jurisdiction.¹⁵¹ Jurisdiction under the territoriality principle permits a country to regulate conduct that occurs

risers. . . . [Law enforcement officials] believe[] that the Internet provides a ripe environment for cyber stalking because potential criminals believe they're safe from detection." *Id.*

¹⁴⁴ *Id.* at 355. In the United Kingdom, "[a] person must not pursue a course of conduct-(a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other." United Kingdom's Protection from Harassment Act of 1997, at <http://www.legislation.hmso.gov.uk/acts/acts1997/97040—a.htm#1> (last visited Mar. 24, 2002). "[T]he person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other." *Id.* "A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other to fear on each of those occasions." *Id.*

Australia is one of the few countries other than the United States to enact legislation specifically applicable to cyberstalking. Soma, *supra* note 134, at 335. "The Australian statute provides: "A person shall not knowingly or recklessly: (a) use a carriage service supplied by a carrier to menace or harass another person; or (b) use a carriage service supplied by a carrier in such a way as would be regarded by reasonable persons as being, in all the circumstances, offensive." Crime Act of 1914, Part VIIB, § 85ZE, at <http://www.judcom.nsw.gov.au/desklaw/ctact/html/1914-12/doc040.htm#sec85ze> (last visited Mar. 23, 2002).

¹⁴⁵ Soma, *supra* note 134, at 317.

¹⁴⁶ Ellen S. Podgor, *International Computer Fraud: A Paradigm for Limiting National Jurisdiction*, 35 U.C. DAVIS L. REV. 267, 269-70 (2002).

¹⁴⁷ *Id.* at 281-82.

¹⁴⁸ *Id.* at 282.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; see also Darrel C. Menthe, *Jurisdiction in Cyberspace: A Theory of International Spaces*, 4 MICH. TELECOMM. & TECH. L. REV. 69, 71 (1998); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. OF CHI. LEGAL F. 323, 323 (2001).

¹⁵¹ Menthe, *supra* note 150, at 71.

within its territory and foreign conduct that has substantial effects or intended effects in its territory.¹⁵² Jurisdiction under the nationality principle allows the country of the criminal offender's nationality to adjudicate the crime.¹⁵³ The rationale behind this principle is that "national sovereign pride and honor are tainted when a national commits an offense abroad. It is considered necessary that the state have authority to control its nationals to ensure that its laws, reputation, and sovereignty are respected."¹⁵⁴ The principle also assumes that it is more appropriate for the criminal offender to be prosecuted by his nation's judicial system.¹⁵⁵

The passive personality theory of jurisdiction gives the victim's nation jurisdiction to prosecute the criminal offender.¹⁵⁶ The rationale under this theory is that criminal law aims to protect society's interests and that the victim's national judicial system has a better idea of what kind of protection should be given.¹⁵⁷

There is no territorial connection required in the protective principle of jurisdiction.¹⁵⁸ This principle instead concentrates on the character of the interests that are threatened by the criminal conduct.¹⁵⁹ Jurisdiction is provided under this principle only when the conduct injures or threatens to injure the state's security, sovereignty, or an important government function.¹⁶⁰ Common examples of conduct that meet this requirement are

¹⁵² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(c) (1987); Bradley, *supra* note 150, at 323; *see, e.g.*, *Consol. Gold Fields PLC v. Minocro, S.A.*, 871 F.2d 252, 261-62 (2d Cir. 1989) (holding that foreign take-over would have substantial effects within the United States because American shareholders owned \$5.3 million shares with a market value of \$120 million); *U.S. v. Evans*, 667 F. Supp. 974, 980 (S.D.N.Y. 1987) (U.S. courts may exercise jurisdiction over acts that occurred outside its territory when acts caused adverse effects within the U.S.); *Kruman v. Christie's Int'l PLC*, 129 F. Supp. 2d 620, 626 (S.D.N.Y. 2001) (granting motion to dismiss based on lack of subject matter jurisdiction where court found transactions involved in plaintiff's claims did not have a substantial effect in U.S. territory); *U.S. v. Bin Laden*, 92 F. Supp. 2d 189, 195 (S.D.N.Y. 2001) (holding that U.S. did not have exclusive or concurrent territorial jurisdiction over embassy premises); *Yahoo!, Inc. v. Ligue Contre Le Racisme Et L'Antisemitisme* 145 F. Supp. 2d 1168, 1176 (N.D. Cal. 2001) (holding that defendants purposefully availed themselves of U.S. law when they knowingly engaged in conduct intended to have an effect on plaintiff's constitutional right of free speech).

¹⁵³ THE INTERNATIONAL LEGAL SYSTEM (Christopher L. Blakesley et al. eds., Foundation Press 2001); *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. e (1987); *see, e.g.*, *U.S. v. Harvey*, 2 F.3d 1318, 1329 (3d Cir. 1993) (rejecting defendant's argument that the federal sentencing provision did not apply because he sexually exploited children abroad in the Philippines, photographed the conduct and possessed the photographs when in the United States).

¹⁵⁴ THE INTERNATIONAL LEGAL SYSTEM, *supra* note 153, at 161.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1987); Bradley, *supra* note 150, at 323.

¹⁵⁷ THE INTERNATIONAL LEGAL SYSTEM, *supra* note 153, at 166.

¹⁵⁸ *Id.*; *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. f (1987); Bradley, *supra* note 150, at 323.

¹⁵⁹ THE INTERNATIONAL LEGAL SYSTEM, *supra* note 153, at 168.

¹⁶⁰ *Id.*

terrorism or intimidation of a government.¹⁶¹ Cyberstalkers could use the Internet to send threatening messages to government officials, but such threats may not pose a danger to the state. This theory of jurisdiction therefore may not be very useful on an individual level.

Jurisdiction under the universality principle allows a state to have jurisdiction to determine the punishment of a criminal for crimes that are recognized by the international community as a universal concern.¹⁶² Acts that usually fall into this category include piracy, slave trade, and genocide.¹⁶³ Cyberstalking of children may fall into this category since there is a general consensus in the international community of condemning the exploitation of children.¹⁶⁴

Despite all of the inconsistencies in international laws governing cybercrime, there have been instances where a foreign nation aids another in its pursuit of a cyberstalker. For instance, the Hong Kong police enlisted the help of the United States to capture Ko Kam-fai.¹⁶⁵ Ko, a twenty-three-year-old apprentice construction worker,¹⁶⁶ repeatedly sent threatening e-mail messages and obscene pictures to two female university students in Hong Kong.¹⁶⁷ In one message, Ko threatened to rape one of his victims and attached a picture of a woman having sex.¹⁶⁸ Ko also hacked into the victims' computers, damaged them by rearranging the digital contents, spammed, and attempted to disrupt the university e-mail system.¹⁶⁹ The Hong Kong police asked the U.S. Federal Bureau of Investigation to help gather evidence and track down Ko, who was using an e-mail account registered in the United States with the company USA.net.¹⁷⁰

International awareness of the dangers posed to children by the

¹⁶¹ *Id.*

¹⁶² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); see Bradley, *supra* note 150, at 324. "[I]ndividuals engaging in crimes subject to universal jurisdiction are viewed as having made themselves 'enemies of mankind.'" *Id.* at 340. Moreover, such individuals are "presumed to be on notice that if they commit a universal crime, they are subject to prosecution wherever they are found." *Id.*

¹⁶³ See Bradley, *supra* note 150, at 324 (during the nineteenth century, American courts regulated piracy of the seas under the universality principle of jurisdiction); see, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 240, *cert. denied*, 518 U.S. 1005, 116 S. Ct. 2524, 135 L. Ed. 2d 1048 (1996) (holding the defendant liable for genocide, war crimes, and crimes against humanity and that he was not immune from service as a United Nations invitee).

¹⁶⁴ *But see* Bradley, *supra* note 150, at 324. There is a debate over exactly what offenses are subject to universal jurisdiction. In addition, there are a few instances where the United States have exercised full criminal jurisdiction. *Id.* at 349-50.

¹⁶⁵ 'Cyber-stalker' Jailed in Hong Kong, *supra* at <http://www.cnn.com/2001/world/asiapcf/east/02/19/hongkong.cyberstalker/index/html> (last visited Mar. 23, 2002).

¹⁶⁶ *Id.*

¹⁶⁷ Stout, *supra* note 143.

¹⁶⁸ 'Cyber-stalker' Jailed in Hong Kong, *supra* note 165.

¹⁶⁹ Stout, *supra* note 143.

¹⁷⁰ 'Cyber-stalker' Jailed in Hong Kong, *supra* note 165.

Internet is increasing. There are about twenty law enforcement teams trained to combat online pedophilia in Europe, Japan, and the United States.¹⁷¹ British police have developed a computerized facial recognition system that helps identify sexually abused children.¹⁷² Swedish officials have created software that cross-references background evidence.¹⁷³ In Japan, law enforcement encourage parents to become computer literate, aware of the dangers lurking on the Internet and to be more involved in their children's lives.¹⁷⁴

B. Federal Legislation

"[C]yberstalking is proving to be beyond the scope of conduct criminalized by many stalking statutes."¹⁷⁵ Regulation is difficult since most penal statutes require the "harassment and intimidation by the cyberstalker to rise to the level of 'threatening' bodily injury."¹⁷⁶ The Internet allows the "perpetrator to inflict psychic damage on a victim without ever actually threatening to inflict physical harm."¹⁷⁷ Cyberstalking statutes face the same constitutional barriers as traditional stalking. In *U.S. v. Alkhabaz*,¹⁷⁸ defendant Jacob Alkhabaz (a.k.a. Jake Baker) sent his friend private e-mails about his fantasies of raping and killing "Jane Doe," a woman he knew from school. Alkhabaz was prosecuted under 18 U.S.C. § 875(c), which prohibits interstate communications containing threats to kidnap or injure another person.¹⁷⁹ The Sixth Circuit held that because Baker did not intend for "Jane Doe" to see this e-mail, she could not have been threatened by it.¹⁸⁰ The district court also held that the First Amendment protects this type of speech.¹⁸¹

Although there may be no actual threat posed to the victim in cyberstalking because the threats occur in cyberspace and not in the real world, the effects on the victim are the same as if received in the real world. The victim can be traumatized for years as a result of the cyberstalking, even after the stalking has ended.¹⁸² The most obvious damage to victims is violence, which may occur as a result of the cyberstalking. Studies show that

¹⁷¹ Brooke, *supra* note 139.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Merschman, *supra* note 6, at 257.

¹⁷⁶ Brenner, *supra* note 5, at ¶ 21.

¹⁷⁷ *Id.* at ¶ 29; see also *Cyberstalking: The Cases*, at <http://www.unc.edu/courses/law367c/cyberprojects/spirng00/cyberstalking/cybertalk/>.

¹⁷⁸ 104 F.3d 1492 (1997).

¹⁷⁹ *Id.* at 1493.

¹⁸⁰ The e-mail messages were not accessible by the public. *Id.* at 1493.

¹⁸¹ *United States v. Baker*, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995); see *infra* p. 31.

¹⁸² See generally Radosevich, *supra* note 16, at 1377.

stalkers are violent to their victims twenty-five to thirty percent of the time.¹⁸³ The probability increases in situations where the victim had a prior relationship with the stalker.¹⁸⁴

“There is no federal law directed at cyberstalkers, but there are statutes that can be used to prosecute the sending of obscene, abusive or harassing communications.”¹⁸⁵ For instance, if 47 U.S.C § 223 is amended as proposed by S. 630, it will “prohibit senders of unsolicited commercial electronic mail from disguising the source of their messages.”¹⁸⁶ The amended statute could allow cyberstalkers to be prosecuted for spamming their victims with pornography or other offensive materials.¹⁸⁷

Another option for the prosecution of cyberstalkers is 18 U.S.C. § 2425, which makes it a crime for anyone to transmit information about a minor. Specifically, it prohibits the knowing transmission of the “name, address, telephone number, social security number, or electronic mail address of another individual,” whom the sender knows is under the age of sixteen, “with the intent to entice, encourage, offer, or solicit any person to engage in any sexual activity.”¹⁸⁸

The prosecution in *United States v. Kammersell*¹⁸⁹ used § 875 of the United States Code to convict the defendant for sending threatening instant messages even though the victim was located in the same state as the defendant.¹⁹⁰ Section 875 prohibits the transmission of threats in interstate or foreign commerce to kidnap, injure the body, property, or reputation of another individual.¹⁹¹ The court found that the jurisdictional requirement of the statute was met since the instant messages were sent over interstate telephone lines and traveled to a server outside of the defendant's.¹⁹² However, the statute cannot be used when there is no threat.¹⁹³ Thus, as a

¹⁸³ Merschman, *supra* note 6, at 262.

¹⁸⁴ Jordan, *supra* note 11, at 535.

¹⁸⁵ Brenner, *supra* note 77, at 50.

¹⁸⁶ S. 630, 107th Congress (2002), available at WL, US-BILLTRK File. 47 U.S.C. § 223 had been invalidated as unconstitutionally broad in *Reno v. American Civil Liberties Union*, 521 U.S. 884 (1997).

¹⁸⁷ *Id.* “The Act may be cited as the ‘Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2001,’ or the ‘CAN-SPAM Act of 2001.’” *Id.* Although the amended statute would be directed at commercial entities rather than private individuals, a cyberstalker could send his victim unsolicited e-mails under the guise of a commercial on-line business.

¹⁸⁸ 18 U.S.C.A. § 2425 (West 2000).

¹⁸⁹ 196 F.3d 1137 (10th Cir. 1999), *cert. denied* 120 S. Ct. 2664 (2000). *Kammersell*, nineteen-years-old, sent an instant message containing a bomb threat to his girlfriend at her workplace, hoping that the threat would allow her to leave work early so they could go on a date. *Id.*; see also Brenner, *supra* note 77, at 56.

¹⁹⁰ *Kammersell*, 196 F.3d at 1139.

¹⁹¹ 18 U.S.C.A. § 875 (West 2000); see also Brenner, *supra* note 77, at 56.

¹⁹² *Kammersell*, 196 F.3d at 1139. The threats were transmitted from Utah to Virginia to Utah. *Id.*

¹⁹³ Brenner, *supra* note 77, at 57.

result, the statute cannot be used against most of the conduct that falls into the stalking class.¹⁹⁴

Two statutes were amended in the past few years to facilitate the prosecution of crimes committed over the Internet. In 1998, Congress revised 18 U.S.C. § 2422(b) to include the use of mail or any facility or means of interstate or foreign commerce to persuade, induce, entice, or coerce any person under the age of eighteen for prostitution or sexual activity.¹⁹⁵ 18 U.S.C. § 2261A¹⁹⁶ was revised on October 28, 2000 to be more inclusive in its definition of interstate acts that may constitute stalking. The amendments were initially proposed in 1998 by Representative Sue Kelley as H.R. 3737, the Stalking Prevention and Victim Protection Act of 1998.¹⁹⁷ Its

¹⁹⁴ *Id.* at 57; *see, e.g. Alkhabaz*, 104 F.3d 1492 (finding that the defendant did not send credible threats).

¹⁹⁵ 18 U.S.C.A. § 2422(b) (West 2000).

¹⁹⁶ The statute provides that an individual who:

travels in interstate or foreign commerce or within the special maritime and territorial jurisdiction of the United States, or enters or leaves Indian country, with the intent to kill, injure, harass, or intimidate another person, and in the course of, or as a result of, such travel places that person in reasonable fear of the death of, or serious bodily injury to, that person, a member of the immediate family (as defined in section 115) of that person, or the spouse or intimate partner of that person; or with the intent—

(A) to kill or injure a person in another State or tribal jurisdiction or within the special maritime and territorial jurisdiction of the United States; or

(B) to place a person in another State or tribal jurisdiction, or within the special maritime and territorial jurisdiction of the United States, in reasonable fear of the death of, or serious bodily injury to—

- (i) that person;
- (ii) a member of the immediate family (as defined in section 115) of that person; or
- (iii) a spouse or intimate partner of that person, uses the mail or any facility of interstate or foreign commerce to engage in a course of conduct that places that person in reasonable fear of the death of, or serious bodily injury to, any of the persons described in clauses (i) through (iii), shall be punished as provided in section 2261(b).

18 U.S.C.A. § 2261A (West 2000).

¹⁹⁷ Amendments to 18 U.S.C. § 2261A were first proposed by Representative Sue Kelly in 1998, in H.R. 3747, the “Stalking Prevention and Victim Protection Act of 1998.” *See* Jefferson, *supra* note 57, at 332; H.R. 3747, 105th Cong. (1998). H.R. 3737 proposed allowing federal law enforcement to take action when a stalker used the Internet or a telephone across state lines. Jefferson, *supra* note 57, at 332; H.R. 3747. 18 U.S.C. § 2261A would have been amended to punish a stalker if his stalking occurred “in or affect[ed] interstate or foreign commerce” on two or more occasions. Jefferson, *supra* note 57, at 333; H.R. 3747. H.R. 3747 also provided for issuing permanent protective orders, denying bail where the stalker had a prior conviction for a violent crime, and increasing sentences if the stalker had been convicted for a crime of violence against the same victim or against a member of that victim’s immediate family or household. Jefferson, *supra* note 57, at 332; H.R. 3747. The bill lowered the specific intent standard to a reasonableness standard. Jefferson, *supra* note 57, at 333; H.R. 3747. The bill also removed the travel requirement, thereby broadening the scope of federal law. Jefferson, *supra* note 57, at 333. However, H.R. 3747 was not enacted. Jefferson, *supra* note 57, at 333.

Representative Kelly presented H.R. 3747 once again, without any changes, in the 106th Congress as H.R. 1869, the Stalking Prevention and Victim Protection Act of 1999. Jefferson,

language includes e-mail, regular mail and other means that a stalker may use to terrify his victim. However, most stalking cases are "prosecuted at the State and local level. Therefore, it is up to the individual states to provide language protection that will protect potential victims."¹⁹⁸

In January 2001, the efforts of prosecutors to fight cybercrime appeared to have been stifled by a federal court ruling¹⁹⁹ in *Konop v. Hawaiian Airlines, Inc.*,²⁰⁰ until the Justice Department expressed concern about the adverse consequences it may have on the prosecution of cybercriminals. In *Konop*, the Ninth Circuit held that the Wiretap Act²⁰¹

supra note 57, at 333; H.R. 1869, 106th Cong. (1998). When the House Conference Committee amended H.R. 1869, the Committee deleted the reasonable intent requirement and the "two or more occasions" requirement. Jefferson, *supra* note 57, at 333; H.R. 1869. H.R. 1869 passed in the House, but remained in the Senate Committee on Judiciary. Jefferson, *supra* note 57, at 333.

On July 27, 2000 Senator Spencer Abraham proposed S. 2011, the Stalking Prevention and Victim Protection Act of 2000, which prohibited stalking on the Internet. Jefferson, *supra* note 57, at 333; S. 2011, 107th Congress (2002), *available at* WL, US-BILLTRK File. When the Senate Committee on Judiciary took no action on S. 2011, Senator Kay Bailey Hutchison further campaigned for the 18 U.S.C. § 2261A amendment by adding a cyberstalking provision to H.R. 3244, the "Victims of Trafficking and Violence Protection Act of 2000." Jefferson, *supra* note 57, at 333. H.R. 3244 increases law enforcement and support for education and training to reduce violence against women. Jefferson, *supra* note 57, at 333, H.R. 3244.

¹⁹⁸ Joanna Lee Mishler, *Cyberstalking: Can Communication Via Internet Constitute a Threat, and Should an Internet Service Provider Be Liable If It Does?*, 17 SANTA CLARA COMPUTER AND HIGH TECH. L.J. 115, 128 (2000).

¹⁹⁹ Caitlin Lui, *Reversal of Internet Ruling is Sought Crime: U.S. and Local Prosecutors Tell Appeals Court That Curbs on Web Site and E-Mail Access Make Their Job Harder*, L.A. TIMES, Apr. 23, 2001, *available at* 2001 WL 2480882.

²⁰⁰ 236 F.3d 1035 (9th Cir. 2001). Robert Konop worked as a pilot for Hawaiian Airlines, Inc. ("Hawaiian") and had a private website where he posted messages criticizing Hawaiian, its officers, and the union. *Id.* at 1041. Konop restricted access to his website by requiring users, but not managers or union representatives, to provide their names and a password and agree to keep secret the contents of the website. *Id.* Konop sued Hawaiian after the company president used another employee's login to gain access to the site. *Id.*; *see also*, Lui, *supra* note 199.

²⁰¹ 18 U.S.C.A. § 2511 (West 2000). The Act prohibits an individual who:

intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication . . . ; intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication,"

Id.

The Act does not apply to "an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the

protects electronic communications from interception when stored to the same extent as when in transit. The Justice Department commented that such a ruling would impede the ability of federal and state investigators and prosecutors to prosecute Internet crimes, since a wiretap order is more difficult to obtain than a search warrant.²⁰² After reconsideration, the opinion was withdrawn later that year, in August 2001.²⁰³

The growing concern and increased awareness of the potential criminal uses of the Internet were also reflected in the Commerce-Justice-State (“CJS”)²⁰⁴ spending bill passed by the Senate in November 2001. The bill provides \$41 billion for cyber-security and online crime fighting initiatives, such as programs to fight cybercrime, child pornography, and technology research programs.²⁰⁵ CJS also gives \$10 million toward the prosecution of cybercrime.²⁰⁶

C. State Legislation

As of April 1, 2000, only twenty-three states have harassment or stalking laws that include electronic communication.²⁰⁷ Only sixteen states have specific cyberstalking laws as of May 2001.²⁰⁸ For instance, California, the first state to have stalking laws, amended section 646.9(g) of its penal code in 1998, to include a provision that prohibits threats made through an electronic communication device with the “intent . . . and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety, or the safety of his or her family.”²⁰⁹ The statute defines electronic communication devices as “including but not limited to telephones, cellular telephones, computers,

transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.” § 2511(2)(a)(i). The Act also does not apply to law enforcement agents when they obtain a court order or “a certification in writing by a person specified in § 2518(7) of this title or the Attorney General of the United States that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required.” § 2511(2)(a)(ii).

²⁰² Lui, *supra* note 199.

²⁰³ Konop, 262 F.3d 972 (9th Cir. 2001).

²⁰⁴ See generally Brian Krebs and Robert MacMillan, *Newsbytes*, Nov. 15, 2001, at www.newsbytes.com/news/01/172189.html (last visited Feb. 3, 2002).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ NVAA Text 2000-Section 2, *supra* note 15.

²⁰⁸ Kevin McDermott, *Legislature OKs Bill Outlawing Net Threats, Harassment; Measure Sent to Ryan Makes “Cyberstalking” A Felony*, ST. LOUIS POST-DISPATCH, May 9, 2001, LEXIS, Nexis Library, News Group File.

²⁰⁹ CAL. PENAL CODE § 646.9(g) & (h) (West 1999).

video recorders, fax machines, or pagers."²¹⁰

Other states have followed suit only after realizing that their laws were outdated and did not provide for threats or harassment made through electronic means, specifically the Internet. In the case of Christian Hunold,²¹¹ the inadequacy of the law was discovered too late. The court granted Hunold's motion to dismiss the charges of dissemination of visual material of a child in a state of nudity, dissemination of visual material of a child in a state of sexual conduct, attempted dissemination of visual material of a child in a state of nudity, and attempted dissemination of visual material of a child in a state of sexual conduct, because it found that the statutory use of the phrase "similar visual representations reproductions"²¹² referred to those in books, magazines, or pamphlets and did not include computer depictions.²¹³

Hunold prompted the Massachusetts legislature to amend Chapter 269 of its General Laws in September 2001 to include the prohibition of the willful communication of a threat "in writing, by mail, by use of a telephonic or telecommunication device including, but not limited to, electronic mail, Internet communications and facsimile communications, through an electronic communication device or by any other means, a threat."²¹⁴ Illinois, Hunold's home state, took legislative action earlier. It passed a bill in August 2001, that "apparently [is] one of the toughest and most specific [law on cyberstalking] in the nation."²¹⁵ The offender may face up to five years in prison for transmitting credible threats over the Internet two or more times.²¹⁶

The most recent bill was proposed in January 2002 in Georgia.²¹⁷ This bill proposes to revise criminal provisions "relating to interception of electronic or oral communications for law enforcement purposes" and allow these revisions to be applied in cases involving terroristic acts and threats.²¹⁸

Another concern that few states have dealt with is the credible threat requirement. For instance, in New Jersey, a cyberstalker currently cannot be convicted unless his threatening behavior actually places the victim in fear of death or bodily injury.²¹⁹ "Thus in cases in which the stalking victim is a child . . . , proving that the stalking occurred can be difficult as the victim

²¹⁰ *Id.*

²¹¹ Commonwealth v. Hunold, Cr. No. 00-967 (001-010) (Middlesex Super. Ct. Jan. 25, 2001) (on file with the Middlesex Super. Ct.).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ S. 2122, 182nd General Court, 2001 Reg. Sess., WL, ma-bills.

²¹⁵ McDermott, *supra* note 208.

²¹⁶ MASS. GEN. LAWS ch. 265 § 43 (2002).

²¹⁷ S. 1130, 146th Assembly, 2001-02 Reg. Sess., available at WL, ma-bills.

²¹⁸ *Id.*

²¹⁹ N.J. STAT. ANN. § 2C:12-10 (West 1995).

may not have the capacity to actually be placed in subjective fear of injury.”²²⁰ The amendments proposed in Assembly Bill No. 2246 would delete the subjective element of the offense and provide that a person would be guilty of stalking if he “purposely or knowingly engages in a course of conduct at a specified person that would cause a reasonable person to fear bodily injury to himself . . . *regardless* of whether the victim has a subjective reasonable fear of injury.”²²¹ All states should follow in revising their statutes to remove the credible threat requirement for victims, at least for children, if not adults also.

D. Constitutional Barriers

As with traditional stalking, statutes directed at cyberstalking face First Amendment and Fourteenth Amendment challenges,²²² especially since state legislatures have recently amended their stalking statutes to include provisions for stalking committed via electronic means and over the Internet.²²³ In *United States v. Baker*,²²⁴ the defendant was prosecuted for writing e-mails to an unknown person describing his violent fantasies about his classmate.²²⁵ The e-mails were not available in any publicly accessible area of the Internet.²²⁶ The district court dismissed the charges because “to infer an intention to act upon his thoughts and dreams from this language would stray far beyond the bounds of the First Amendment, and would amount to punishing [him] for his thoughts and desires.”²²⁷

In addition, some defendants argue that state laws criminalizing cyberstalking may violate the Commerce Clause.²²⁸ The Commerce Clause allows the federal government to legislate matters that deal with interstate commerce.²²⁹ Therefore, opponents of state cyberstalking statutes argue that only the federal government, not the states, is allowed to regulate the Internet and state that cyberstalking statutes are void based on these constitutional grounds.²³⁰

²²⁰ 2002 Electronic Update Assembly Judiciary Committee Statement to N.J. STAT. ANN. § 2C:12-10, at WL, NJ-St-Ann File.

²²¹ *Id.*

²²² *See supra* Part II.

²²³ *See supra* Part V. C.

²²⁴ 890 F. Supp. 1375 (E.D. Mich. 1995).

²²⁵ *Id.*; *see generally*, Yamagami, *supra* note 95, at 559.

²²⁶ *Baker*, 890 F. Supp. at 1390.

²²⁷ *Id.* at 1492; *see generally*, Yamagami, *supra* note 95, at 559. *But see* Laughner v. Indiana, 769 N.E.2d 1147, 1155-57 (Ind. Ct. App. 2002) (defendant’s due process rights were not violated when he was prosecuted pursuant to state law for his belief that adult undercover detective posing as a thirteen-year-old boy on the Internet was a child).

²²⁸ Yamagami, *supra* note 95, at 559.

²²⁹ U.S. CONST. ART. I, § 8, cl. 3. Congress has the power “[t]o regulate Commerce within foreign Nations, and among several States, and with Indian Tribes.” *Id.*

²³⁰ Yamagami, *supra* note 95, at 560.

VI. PROPOSED SOLUTIONS

A. *Holding Internet Service Providers Liable*

Some scholars have suggested that holding the Internet Service Providers ("ISPs") liable for hosting cyberstalker's messages would increase deterrence of cyberstalking.²³¹ ISPs themselves, since they manage the user registration and maintenance, may be in the best position to monitor the on-goings of their websites.²³² However, it may be unduly financially burdensome for ISPs to develop and maintain a system to police its users. In addition, ISPs would face the same problems as law enforcement in interpreting which messages pose serious threats. Nonetheless, in terms of ISPs, the policy focus should continue to be on providing users with full information and information security. The government should continue to require ISPs to explicitly state how it will use, share and/or protect member information. In terms of member conduct, ISPs should be driven by market forces to have policies for dealing with disruptive members.

B. *Increase Severity of Penalties*

Another suggestion for deterring cyberstalking is to increase the penalties for cyberstalkers who target children. As discussed earlier, many cyberstalkers are first time offenders, which is why they are given lenient sentences.²³³ A severe punishment would deter individuals from even engaging in cyberstalking in the first place and serve to protect some of the more vulnerable members of society.

C. *Increase Resources for Local Law Enforcement*

Increasing funding for computer training and equipment for local law enforcement agencies is another solution for deterring cyberstalking.²³⁴ As discussed, stalking through electronic means is significantly different from traditional stalking. Thus law enforcement needs to better understand and explore this new medium for crime, and embrace new technologies. Law enforcement agencies cannot anticipate and prevent crime, let alone pursue offenders if they do not understand and respect cyberspace.

D. *Increase Parental Awareness*

Because children often access the Internet in their homes, parents have the most opportunity to prevent their children from becoming victims or

²³¹ Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. REV. 1003, 1036 (2001).

²³² *Id.*

²³³ *See supra* Part IV.

²³⁴ *See supra* Part II.

perpetrators of cyberstalking. First, parents need to reiterate to children that their actions, whether intended as a harmless prank or not, may have serious repercussions on other people. Moreover, parents need to inform their children that there may be legal consequences to their actions and, as a deterrent, provide their children with real life examples in which minors were prosecuted.

Parents need to become better educated about how to protect their children from pedophiles. This begins with monitoring their children's activities. Parents must take more action than merely telling their children not to engage in communication with strangers or meet with people they encounter over the Internet. Parents should become more involved in their children's lives and ensure that their warnings are heeded. A study conducted by a Canadian agency called Environics Research Group showed that seventy percent of children said that their parents know nothing or little about their on-line lives.²³⁵ Another study by Media Awareness Network, an Ottawa based non-profit organization, revealed that thirty percent of nine-to-ten-year-olds, fifty-eight percent of eleven-to twelve-year-olds, seventy percent of thirteen-to-fourteen-year-olds, and seventy-two percent of fifteen-to-seventeen-year-olds admit to visiting private and adult-only chat rooms.²³⁶

Though parents today cannot expect to be as computer literate as their children, there are numerous tools available to combat online predators. A recent product called the McAfee Visual Trace is a geographical trace utility that allows users to trace Internet traffic, including e-mails and instant messages.²³⁷ Parents can also use the McAfee Visual Trace to trace the location of a person sending inappropriate messages to their children in a chat room.²³⁸ According to Mike Sullivan, a police detective who demonstrated the uses of the tracer on an Oprah episode, most of the online child predators are not as computer savvy as one might assume.²³⁹ These predators think that they have complete anonymity when they are on the Internet.²⁴⁰

The government can also play an important role in helping to educate families about how to better manage their use of the Internet. The establishment of an agency focused on education and personal security may help bring focus to this information gap between parents and their children.

²³⁵ Stephen Cole, *Frontiers: Net Smut*, THE GLOBE AND MAIL, Jan. 5, 2002, available at LEXIS, Nexis Library, News Group File.

²³⁶ *Id.*

²³⁷ *McAfee Visual Trace Empowers Parents and Law Enforcement to Deter Illicit Online Activity; Graphical Trace-Route Capability as Demonstrated on 'The Oprah Show' Aids in Apprehending Online Predators*, PR Newswire, Feb. 12, 2002, LEXIS, Nexis Library, News Group File.

²³⁸ *Id.*

²³⁹ *Id.* at 1.

²⁴⁰ *Id.*; see discussion *supra* Part III on "true anonymity" and "pseudo-anonymity."

This can also provide families with an independent assessment of protection and monitoring tools on the market, as well as provide a safe forum for ongoing discussions concerning this important area.

E. Update State Laws

Since most cyberstalking cases are prosecuted on the local level, states need to revise the laws on the books to encompass stalking conducted over the Internet. Though society has not yet learned to understand the Internet and all of its implications, there are some basic revisions that should be instituted immediately. In particular, laws need to protect against a situation where a defendant may escape conviction for cyberstalking or be charged with a lesser offense because there was no law criminalizing his or her on-line conduct. State laws should be drafted to prohibit stalking over the Internet and increase penalties when stalkers target children, even if it may be the stalker's first offense. Lenient punishment would not be effective in deterring others.

VII. CONCLUSION

In short, it is important to fully recognize the relevance of the emergent area of cybercrimes, particularly those involving minors. As computers become more ingrained in society, validating cyberspace as a new venue for criminal activity is without question. With the speed with which these new technologies are adopted, children have distorted the natural assumptions of nature by being more knowledgeable than their parents in cyberspace. This clearly provides dangerous opportunities.

Government policy first and foremost should be centered around closing the information gap. Providing funding for family education, Internet security tools and advice will help parents better understand the electronic world children live in today. By providing independent Internet management resources for families, prevention of cybercrimes will begin in the home.

Likewise, law enforcement bodies also need educational help. The tendency to simply apply off-line analogies to on-line activities must be guarded against. We have seen, for example, that simply applying stalking laws to cyberspace does not adequately address the needs of society in protecting its members from criminal activity. Law enforcement agencies need to be encouraged to become more involved in cyberspace and new technologies.

By focusing policy on education for both families and law enforcement agencies, we can begin to deepen our understanding of cyberspace and the dangers it presents. As society more fully accepts the Internet as a new, separate and distinct venue, this will begin to generate the necessary

discourse that will lead to laws specifically pertaining to the Internet. However, though these laws would be valuable today, we must walk before we can run. After education initiatives become a regular part of general society, we can, and must revisit Internet laws.

