

# NEW JERSEY'S ADULT INTERNET LURING STATUTE: AN APPROPRIATE NEXT STEP?

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## ABSTRACT

*New Jersey recently enacted legislation prohibiting the use of the Internet to lure or entice someone to a location with the purpose of committing a crime with or against that person or some other person. Most states have similar laws pertaining to pedophiles, but this is the first adult Internet luring statute. State measures to regulate the Internet, even in the context of criminal justice, will likely face constitutional challenge since the Internet has become such a critical vehicle for both protected speech and interstate commerce. Furthermore, while the use of the Internet in the commission of crimes against other persons is a new phenomenon, it is unclear whether new laws are the best solution, or whether other responses such as equipping police and investigators with more resources and training to properly enforce existing law would be more effective. This iBrief analyzes the issues New Jersey will face with its statute and the issues other states should be aware of when considering similar legislation.*

## INTRODUCTION

¶1 Public service announcements on the radio, crime drama television shows, stories from the local news – the Internet predator threat to children has been thoroughly publicized through these and many other types of media.<sup>2</sup> Responding to this threat, many states have enacted laws prohibiting the use of the Internet to communicate with children in a sexual manner.<sup>3</sup> Many of these laws prohibit luring or enticing children via the

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<sup>2</sup> See, e.g., The Ad Council, *Online Sexual Exploitation*, information available at [http://www.adcouncil.org/campaigns/online\\_sexual\\_exploitation/](http://www.adcouncil.org/campaigns/online_sexual_exploitation/) and Law & Order: SVU, Episode E0923, *Chat Room*, description available at [http://www.nbc.com/Law & Order: Special Victims Unit/episode\\_guide/18.html](http://www.nbc.com/Law%20&%20Order:SpecialVictimsUnit/episode_guide/18.html).

<sup>3</sup> See Alex C. McDonald, *Dissemination of Harmful Matter to Minors Over the Internet*, 12 SETON HALL CONST. L.J. 163, 163-64 (Fall 2001). See, e.g., CAL.

Internet with the purpose of having them engage in some illegal sexual conduct.<sup>4</sup> Congress has also expanded federal child sex crime law to ensure Internet luring can be prosecuted.<sup>5</sup> In addition, the U.S. Departments of Justice<sup>6</sup> and Homeland Security<sup>7</sup> have both established programs targeting Internet predation of children.

¶2 Pedophiles, however, are not the only predators who have taken advantage of the Internet to target their victims, and children are not the only victims of Internet predation. One of the more infamous examples of this is the recent murder of Bobbie Jo Stinnett. Lisa Montgomery allegedly used a fictitious name in an online chat room for dog breeders to express an interest in purchasing a rat-terrier from Stinnett.<sup>8</sup> Stinnett gave Montgomery directions to her home so that they could meet to arrange a sale.<sup>9</sup> However, Montgomery was not interested in Stinnett's dogs, but she instead wanted Stinnett's 8-month fetus.<sup>10</sup> Montgomery allegedly strangled Stinnett before cutting her open and removing and kidnapping the baby.<sup>11</sup>

¶3 Another Internet predator incident, fortunately with a less tragic result, became the impetus for a new law in New Jersey.<sup>12</sup> In April, 2002, Patricia Barteck called police after she noticed that a strange man in a vehicle parked near her Wood-Ridge, New Jersey home had been watching her.<sup>13</sup> The man had been lured to Barteck's home over the Internet by one

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PENAL CODE § 288.2(b) (West 1999); N.Y. PENAL LAW §§ 235.21, 235.22 (McKinney 2000).

<sup>4</sup> See *id.* at 173.

<sup>5</sup> Enticement Statute, 18 U.S.C. § 2422(b) (2000).

<sup>6</sup> See "Internet Crimes Against Children Task Force Program" operated by the Department of Justice's Office of Juvenile Justice and Delinquency Prevention, at <http://ojjdp.ncjrs.org/programs/ProgSummary.asp?pi=3>.

<sup>7</sup> See Information on "Operation Predator" program operated by the U.S. Immigration and Customs Enforcement division of the Department of Homeland Security, at <http://www.ice.gov/graphics/predator/index.htm>.

<sup>8</sup> *Slain mom laid to rest* CNN.COM, (Dec. 22, 2004), at <http://www.cnn.com/2004/LAW/12/21/stolen.fetus/> (last visited March 17, 2005).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Indictment, *United States v. Lisa M. Montgomery*, at para. 8 (W.D.M.S. Jan. 12, 2005), available at [http://www.usdoj.gov/usao/mow/news2005/montgomery\\_indictment.pdf](http://www.usdoj.gov/usao/mow/news2005/montgomery_indictment.pdf) (last visited May 23, 2005).

<sup>12</sup> Press Release, NJ Office of the Governor, Codey Signs Bill Cracking Down on Internet Predators (Jan. 18, 2005), available at [http://www.nj.gov/cgi-bin/governor/njnewsline/view\\_article.pl?id=2323](http://www.nj.gov/cgi-bin/governor/njnewsline/view_article.pl?id=2323).

<sup>13</sup> Kathleen Hopkins, 'Cyber-Rape' Outlawed: N.J. Cracks Down on Computer-Aided Crime, APP.COM (Jan. 19, 2005), at <http://www.crime-research.org/news/19.01.2005/910/> (last visited March 17, 2005).

of Barteck's in-laws, Jonathon Gilberti.<sup>14</sup> Gilberti had posed as Barteck in an Internet rape fantasy chat-room, indicated that Barteck wanted to act out a rape fantasy, and gave out Barteck's address, physical description and other personal information to someone interested in fulfilling Barteck's fantasy.<sup>15</sup>

¶4 Gilberti received a 10-year prison term after pleading guilty to attempted sexual assault for this and a similar incident involving another New Jersey woman.<sup>16</sup> Nevertheless, police and prosecutors claimed difficulty in using the sexual assault laws on the books to prosecute this type of crime.<sup>17</sup> Barteck pressed her state legislators to respond and they did, sending a bill to Acting Governor Richard Codey for his signature that makes it illegal to lure someone over the Internet into committing a crime or becoming the victim of a crime.<sup>18</sup> The statute reads:

A person commits a crime of the third degree if he attempts, via electronic or any other means, to lure or entice a person into a motor vehicle, structure or isolated area, or to meet or appear at any place, with a purpose to commit a criminal offense with or against the person lured or enticed or against any other person.<sup>19</sup>

¶5 Believed to be the first state law of its type,<sup>20</sup> the statute raises a number of questions. First, unlike child predator laws that narrowly target child sex crimes, the New Jersey statute addresses a far greater range of conduct. In the sometimes fantasy world of cyberspace, this law may tread on the First Amendment rights of Internet users by punishing speech that is not related to criminal conduct but is instead just an expression of mere thoughts. A second constitutional issue raised by the broad reach of the law is whether New Jersey has encroached upon the federal government's exclusive power to regulate interstate commerce. A third concern is whether the double inchoate aspect of the law criminalizes conduct that is too far removed from an actual criminal action. Finally, considering existing law covering solicitation, conspiracy, and attempted crimes, the law may not be the most effective response to the use of the Internet as a tool in committing crimes against persons.<sup>21</sup> This iBrief analyzes both the

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 2005 N.J. Sess. Law Serv. Ch. 1 (ASSEMBLY 2864) (WEST).

<sup>20</sup> Interview, Office of New Jersey State Senator Paul Sarlo; New Jersey Office of Legislative Services, March 15, 2005.

<sup>21</sup> This iBrief only addresses the use of the Internet to commit crimes against persons, not crimes against property such as theft of digital or financial information.

constitutional challenges the New Jersey statute will likely face and whether such laws are an appropriate response to the law enforcement problems created by the Internet.

## I. PROHIBITING CERTAIN INTERNET COMMUNICATION: IS NEW JERSEY TARGETING FANTASY SPEECH OR CRIMINAL CONDUCT?

### A. *First Amendment overbreadth challenges*

¶6 When states began prosecuting individuals using Internet child luring laws targeted specifically at pedophiles, they encountered questions over whether those laws violated the First Amendment.<sup>22</sup> Since the New Jersey Internet luring statute is far broader than the child luring laws, New Jersey is likely to face a similar First Amendment overbreadth challenge. Whether the statute survives such a challenge will ultimately rest on whether the courts find the law prohibits only speech that is incidental to criminal conduct.

¶7 For example, a defendant prosecuted under a New York statute prohibiting the use of a computer to invite a minor to engage in sexual conduct for his benefit argued that the statute was unconstitutionally overbroad.<sup>23</sup> However, the New York Court of Appeals noted that a statute is subject to less scrutiny under the First Amendment when it prohibits behavior that is more akin to conduct than speech, particularly when the targeted conduct is subject to otherwise valid criminal laws that support a legitimate exercise of a state's police power.<sup>24</sup> With regard to the child luring statute, the court held that the law's luring prong is significant and that the enticement it barred is distinguishable from pure speech.<sup>25</sup> Since the law targeted otherwise criminal conduct and not mere speech, and was narrowly tailored to serve the compelling state interest of protecting children from pedophiles, there was no First Amendment violation.<sup>26</sup>

¶8 The Supreme Court of North Dakota relied on that same logic to deny a First Amendment challenge to a North Dakota Internet luring law.<sup>27</sup> The court noted that the Supreme Court decisions invalidating provisions of the Child Pornography Prevention Act of 1996 and Communications Decency Act of 1996, which restricted dissemination of child pornography, were distinguishable from the statute in its case because those provisions

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<sup>22</sup> See, e.g., *State v. Robins*, 646 N.W.2d 287, 295-97 (Wis. 2002).

<sup>23</sup> *People v. Foley*, 731 N.E.2d 123 (N.Y. 2000), *cert. denied*, 531 U.S. 875 (2000).

<sup>24</sup> *Id.* at 128.

<sup>25</sup> *Id.* at 129.

<sup>26</sup> *Id.* at 130, 132.

<sup>27</sup> *State v. Backlund*, 672 N.W.2d 431, 439 (ND 2003).

did not prohibit speech aimed at luring minors to engage in sexual acts.<sup>28</sup> The court's ruling relied primarily on the arguments that the law addressed conduct, not speech, and that the law was narrowly tailored to serve the compelling state interest of protecting children from sexual predators.<sup>29</sup>

¶9 The federal child luring law was the target of a First Amendment challenge in *U.S. v. Bailey*.<sup>30</sup> The statute at issue in that case targets anyone who

using any facility or means of interstate or foreign commerce . . . 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 . . .<sup>31</sup>

In holding that the statute did not violate the First Amendment for being overbroad, the United States Court of Appeals for the Sixth Circuit emphasized that the statute applied only to those who knowingly targeted minors to engage in illegal activity.<sup>32</sup> So again in that case, the court read the luring statute as merely restricting the criminal conduct of enticing or luring a child to commit a crime, not limiting any protected speech.

¶10 Based on these three cases, it is clear that the key characteristics of the luring statutes that survived First Amendment challenges are (1) narrow tailoring to address the specific state interest in protecting children from pedophiles and (2) targeting the conduct of luring or enticing children, not mere words.<sup>33</sup> Under these circumstances, the speech is merely incidental to the criminal conduct. It remains to be seen whether New Jersey was successfully able to craft its adult luring statute to be broad enough to be effective, but not so broad that it criminalizes conduct protected by the First Amendment.<sup>34</sup>

¶11 The New Jersey statute is clearly not as narrowly tailored as the state and federal laws addressing pedophiles who entice children to engage

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<sup>28</sup> *Id.* at 439.

<sup>29</sup> *Id.* at 440-42.

<sup>30</sup> 228 F.3d 637 (6th Cir. 2000).

<sup>31</sup> Enticement Statute, *supra* note 5.

<sup>32</sup> *Bailey*, 228 F.3d at 639.

<sup>33</sup> Amy Keane, *Validity of State Statutes and Administrative Regulations Regulating Internet Communications Under Commerce Clause and First Amendment of Federal Constitution*, 98 A.L.R. 5TH 167 (2002).

<sup>34</sup> See Kimberly Wingteung Seto, *How Should Legislation Deal with Children as the Victims and Perpetrators of Cyberstalking?* 9 CARDOZO WOMEN'S L.J. 67, 72 (2002) (describing the balance between having a law broad enough to be effective while not burdening First Amendment rights in the cyberstalking context).

in sexual activity. Instead, the statute broadly targets those enticing someone to commit, or become the victim of, *any* criminal offense. Because of the broader reach of this law, defendants would seem to have a stronger argument that this law is overbroad and therefore a violation of the First Amendment free speech protections.

¶12 However, the statute still targets conduct, not speech. It is not the words typed in a chat-room or e-mail that are prohibited, but the act of luring or enticing someone into a situation where they either commit, or become the victim of, a crime. While the Supreme Court has said that the government may not suppress lawful speech as a means to suppress unlawful speech,<sup>35</sup> the Court has recognized that “freedom of speech does not extend to speech used as an integral part of conduct in violation of a criminal statute.”<sup>36</sup> Such is the case with Internet luring and enticement crimes.

### *B. Proving intent in the fantasy world of cyberspace*

¶13 While the New Jersey statute on its face targets criminal conduct and not mere speech, there remains the question of when does one know whether the Internet user typing on his keyboard is actually intending to lure a victim or entice someone to commit a crime, or whether he is merely engaging in a harmless, fictional expression of some fantasy. The same inherent anonymity, reach, and ease of use of the Internet that has given pedophiles and other criminals greater criminal opportunities has also given many other law abiding citizens the chance to explore personal fantasies without creating real harm.<sup>37</sup> Merely fantasizing about a crime is not enough to trigger punishment. In cyberspace, determining when the line from fantasy to reality is in fact crossed is very difficult.<sup>38</sup>

¶14 Accentuating the problem here is that the New Jersey law criminalizes an attempt to lure or entice someone into committing a crime.<sup>39</sup> Michael Sheetz, a Florida law enforcement official, suggests considering a spectrum of criminality where thoughts are on the far left and voluntary criminal acts are on the far right.<sup>40</sup> With conspiracy laws, the point of illegality is to the right center of that spectrum.<sup>41</sup> A law prohibiting

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<sup>35</sup> Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002).

<sup>36</sup> New York v. Ferber, 458 U.S. 747, 762 (1982).

<sup>37</sup> Donald S. Yamagami, Comment, *Prosecuting Cyber-Pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?* 41 SANTA CLARA L. REV. 547, 562-63 (2001).

<sup>38</sup> Michael W. Sheetz, Comment, *Cyberpredators: Police Internet Investigations Under Florida Statute*, 54 U. MIAMI L. REV. 405, 423 (Jan. 2000).

<sup>39</sup> 2005 NJ Sess. Law Serv. Ch. 1 (ASSEMBLY 2864) (WEST).

<sup>40</sup> Sheetz, *supra* note 38, at 423-24.

<sup>41</sup> *Id.*

solicitation moves further left on the spectrum toward thoughts.<sup>42</sup> The portion of New Jersey law dealing with attempts to lure or entice is even further to the left on that spectrum than a straight solicitation law, getting very close to the point where thoughts are criminalized.<sup>43</sup> Thus, the combination of a law targeting guilty thoughts expressed on the Internet and the widespread use of the Internet for exploring fantasy presents an extremely difficult challenge for law enforcement.<sup>44</sup>

¶15 In fact, some defendants have successfully avoided prosecution under the pedophile luring laws by using a so-called “fantasy defense.”<sup>45</sup> Patrick Naughton had been engaging in sexual correspondence over the Internet with someone claiming to be a thirteen-year old girl.<sup>46</sup> Naughton wrote to his chat partner that he wanted her to join him in a hotel room and strip for him.<sup>47</sup> The two arranged a meeting, but when Naughton found out his online chat partner was actually an FBI agent, he claimed he never really believed that she was a minor, but instead someone merely playing the role of a young girl.<sup>48</sup> Even though Naughton traveled from Seattle to California to meet his online pen pal, the jury believed his fantasy defense and acquitted him.<sup>49</sup>

¶16 The line between mere fantasy and true threat was also explored in a federal case against a University of Michigan student who posted a story with graphic descriptions of torture, rape, and murder on an internet newsgroup site, and sent e-mails expressing a sexual interest in similar violence against women and young girls.<sup>50</sup> The case was dismissed because the online communications did not include “true threats.”<sup>51</sup> While some of the e-mails included threats to young girls generally, the court found that the messages did not refer to a sufficiently specific individual or class of individuals.<sup>52</sup> Some of the e-mail messages did include more specific descriptions of particular individuals, but the court found those messages expressed a deep desire to act, but not an actual intention to act.<sup>53</sup> The court warned that punishing someone for messages that do not express an actual intention to act against a specific individual or class of individual would

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<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> Yamagami, *supra* note 37, at 561.

<sup>46</sup> *Id.* at 547.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 547-48.

<sup>49</sup> *Id.* at 547.

<sup>50</sup> *U.S. v. Baker*, 890 F.Supp. 1375, 1379 (E.D. Mich. 1995).

<sup>51</sup> *Id.* at 1387-88.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1389.

amount to punishing someone for their mere thoughts and desires, not their conduct.<sup>54</sup>

¶17 The fantasy defense may grow even more difficult for prosecutors to overcome.<sup>55</sup> Criminals who use the Internet are likely to have a greater understanding of both computers and the law than other criminals.<sup>56</sup> These criminals might limit their criminal conduct to specific chat rooms that include explicit rules outlining a fantasy role-playing intent.<sup>57</sup> They might also slip phrases, such as “we’re just pretending, right?” into their online conversations to further setup a potential fantasy defense.<sup>58</sup>

¶18 Transcripts of Internet chats, bulletin board messages or e-mail alone may not be enough to prove an Internet user truly intended to lure or entice someone to commit a crime. Law enforcement officials investigating these types of crimes will need to identify a corroborating substantial step such as traveling to the area where the actual crime is to be committed.<sup>59</sup> To enforce child luring statutes, law enforcement officials have turned primarily to online undercover operations with investigators posing as minors.<sup>60</sup> This tactic requires that the investigators be properly trained to effectively target true criminals without opening the door to an entrapment defense, making the criminal suspicious or allowing “overzealous enforcement . . . [to] overstep principles militating against the punishment of guilty thoughts.”<sup>61</sup> While society has little patience for anyone exploring pedophilia online even in a purely fantastical manner,<sup>62</sup> enforcement of the broader New Jersey luring statute might implicate other expression of more benign fantasies, possibly encroaching on First Amendment rights and traveling too far down the path of punishing mere thought.

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<sup>54</sup> *Id.*

<sup>55</sup> Christa M. Book, *Do You Really Know Who is on the Other Side of Your Computer Screen? Stopping Internet Crimes Against Children*, 14 ALB. L.J. SCI. & TECH. 749, 770 (2004).

<sup>56</sup> *Id.*

<sup>57</sup> *See id.* at 767.

<sup>58</sup> *Id.*

<sup>59</sup> *See* U.S. v. Murrell, 368 F.2d 1283, 1288 (11th Cir. 2004) (noting that traveling to another country to meet the minor chat-room partner and carrying a teddy bear with cash and condoms was enough to corroborate the intent to lure a minor to engage in sexual activity that was evident in the defendant’s online communications).

<sup>60</sup> Book, *supra* note 55. at 754-55.

<sup>61</sup> Sheetz, *supra* note 38, at 425.

<sup>62</sup> *See* Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 535-38 (Summer 2002) (noting the deep and widespread disgust the public and lawmakers have toward online pedophiles).

## II. STATE INTERNET LURING LAWS AND THE DORMANT COMMERCE CLAUSE

¶19 In addition to First Amendment overbreadth challenges, defendants have also attacked state child Internet luring laws as violations of the Dormant Commerce Clause, arguing that regulation of the Internet is reserved to the federal government since it is a tool of interstate commerce.<sup>63</sup> While the New Jersey statute prohibits using “electronic or any other” means to lure someone to commit a crime,<sup>64</sup> the primary target is Internet use<sup>65</sup> and the law has a much broader reach than the pedophile luring laws, so it is likely the law will also be challenged as a violation of the dormant commerce clause.

¶20 Because the fundamental nature of the Internet is that its traffic flows from state to state, a number of state statutes regulating the dissemination of sexually explicit material to children have been invalidated for violating the Dormant Commerce Clause.<sup>66</sup> When the restrictions imposed were not limited to activity that took place entirely within one state, they burdened interstate commerce. For example, out-of-state website operators of a sexual health website successfully challenged a Vermont statute that prohibited the transfer of sexually explicit materials that were harmful to minors because the law unduly burdened legitimate interstate commerce.<sup>67</sup> A similar Michigan statute was invalidated as a violation of the dormant commerce clause because the law attempted to regulate all

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<sup>63</sup> See, e.g., *People v. Barrows*, 709 N.Y.S.2d 573, 574 (N.Y. App. Div. 2000). The Dormant Commerce Clause is a doctrine inferred by the Supreme Court from the actual Commerce Clause that serves as a limitation on the power of states to make legislation that effect interstate commerce. See e.g., *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-35 (1949) (explaining that although the text of the Commerce Clause does not say what the states may or may not do to regulate commerce, the Court has used the clause to invalidate state legislation that restrains interstate commerce for local economic advantage). For a more detailed and focused look at the different Dormant Commerce Clause treatment of state child luring law as compared to state child dissemination law, see Chin Pann, *The Dormant Commerce Clause and State Regulation of the Internet: Are Laws Protecting Minors From Sexual Predators Constitutionally Different than those Protecting Minors From Sexually Explicit Materials?*, 2005 DUKE L. & TECH. REV. 8 (March 2005), available at <http://www.law.duke.edu/journals/dltr/articles/2005dltr0008.html>.

<sup>64</sup> 2005 N.J. Sess. Law Serv. Ch. 1 (ASSEMBLY 2864) (WEST).

<sup>65</sup> Press Release, State Senator Paul Sarlo, *Sarlo Hails Hometown Heroine for Fighting Internet Sleaze* (Jan. 18, 2005), available at <http://www.politicsnj.com/sarlo011805.htm>.

<sup>66</sup> See, e.g., *PSINET, Inc. v. Chapman*, 167 F. Supp. 2d 878 891 (W.D. Va. 2001).

<sup>67</sup> *Am. Booksellers Found. v. Dean*, 342 F.3d 96 104 (2d Cir. 2003).

Internet traffic through the state, even though the majority of such traffic originated outside the state.<sup>68</sup>

¶21 Those same arguments were used in *American Libraries Ass'n v. Pataki* to invalidate a New York law criminalizing the dissemination of sexually explicit e-mail to minors.<sup>69</sup> The *Pataki* court explained further that since New York already had laws protecting children from obscenity and pornography, the law's incremental local benefit was too small in comparison to the burden on interstate commerce.<sup>70</sup>

¶22 In *Hatch v. Superior Court*, the California Court of Appeals distinguished the *Pataki* case, since the statute at issue in *Hatch* included an intent to seduce element, while the statute at issue in *Pataki* did not.<sup>71</sup> Where the New York statute was banning all communication of certain materials to minors, the California statute instead targeted the conduct of seduction.<sup>72</sup> The *Hatch* court reasoned that since no legitimate commerce is furthered by seducing minors, the commerce clause limitation on state regulation is inapplicable to this situation.<sup>73</sup> The *Hatch* court also dismissed the argument that California was imposing its will onto other states, since the law affected only those whose acts had a greater than 'de minimis' connection to California would be prosecuted.<sup>74</sup>

¶23 Other state courts have followed similar logic in finding that state laws prohibiting the use of the Internet to lure minors to perform sexual acts are valid exercises of state police powers and deserve no economic protection.<sup>75</sup> However, the New Jersey statute goes beyond the criminalization of the Internet as a tool to engage in sex acts with children. Rather, it targets the use of the Internet to lure or entice someone to engage in any type of criminal offense.<sup>76</sup>

¶24 The broad reach of the statute may make it more susceptible to a commerce clause challenge than the earlier cases. As noted above, the *Pataki* court indicated that its decision to invalidate a law prohibiting dissemination of sexually explicit material to minors over the Internet was

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<sup>68</sup> *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 830-31 (E.D. Mich. 2001).

<sup>69</sup> 969 F.Supp. 150 (S.D.N.Y. 1997).

<sup>70</sup> *Id.* at 178-79.

<sup>71</sup> *Hatch v. Superior Court*, 94 Cal.Rptr.2d 453, 471 (Cal. Ct. App. 2000).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 472.

<sup>74</sup> *Id.* at 473.

<sup>75</sup> Jeffery C. Morgan, *State attempts to regulate the sale of products—State anti-pornography statutes-Child Luring Laws*, 2 INTERNET LAW AND PRACTICE § 25:20 (2005).

<sup>76</sup> 2005 N.J. Sess. Law Serv. Ch. 1 (ASSEMBLY 2864) (WEST).

based in part on the fact that New York already had other laws on the books protecting minors from obscene material.<sup>77</sup> The *Pataki* court reasoned that the Internet law therefore conferred a relatively small additional benefit to the state, while significantly burdening interstate commerce.<sup>78</sup> As explained below, the New Jersey luring statute may not criminalize much that existing law does not already prohibit. Since the luring statute may only confer a relatively small local benefit, and its broad reach has the potential to burden interstate commerce, New Jersey may have a difficulty surviving a challenge if the *Pataki* reasoning is followed.

¶25 New Jersey should be comforted to know that a significant common thread running through the decisions upholding child luring statutes is that the conduct targeted is legitimately criminal in nature and deserves no economic protection. New Jersey is similarly only targeting the use of the internet as a tool to commit crime. However, since each of the luring statutes that were upheld were focused narrowly on pedophile conduct, the question of whether the courts upheld the statutes purely on the principle of targeting otherwise criminal conduct, or more so because of the specific underlying offense (an offense that draws a particularly great level of disgust)<sup>79</sup> is unresolved.

### III. ARE THESE LAWS EVEN NECESSARY?

*A. Internet luring and enticement crimes are already covered by existing criminal statutes in most states.*

¶26 Perhaps the most important question to ask is whether adult luring laws are even necessary. While using the Internet as a means to commit crime is a growing problem, the crimes committed are often just old crimes committed in new ways.<sup>80</sup> Existing statutes establishing crimes against other persons, and the related attempt, solicitation, and conspiracy statutes should not be insufficient merely because the Internet or some other computer technology was used in the commission of one of those crimes.<sup>81</sup> Whether one solicits someone to commit rape over the phone, over the Internet, or with a handwritten letter, the crime is still the same. Even the crime that was the impetus to the New Jersey law was chargeable under

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<sup>77</sup> *Pataki*, 969 F.Supp. 150 at 178-79.

<sup>78</sup> *Id.*

<sup>79</sup> See Lynch, *supra* note 62.

<sup>80</sup> Christine Gregoire, *Law Enforcement Challenges in Cyberspace*, 34-Oct Prosecutor 28, 30 (Sept./Oct. 2000).

<sup>81</sup> Patrick E. Corbett, *Anatomy of a Computer Crime: Awareness of the Problem May Provide a Remedy*, 7 T.M. COOLEY J. PRAC. & CLINICAL L. REV. 1, 15 (2004) (arguing that creating news laws is debatable since most internet crime is merely an old law committed in a new way).

existing attempted sexual assault law.<sup>82</sup> In fact, the solicitor is serving ten years in prison after pleading guilty to attempted sexual assault for the two instances where he solicited someone over the Internet to commit rape.<sup>83</sup>

¶27 A similar crime occurred in Pittsburgh.<sup>84</sup> There, a twenty-nine-year-old woman posed online as a long time acquaintance and invited men over the Internet to come to the acquaintance's house to rape her.<sup>85</sup> Five of the men showed up at the acquaintance's door.<sup>86</sup> In that case, existing law was also sufficient, and the woman was charged with criminal solicitation to commit rape, identity theft, stalking, and recklessly endangering another person.<sup>87</sup> Of course some states have not criminalized solicitation. In those states, an internet luring law would be a much more valuable tool to address criminal Internet enticement. But states that have been slow to recognize the need for solicitation statutes may also be slow to recognize the Internet luring threat.

¶28 Even if a state has sufficient solicitation, conspiracy, and attempt statutes, the use of the Internet as a means to commit crimes against others still presents significant law enforcement issues that must be addressed. The greater anonymity and distance between an Internet predator and his victim lowers the predator's inhibitions, possibly making him more likely to engage in criminal conduct.<sup>88</sup> Moreover, the Internet is also easily accessible and affordable, further reducing the potential costs of engaging in criminal behavior.<sup>89</sup> Criminals can also have greater reach by using the Internet since it connects persons around the world.<sup>90</sup> Additionally, obtaining and preserving digital evidence has proven to be an extremely challenging task.<sup>91</sup> Until law enforcement has the capability to combat these issues, the use of the Internet in criminal activity will continue to increase.

¶29 Furthermore, the Internet has enabled individuals to harass or intimidate others through new methods that do not necessarily include a

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<sup>82</sup> See NJS C.2C:14-2 (Sexual assault); NJS C.2C:5-1 (Criminal attempt); NJS C.2C:2-6 (Liability for conduct of another; complicity).

<sup>83</sup> Hopkins, *supra* note 13.

<sup>84</sup> Jonathan D. Silver, "Police solve bizarre Web case," PITTSBURGH-POST GAZETTE, Oct. 23, 2004, available at <http://www.post-gazette.com/pg/04297/400456.stm> (last visited April 13, 2005).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See Seto, *supra* note 34, at 73.

<sup>89</sup> *Id.*

<sup>90</sup> See Marc D. Goodman, Comment, *Why the Police Don't Care About Computer Crime*, 10 HARV. J.L. & TECH. 465, 485 (1997).

<sup>91</sup> *Id.* at 483.

direct threat to cause physical injury, and therefore may not be covered by existing law.<sup>92</sup> For example, “cyberstalking” is a new criminal phenomenon that involves the use of the Internet, e-mail, or other electronic communication to harass, threaten, or intimidate another person.<sup>93</sup> This conduct includes harassing persons online, posing as someone else in a chat-room or online message board, and giving out someone’s private information online.<sup>94</sup> Both the original federal and state stalking laws failed to include this type of online conduct,<sup>95</sup> so cyberstalking is one area where the use of the Internet has created a need for new legislation to combat criminal behavior. Forty-five states have either established new cyberstalking laws, or amended existing stalking law to encompass online conduct.<sup>96</sup> Curiously, New Jersey is not one of them,<sup>97</sup> and the new luring statute still fails to properly address the cyberstalking problem.

*B. More is needed than just new laws to prevent and punish Internet crimes.*

¶30 The New Jersey law’s most important benefit might be that it raises awareness about the general problem.<sup>98</sup> Internet users need to be more careful and vigilant when using the Internet to avoid falling prey to an Internet predator.<sup>99</sup> Law enforcement must also be more vigilant and capable of understanding and investigating how the Internet is used in criminal conduct. Potential criminals need to be aware that law enforcement recognizes that the Internet is a tool for criminal activity and will severely punish such conduct. So if the new law does raise awareness and leads to more vigilance on the part of the Internet user and law enforcement communities, then the law will be beneficial.

¶31 In addition to creating awareness, state and local governments must work with law enforcement officials to establish a comprehensive, multi-

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<sup>92</sup> *Id.*

<sup>93</sup> Shonah Jefferson and Richard Shafritz, *A Survey of Cyberstalking Legislation*, 32 UWLA L. REV. 323, 323 (2001).

<sup>94</sup> *Id.* at 324.

<sup>95</sup> *See id.* at 338; Harvey A. Valetk, *Mastering the Dark Arts of Cyberspace: A Quest for Sound Internet Safety Policies*, 2004 STAN. TECH. L. REV. 2 (2004).

<sup>96</sup> *See* Working to Halt Online Abuse, *List of Cyberstalking Laws*, available at <http://www.haltabuse.org/resources/laws/index.shtml> (last visited March 20, 2005).

<sup>97</sup> *Id.*

<sup>98</sup> *See* Corbett, *supra* note 81, at 26 (concluding that heightening awareness of computer crime provides a partial solution by resulting in a coordinated effort by law enforcement, schools, government, the courts, private industry and individual Internet users).

<sup>99</sup> *See* Gregoire, *supra* note 80, at 30.

lateral strategy that addresses the Internet crime problem.<sup>100</sup> New Jersey is one of a handful of states who have established specialized high-tech crime units that include both attorneys and investigators charged with developing and executing such strategies.<sup>101</sup> Governments must equip law enforcement officers with the resources necessary to develop the capability to investigate and pursue predators that use the Internet to commit their crimes.<sup>102</sup> These resources may include training investigators to recognize Internet crime, effectively perform online undercover operations, and properly handle digital evidence,<sup>103</sup> and training prosecutors on how to properly use the fruits of online investigations.<sup>104</sup> Considering how quickly technology changes, law enforcement needs the resources to ensure a continuous commitment to training both police and prosecutors.<sup>105</sup>

### CONCLUSION

¶32 There is no question the evil among us will continue to exploit the Internet as a means for conducting criminal behavior. Federal, state, and local governments need to address the use of the Internet as a criminal tool. However, new laws regulating Internet activity may not be the most effective means of reducing the problem, particularly when a criminal merely uses the Internet as a tool to commit an established crime. In addition to the question of efficacy, policing the Internet raises particular First Amendment and Dormant Commerce Clause concerns.

¶33 While the New Jersey adult Internet luring law has probably helped raise awareness of the problem, the press releases issued by the Governor and legislators who supported the bill have exaggerated its potential effectiveness. Most of the activity proscribed by the statute is already illegal in New Jersey and most other states through existing statutes covering solicitation, conspiracy, and attempted crimes. Even the predator whose activity became the impetus for the New Jersey luring law was convicted under laws that already existed.

¶34 The statute may sound good in a press release, but in reality, it will do little to solve the problem of Internet crime. New Jersey and other states should enact legislation targeting the new crimes the Internet has created that are not covered by existing law, such as cyberstalking. Furthermore, no law can be effective unless investigators and prosecutors have the resources

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<sup>100</sup> Goodman, *supra* note 90, at 488-89.

<sup>101</sup> Gregoire, *supra* note 80, at 30.

<sup>102</sup> Seto, *supra* note 34, at 92.

<sup>103</sup> Goodman, *supra* note 90, at 485.

<sup>104</sup> Kevin P. Meenan, *Rethinking Our Response to Cybercrime*, 35-Oct Prosecutor 5, 12 (Sept./Oct. 2001).

<sup>105</sup> Goodman, *supra* note 90, at 484.

to enforce it. State and local governments must ensure their police forces and investigators are able to develop an awareness of how criminals leverage the Internet, capable of performing online undercover and other appropriate investigations, and understand how to collect and preserve digital evidence. Moreover, state and local governments must also ensure their prosecutors have the resources to pursue crimes committed using the Internet and the capability to use the results of online investigations at trial. Adult luring laws, by themselves, are not the answer.