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The Evolution of Electronic Luring Statutes: Current and Future Trends

By Danica Szarvas-Kidd'

Five years ago, when 17 million American teens aged 12 to 17 were online,² the Crimes Against Children Research Center reported that one in five children had been sexually solicited or approached over the Internet in the preceding year.³ By late 2004, 21 million teens were online, an increase of 24%,⁴ and it may be safe to assume that the proportion of children who are solicited online has increased commensurately.⁵

Recognizing the threat to America's children, many states have created new electronic solicitation or luring statutes, or have strengthened existing sexual solicitation statutes to enable aggressive prosecution of these crimes. This article will identify and analyze the major trends and models that states have developed in combating these crimes against children.

Charging Attempt or Solicitation of Sexual Offenses

The first approach is to charge attempt or solicitation of preexisting sexual offenses against children, including but not limited to statutory rape, sexual assault and/or battery of a minor, and other relevant traditional child sex abuse offenses. Most states that have not developed electronic luring statutes have relied on this approach to prosecute Internet predators.⁶

Generally, the crime of attempt consists of two elements: (1) an intent to engage in crime, and (2) conduct constituting a substantial step towards commission of the crime.⁷ States have not come to a general consensus as to what constitutes a "substantial step." One court articulated that liability for attempt attaches if the defendant's actions have proceeded to the point at which, if not interrupted, they would culminate in the commission of the underlying crime.⁸ Others have defined a "substantial step" more restrictively, stating that the act must come very near to accomplishment of the resulting crime.⁹ This places the burden on the prosecutor to show that the defendant was close to committing the attempted crime, in this case, sexual contact with the child. In some jurisdictions, the need to demonstrate that the defendant was close to committing the attempted crime can be challenging, especially in cases where defendants are intercepted by law enforcement before even meeting with the child, or when the "child" is actually an undercover police officer.

Creation of Electronic Luring Statutes

To date, 38 states have enacted electronic luring statutes criminalizing the online solicitation of children for sexual acts. Although these statutes vary greatly from state to state, there have been some identifiable trends, described below. The most widespread trend has been to create a statute that focuses on the act of intentionally using a computer to entice, solicit, seduce or lure a minor to engage in illegal sexually explicit conduct.¹⁰ However, within this general trend,

there are several major and minor variants. For example, the majority of states that have enacted these statutes require that the victim (solicited minor) be 16 years or younger.¹¹ Other states require that the victim be under 15 years,¹² 14 years,¹³ or provide different penalties depending on the age of the victim.¹⁴ However, some states strictly interpret the word "minor" to include any child 18 or younger and criminalize the solicitation of older teens as well.¹⁵

There is little consensus among the states as to how to classify the crime of electronic luring of minors. Most states classify this crime as a felony, ranging from the lowest level felony¹⁶ to the highest-level felony,¹⁷ with many states falling somewhere in between. Only two states, however,¹⁸ treat this crime as a misdemeanor.

In addition, some states follow the model of utilizing the attempt statutes by classifying the crime of electronic luring of minors as an attempt to commit the crime the defendant has ultimately intended.¹⁹ A second trend among states in drafting electronic luring statutes is to include an additional provision proscribing the transmission of obscene materials to minors.²⁰ The act of transmitting obscene materials to minors is a separate and usually lesser offense from electronic luring but is included in many states' electronic luring statutes. This approach builds on the general trend articulated above by focusing not only on the end result (engaging children in sexual acts), but also focusing on the initial steps an offender might take to achieve that end result, i.e., transmitting obscene materials through electronic communications. These provisions criminalize the behavior of sending sexually explicit materials²¹ to children, either images (real or simulated) or words, which are sexual in nature, regardless of the offender's motives for transmitting the materials. Therefore, prosecutors may obtain a separate conviction in cases where the Internet may not have been used to lure the child, but where obscene materials were sent to the child as a part of an unrelated offense or independently.

The disadvantage to charging these crimes is that they are classified primarily as misdemeanors or low-level felonies. To compensate for this disadvantage, some states have combined the two crimes of electronic luring and dissemination of obscene materials to a minor, resulting in a harsher dissemination statute and/or a more lenient luring statute. For example, California's statute reads "knowingly distributes...any harmful matter...to a minor with intent of arousing...a minor, and with the intent, or for the purpose of seducing a minor."²² In other words, the sexually explicit communications are coupled with the intent of arousing and/or seducing the child to add more teeth to the statute. The end result is the desired harsher penalty without having to prove additional elements, such as requiring the offender to travel to a specified place at a specified time.²³ Most states have not followed California's lead and have opted, instead,

to include both approaches in their statutes as two separate crimes: the crime of electronic enticement or luring of a minor and the crime of dissemination of obscene material to a minor.²⁴

The third and final trend is perhaps the lesser known of the three. This trend involves coupling one or both of the other two approaches with a third type of statute that prohibits the electronic compilation of any identifying information belonging to a minor. This includes a minor's name, phone number, address, physical characteristics, or other descriptive information that has been compiled or transmitted by means of a computer for the purpose of soliciting a minor to engage in a prohibited sexual act.²⁵ This crime has been given different names and different classifications by different states. For example, Florida includes this crime in its "computer pornography" statute²⁶ and classifies it as a felony of the third degree, whereas South Dakota names this crime "solicitation of a minor" and classifies it as a Class 6 felony. Interestingly, regardless of the lack of consensus over what to call it and how to classify this crime, the seven states that have included it in their statutes have all used almost identical language to define it.²⁷

One additional noteworthy development in electronic luring statutes has been the tendency by states to anticipate and preclude certain defenses. In particular, 11 states²⁸ have included language in their statutes to preclude the viability of the defense of impossibility where a defendant is prosecuted as a result of communications with an undercover officer. These statutes state specifically that it is not a defense to a prosecution that an undercover officer posed as a minor for the purposes of detecting and investigating an offense.²⁹ Therefore, the defendant cannot argue that it was impossible to commit the offense of electronic luring of a child. It is likely that as more of these cases go to trial and more defenses are put forth, state legislatures will continue to review and amend their statutes accordingly.

Conclusion

Although each state has taken its own unique statutory approach in combating electronic luring of children, this article addresses some of the major trends and significant variations. As more states enact electronic luring statutes, more unified, identifiable trends may emerge. For a complete list of electronic luring statutes, including the texts of the statutes, please see:

<http://www.ndaa-apri.org/apri/programs/ncpca/statutes.html>.

¹ Staff Attorney, APRI's National Center for Prosecution of Child Abuse. Special thanks to Elizabeth Kotchian for her outstanding legal research assistance.

² David Finkelhor et al., Crimes Against Children Research Center, Online Victimization: A Report on the Nation's Youth (2000).

³ Id (reflecting the year directly preceding the release of the report).

⁴ Amanda Lenhart, PEW/INTERNET & AMERICAN LIFE PROJECT, Protecting Teens Online (2005).

⁵ See Crimes Against Children Research Center (forthcoming study updating data on children and Internet usage, including up to date statistics of children who have experienced sexual solicitations over the Internet) available at <http://www.unh.edu/ccrc/>.

⁶ This is excluding those states that rely on general solicitation or luring statutes to prosecute Internet predators. See e.g. S.C. CODE ANN. § 16-15-242 (2004). South Carolina's solicitation statute has been successfully utilized to prosecute Internet predators, although it is not included as an electronic luring statute for the purpose of this article because it does not contain language specific to using a computer or electronic device to lure a minor for illegal sexual acts.

⁷ 21 Am Jur 2d *Criminal Law* § 175 (2004).

⁸ U.S. v. Thompson, 130 F.3d 676 (5th Cir. 1997).

⁹ Com. v. Dixon, 614 N.E.2d 1027 (Mass. App. Ct. 1993).

¹⁰ E.g., N.H. REV. STAT. ANN. § 649-B: 4 (2004).

¹¹ ALA. CODE § 13A-6-110 (2005); CONN. GEN. STAT. §53a-90a (2004); IDAHO CODE §18-1509A (2004); N.C. GEN. STAT. §14-202.3 (2005); NEB. STAT. §28-320.02 (2004); NEV. REV. STAT. § 201.560 (2004); OHIO REV. CODE § 2907.07 (2005); WIS. STAT. § 948.075 (2004).

¹² MINN. STAT. § 609.352 (2004); MO. REV. STAT. § 566.151 (2004).

¹³ IND. CODE § 35-42-4-6 (2004).

¹⁴ OHIO REV. CODE ANN. 2907.07 (2005).

¹⁵ N.J. STAT. § 2C:13-6(2005); HAWAII REV. STAT. § 707-757 (2004).

¹⁶ E.g. MINN. STAT. § 609.352 (2004).

¹⁷ E.g. ALA. CODE §13-6-110 (2005).

¹⁸ CAL. PENAL CODE § 272 (2005) (crime is a misdemeanor if first offense); N.D. CENT. CODE § 12.1-20-05.1 (2005) (crime is a misdemeanor if the offender is less than 22 years of age or if the offender reasonably believes the victim is at least 16 years of age).

¹⁹ E.g. UTAH CODE ANN. § 76-4-401 (2005).

²⁰ CODE OF ALA. § 13A-6-110, 111 (2005); ARIZ. REV. STAT. ANN § 13-3554, 3506.01 (2004); GA. CODE ANN. § 16-12-100.2 (2004); MISS. CODE ANN. § 97-5-27 (2005); N.M. STAT. ANN. § 30-37-3.2 (2005); NEV. REV. STAT. § 201.560 (2004).

²¹ See e.g. MISS. CODE ANN. 97-5-27 (2005) which states, "any material is sexually oriented if the material contains representations or descriptions, actual or simulated, of masturbation, sodomy, excretory functions, lewd exhibition of the genitals or female breasts, sadomasochistic abuse (for the purpose of sexual stimulation or gratification), homosexuality, lesbianism, bestiality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification or perversion."

²² CAL. PEN. CODE § 288.2 (2005); see also N.Y. PENAL LAW §235.22 (2005).

²³ Hawaii's statute requires that the offender "intentionally or knowingly travel to the agreed upon meeting place at the agreed upon time" to be guilty of electronic enticement of a child in the first degree. HAWAII REV. STAT. § 707-757 (2004).

²⁴ CODE OF ALA. § 13A-6-110, 111 (2005); ARIZ. REV. STAT. ANN § 13-3554, 3506.01 (2004); GA. CODE ANN. § 16-12-100.2 (2004); MISS. CODE ANN. § 97-5-27 (2005); N.M. STAT. ANN. § 30-37-3.2 (2005); NEV. REV. STAT. § 201.560 (2004).

²⁵ S.D. CODIFIED LAWS § 22-22-24.5 (2004).

²⁶ FLA. STAT. ANN. § 847.0135 (2005).

²⁷ In addition to Florida and South Dakota, the following statutes include this crime: OKLA. STAT. tit. 21, § 1040.13a (2004); N.H. REV. STAT. ANN. § 649-B:3 (2004); GA. CODE § 16-12-100.2 (2004); DEL. CODE ANN. tit. 11 § 1112A (2005); ARK. CODE ANN. § 5-27-603 (2005).

²⁸ South Carolina has also included this language in its general criminal solicitation of a minor statute, but is not included as one of these 11 states because the statute is not an electronic luring statute for purposes of this article. S.C. CODE ANN. § 16-15-342 (2004).

²⁹ The eleven state statutes that include this provision are: ARIZ. REV. STAT. ANN. §§13-3554, 13-3506.1 (2004); COLO. REV. STAT. §§ 13-21-1002 (2004); FLA. STAT. ANN. §847.0135 (2005); GA. CODE ANN. §16-12-100.2 (2004); IDAHO CODE §18-1509A (2005); NEB. REV. STAT. §28-320.02 (2005); MD. CODE ANN. CRIM. LAW §3-324 (2004); MO. REV. STAT. §566.151 (2005); OHIO REV. CODE ANN. §2907.07 (2005); OKLA. STAT. ANN. tit. 21, §1040.13a, 1123 (3004); UTAH CODE ANN. §76-4-401 (2005).

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American Prosecutors Research Institute
National Center for Prosecution of Child Abuse
99 Canal Center Plaza, Suite 510
Alexandria, Virginia 22314
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