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UPDATE

Electronic Luring Statutes Under Fire Part I: How the Courts have Responded to Constitutional Challenges to Electronic Luring Statutes

(Part I of II)

By Danica Szarvas-Kidd¹

The 2005 article “*The Evolution of Electronic Luring Statutes: Current and Future Trends*” identified and analyzed various trends by states in developing electronic luring statutes.² Since that article was written, the number of states that have enacted electronic luring statutes has increased from 38 to 40 states,³ and a multitude of case law has emerged as courts have struggled to interpret these statutes. Part I of this article will examine the courts’ responses to state electronic luring statutes as a result of various constitutional challenges. To date, none of these challenges has been successful; all state high courts that have faced these issues have upheld electronic luring statutes as constitutional.⁴ Below is a discussion of the most commonly relied upon constitutional challenges and responses from courts.

Constitutional Challenge #1: Inconsistency/Inconsistent Terms

The “inconsistent terms” challenge refers to the rule that a statute should be deemed unconstitutional if there is no reasonable basis upon which the statute can be construed as conforming to constitutional requirements.⁵ According to the Utah Court of Appeals, when one interpretation results in constitutional conflict, the court may adopt another construction, if possible, as long as the alternative construction does not conflict with the legislative purposes of the statute.⁶

In the case of *Utah v. Ansari*, the defendant argued that the terms of the statute required the state to affirmatively prove the absence of attempt, conspiracy, or solicitation and also to disprove attempt, conspiracy and solicitation as a natural reading of the statute, thus producing inconsistent terms.⁷ The statute read, “a person commits enticement of a minor over the internet when *not amounting to* attempt, conspiracy, or solicitation...”⁸ Based on the articulated rule that the court need only determine if there exists any reasonable interpretation, the court rejected the claim that the statute has fatally inconsistent terms. The court determined that a reasonable interpretation existed in the “*not amounting to*” clause, which could be read as an alternative to attempt, conspiracy, and solicitation and therefore does not require that the state first prove the absence of these crimes.¹⁰ This case demonstrates the difficulty in successfully arguing this challenge on the merits, as any state court will most likely quash this challenge in favor of any possible reasonable interpretation.

Constitutional Challenge #2: Violation of the Commerce Clause

The primary argument that electronic luring statutes violate the Commerce Clause is based on the dormant commerce clause, or the “negative” or “dormant” aspect of the Commerce Clause. By affirma-

tively granting authority to Congress, the Constitution also has a “negative” or “dormant” effect, which prohibits a state from enacting legislation that unduly burdens interstate commerce.¹¹ Defendants have asserted that they are unduly burdened by electronic luring statutes because Internet users in general may be subject to conflicting or inconsistent regulations by different states.¹² The rule articulated in *Pike v. Bruce Church, Inc.*¹³ states that “where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce clause is clearly excessive in relation to the local putative benefits.”¹⁴

Every court faced with determining a Commerce Clause challenge has applied this standard and ultimately determined no such violation exists. Courts have not only found that states have a compelling interest in protecting minors from harm generally and certainly from being seduced to engage in sexual activities, but also that it is difficult to conceive of any legitimate commerce that would be burdened by penalizing the transmission of harmful sexual material to known minors in order to seduce them.¹⁵ Additionally, courts have held that only a very narrow class of adults who intend to have sex with minors would be affected, who deserve no protection under the dormant commerce clause.¹⁶ Courts have also determined that these statutes are narrowly tailored to serve the interest of the state in promoting the welfare of children.¹⁷

Courts have also rejected the argument that Internet users may be subject to conflicting or inconsistent regulations, stating that because electronic luring statutes are narrowly tailored and restrict only materials disseminated to a known minor with the intent to lure the minor, interstate commerce is not burdened.¹⁸ Additionally courts have determined that because the statutes allow the prosecution of electronic luring crimes that occur wholly or partially in the state, these statutes do not unfairly prosecute persons or activities that occur outside of the state altogether.¹⁹ Best summarized by the Court of Appeals of New York, the statute “does not discriminate against or burden interstate trade; it regulates the conduct of individuals who intend to use the Internet to endanger the welfare of children.”²⁰

Constitutional Challenge #3: Violation of the First Amendment

Under the umbrella of the First Amendment, defendants have put forth two main arguments. First, states place an unconstitutional content-based restriction on speech by criminalizing sexually explicit speech to minors. Defendants have argued that electronic luring statutes are content-based restrictions that do not pass strict scrutiny. Content-based speech restrictions are presumptively invalid and will not survive strict

scrutiny unless the government can show that the regulation promotes a compelling State interest and that it chose the least restrictive means to further the articulated interest.²¹ Some states have accepted the argument that electronic luring statutes are content-based restrictions and have applied strict scrutiny to the statutes.²²

However, others have rejected this argument and have ruled that electronic luring statutes are not content-based restrictions because they regulate not only words, but conduct as well. The argument is that speech in conjunction with the conduct of child solicitation or the act of “luring” together constitute this crime.²³ Based on this approach, courts have determined that these speech-conduct regulations do not violate the First Amendment because the defendant does not have a First Amendment right to attempt to entice minors to engage in illegal sexual acts.²⁴ Regardless of which approach the various courts have followed, they have all come to the same conclusion: electronic luring statutes do not infringe upon defendants’ freedom of speech right.

The second argument that these statutes violate the First Amendment is based on the contention that each electronic luring statute is overbroad on its face, exposing individuals to criminal liability who may unintentionally address a minor through sexually oriented communication.²⁵ According to the New York Court of Appeals, the New York luring statute is not directed at the mere transmission of certain types of communication over the Internet, because the luring prong adds a significant element.²⁶ The statute should be read as requiring that an individual intend to initiate this kind of contact with a minor, and intend to seduce or lure a minor to engage in sexual contact.²⁷ Because the statute includes an “intent” requirement, this precludes the argument that unsuspecting persons would be subject to criminal liability.²⁸

Constitutional Challenge #4: Void for Vagueness

The “void for vagueness” argument specifically refers to those terms describing the act of solicitation or luring. Many defendants have claimed that terms like “entice, solicit, lure,” etc. do not provide a person of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited.²⁹ The rule states that a statute is impermissibly vague if it either (a) “fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” or (b) “authorizes or even encourages arbitrary and discriminatory enforcement.”³⁰ Every court has found that any person of ordinary intelligence could reasonably tell what conduct is prohibited by a simple reading of the statute.³¹ Courts agree that the statutes clearly prohibit adults from using computers to solicit minors for sexual activity, leaving no room for confusion.³²

Conclusion

No state has struck down its electronic luring statute as unconstitutional on any basis, and judging from the volume of case law, it does not appear that any state will. When constitutional challenges have failed, defendants have moved directly to challenging the crime itself, usually in the form of attacks against the crime itself. Part II of this article will analyze and discuss the courts’ responses to notable legal defenses of electronic luring crimes.

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² Danica Szarvas-Kidd, *The Evolution of Electronic Luring Statutes: Current and Future Trends*, 2:2 APRI’s CHILD SEXUAL EXPLOITATION UPDATE (2005).

³ For a complete list including text of current state electronic luring statutes, please visit http://www.ndaa-apri.org/pdf/statute_computer_facilitated_luring_child_2006.pdf

⁴ See, e.g., *New York v. Barrows*, 273 A.D. 2d 246 (N.Y. App. Div. 2000) (overruling the trial court’s determination that NY’s electronic luring statute violates the Commerce Clause based on a recent New York Court of Appeals decision (*New York v. Foley*, 94 NY2d 668 (N.Y. 2000) that held that the statute represents a legitimate exercise of the State’s police power and does not discriminate against or burden interstate trade).

⁵ See *Utah v. Ansari*, 100 P.3d 231 (Utah Ct. App. 2004) (discussing the standard

for determining whether a statute has fatally inconsistent terms).

⁶ *Id.* at 236.

⁷ *Id.* at 234-35.

⁸ Italics added for easy reference.

⁹ UTAH CODE ANN. § 76-4-401 (2003). This statute has since been amended and the phrase “not amounting to an attempt, conspiracy, or solicitation” was omitted. UTAH CODE ANN. § 76-4-401(1) (Supp. 2003).

¹⁰ *Ansari*, 100 P.3d at 236.

¹¹ *North Dakota v. Backlund*, 672 N.W. 2d 431, 436 (N.D. 2003) (citing *D.D.I., Inc. v. State ex rel. Clayburgh*, 657 N.W. 2d 228 (N.D. 2003)).

¹² See, e.g., *Ohio v. Bolden*, 2004 Ohio 2315 (Ohio Ct. App. 2004) (quotes the defendant as stating that the Ohio legislature “is attempting to regulate a system which due to its vast nature invokes national control, and it is imposing the laws of Ohio upon other states”); see also *Simmons v. Florida*, 886 So. 2d 399 (Fla. Dist. Ct. App. 2004) (finding that there is no evidence that Congress intended to exclusively occupy the field and preclude states from enacting their own legislation).

¹³ 397 U.S. 137 (1970).

¹⁴ *Id.* at 142.

¹⁵ See, e.g., *California v. Hsu*, 82 Cal. App. 4th 976, 984 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

¹⁶ See, e.g., *Bolden*, 2004 Ohio at P45 (finding that the statute regulates conduct of adults who seek to solicit minors to engage in sexual).

¹⁷ *Id.*; see also *New York v. Foley*, 731 N.E.3d 123, 132 (N.Y.2000) (citing *New York v. Ferber*, 458 U.S. 747, 756-757 (1982) which states that the State “plainly has a compelling interest in protecting children from sexual exploitation in order to safeguard their physical and psychological well-being).

¹⁸ See *Hsu*, 82 Cal. App. 4th at 984-985.

¹⁹ See, e.g., *id.* at 985 (finding that the statute does not effectively regulate activities beyond California, as California only prosecutes those criminal acts that occur wholly or partially within the state); see also *Bolden*, 2004 Ohio at P44 (stating that Ohio has jurisdiction to prosecute crimes that are partially committed in the state and also where the object of the crime is in Ohio).

²⁰ *Foley*, 731 N.E.2d at 132.

²¹ See *id.* at 131 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)).

²² See, e.g., *Hsu*, 82 Cal. App. 4th at 987 (finding that the statute’s purpose is to restrict harmful matter from reaching minors in order to seduce or lure them, and therefore is a content-based restriction); see also *LaRose v. Indiana*, 820 N.E.2d 727, 730 (Ind. Ct. App. 2005) (finding that Indiana’s electronic luring statute is a content-based regulation subject to strict scrutiny).

²³ See, e.g., *Backlund*, 672 N.W.2d at 440 (citing to other courts including *US v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) which have held that the First Amendment does not protect speech in conjunction with the conduct of child solicitation); see also *Michigan v. Cervi*, 2006 Mich. App. LEXIS 1171 (Mich. Ct. App. 2006) (holding that Michigan’s luring statute does not impermissibly burden free speech expression because the statute criminalizes communication with a minor or perceived minor with the specific intent to make that person the victim of one of the enumerated crimes).

²⁴ *Id.* at 441 (finding that the freedom of speech does not extend to speech used as an integral part of conduct in violation of a valid criminal statute).

²⁵ See, e.g., *Foley*, 731 N.E.2d at 128 (citing *New York v. Ferber*, 458 U.S. 747 (1982) stating that where conduct and not merely speech is involved, the overbreadth doctrine can be invoked only where overbreadth is “substantial”).

²⁶ *Id.* at 129.

²⁷ *Id.*

²⁸ See *id.* at 130 (stating that the legislation “would not hold liable a computer network or other individual who did not intentionally transmit materials to minors”).

²⁹ See, e.g., *Ansari*, 100 P.3d at P43 (arguing additionally that the statute’s imprecise terms permits discretionary enforcement).

³⁰ *Id.* at P42 (citing the rule stated in *Hill v. Colorado*, 530 U.S. 703 (2000)).

³¹ See, e.g., *Ohio v. Turner*, 805 N.E.2d 124 (Ohio Ct. App. 2004) (finding that the only arguable terms are “sexual activity,” “reckless,” and “telecommunication device” which the court dismisses as not confusing).

³² *Id.* at P27.

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