

UNCOVERING AND ELIMINATING CHILD PORNOGRAPHY RINGS ON THE INTERNET: ISSUES REGARDING AND AVENUES FACILITATING LAW ENFORCEMENT'S ACCESS TO 'WONDERLAND'

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INTRODUCTION

What does Wonderland mean to you? In the children's classic, *Alice's Adventures in Wonderland*,¹ it was a place where playing cards spoke, white rabbits ran and the Cheshire Cat's eerie grin remained visible though he could not be seen.² In short, Wonderland was a very strange place to be. Today, Wonderland has another connotation, no less strange, but much more grim.

The "Wonderland Club," uncovered by British authorities in April 1998, was a sophisticated, world-wide, covert, Internet child pornography ring.³ It was the largest child pornography ring yet discovered.⁴ The U.S. Customs Service estimates that members of this "club" collected and distributed among themselves over two million pornographic images of children.⁵ Operating behind assumed names and KGB encryption, these child pornographers believed they, like Carroll's Cheshire Cat, were hidden from the world.⁶

On September 2, 1998, these residents of Wonderland discovered how wrong they were.⁷ On that date, law enforcement officials from around the world joined forces to conduct one of the largest simultaneous law

1. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* (Heritage Press 1941) (1865).

2. *See id.*

3. *See* Jason Bennetto, *Seaside Clue Led to Hoards of Child Porn*, *THE INDEPENDENT* (London), Sept. 3, 1998, at 2.

4. *See* Tim Bryant, *5/. Charles Man Admits His Role in Child Porn Ring*, *ST. LOUIS POST-DISPATCH*, NOV. 17, 1998, at B3.

5. *See* Stuart Millar, *Technological level of Wonderland Network Shocked All Investigators: a KGB Code Is Believed to Have Enhanced Secrecy*, *THE IRISH TIMES*, Sept. 3, 1998, at 15.

6. *See id.*

7. *See* Mary Jane Fine, *Internet Child Porn Network Smashed*, *THE REC.* (Northern N.J.) >Sept. 3, 1998, at A01.

enforcement actions ever attempted.⁸ Authorities in the United States and thirteen other nations acted decisively as one.⁹ In so doing, they removed the invisibility from these pedophiles, allowing modern society a chance to protect its most innocent and vulnerable citizens - children.

This Comment delves into the issues surrounding child-pornography rings on the Internet. Specifically, it examines the dangers these rings pose, the constitutional questions they envoke, and the steps necessary for law enforcement to discover and eradicate them. Part I explores child pornography, its relationship to the Internet, and the "Wonderland Club" in particular. Part II examines the laws that have been established in this nation, and others, to combat child pornography and to punish its consumers. Part III discusses four constitutional issues encountered by law enforcement in its effort to control and combat child pornography. Finally, Part IV suggests ways to enhance law enforcement's effectiveness in the elimination of Internet child-pornography rings and the apprehension of their members.

I. BACKGROUND

A. What is Child Pornography?

Child pornography has been defined in social science literature as "any visual or print medium depicting sexually explicit conduct involving a child."¹⁰ In addition, United States federal child pornography statutes clearly identify these depictions as a form of child abuse.¹¹ It is associated with violence against children in two significant ways. The primary harm is, of course, the actual sexual abuse of the children depicted in the making of the pornography.¹² The secondary harm, however, though not as immediately evident, is just as horrific.

Pedophiles use child pornography to facilitate the abuse of new victims.¹³ This material is used to "destroy children's inhibitions, teach the

8. *See id.*

9. See Michael Grunwald, *Global Internet Child Porn Ring Uncovered*, WASH. POST, Sept. 3, 1998, at A12.

10. Kenneth V. Lanning, *Collectors*, in *CHILD PORNOGRAPHY AND SEXRINGS* 83 (Ann Wolbert Burgess ed., 1984).

11. *See* 18 U.S.C. § 2252 (1994) The statute's very title, "Sexual Exploitation and Other Abuse of Children," indicates that Congress acknowledged that child pornography is a form of child abuse. *See id.*

12. *See* Lesli C. Esposito, *Regulating The Internet: The New Battle Against Child Pornography*, 30 CASE W. RES. J. INT'L L. 541, 544 (1998) (acknowledging that the sexual abuse of the child depicted is arguably the worst effect of child pornography).

13. *See id.*

performance of sexual acts, and threaten or blackmail children, thereby furthering actual abuse."¹⁴ Additionally, child pornography is used by pedophiles to lure children into secluded meetings away from their homes.¹⁵ Finally, the exchange of child pornography among pedophiles is a significant reinforcement of the pedophile's urge to sexually abuse, thus it actually incites and encourages continued abuse.¹⁶

B. The Internet

The Internet is a vast network of interconnected computers which communicate with each other through a common linking protocol.¹⁷ Through this network, academics, government employees, businesspersons and private individuals, in 160 nations, have access to virtually an unlimited number of documents and graphic images.¹⁸ In addition, this network enables users to make data available to others, without ever knowing their identities.¹⁹

The Internet, as a medium, is experiencing tremendous growth.²⁰ That growth has brought many benefits, including an unparalleled ease of communication between distant parties.²¹ Unfortunately this growth has also

14. *Id.*; see also Adam J. Wasserman, *Virtual.Child.Porn.Com: Defending the Constitutionality of the Criminalization of Computer-Generated Child Pornography by the Child Pornography Prevention Act of 1996 - A Reply to Professor Burke and Other Critics*, 35 HARV. J. ONLEGIS. 245,267 (1998) (noting that Congress has found that child pornography is often used to seduce children into sexual activity); Lanning, *supra* note 10, at 86 (stating that child pornography is used by pedophiles to show children that sexual activity is fun and to lower their inhibitions).

15. See Keith F. Durkin, *Misuse of the Internet by Pedophiles: Implications for Law Enforcement and Probation Practice*, FED. PROBATION, Sept. 1997, at 14 (citing that the FBI has "arrested more than a dozen people transmitting child pornography and soliciting children for sexual purposes via America Online").

16. See Esposito, *supra* note 12, at 544 (exchange of child pornography reinforces the behavior); Wasserman, *supra* note 14, at 272 (noting that the viewing of child pornography, real or virtual, by pedophiles incites abuse against actual children).

17. See Dawn A. Edick, *Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis*, 21 B.C. INT'L & COMP. L. REV. 437, 438 (1998).

18. See Durkin, *supra* note 15, at 14.

19. See Devon M. Lee, *Child Pornography and the Internet: A New Era of Regulation*, 28 PAC. L. J. 717, 719 (1997).

20. See *Reno v. ACLU*, 521 U.S. 844 (1997) (noting that the Internet had experienced "extraordinary" growth; in 1997 there were approximately 40 million Internet users, and the Court expects this number to rise to 200 million by 1999).

21. See *Kansas State University: Internet Opens Window to the World for Rural Kansas*, M2 PRESSWIRE, Sept. 22, 1998, available at 1998 WL 16523983 (noting that the Internet gives rural communities news access to resources and persons not previously available).

had major negative consequences, including renewed exploitation of children through child pornography.²²

C. Child-Pornography Rings

Child-pornography rings existed prior to the growth of the Internet, but were defined differently.²³ In the past, only those actually involved in the production of child pornography were thought of as members of the ring.²⁴ The consumer, or collector, was not generally included in the discussion.²⁵

Today, the concept of child-pornography rings has grown to include consumers.²⁶ This change in thinking is due largely to the ease and anonymity of information transfer world-wide.²⁷ The Internet has made the consumers virtually inseparable from producers because consumers by re-trading images, in effect, become distributors.²⁸ Thus, the consumer-trader may be thought of as the mortar that holds the bricks, i.e., the content-producing child pornography operations, together.

D. The Wonderland Club

1. *The Child Pornography Ring*

Prior to September 2, 1998, the Wonderland Club was a large and sophisticated child pornography ring which took full advantage of the protections provided by the Internet.²⁹ The ring was a highly structured, U.S.-

22. See Esposito, *supra* note 12, at 541 (noting the Internet has created an increase in the production and distribution of child pornography); Fine, *supra* note 7, at A01 (noting that the worldwide child pornography industry was eradicated in the 1980s, but now has resurfaced due to computer technology).

23. See Albert J. Belanger et al., *Typology of Sex Rings Exploiting Children*, in CHILD PORNOGRAPHY AND SEX RINGS 51 (Ann Wolbert Burgess ed., 1984) (describing three types of child pornography sex rings according to the level of sophistication of their child-victim recruitment and their distribution of the product. The "solo ring" involved only a single adult, a small group of children, and no distribution of the child pornography. The "transition ring" involved pressure upon victims to recruit other children and some sale or exchange of the child pornography. Finally, the "syndicated ring" was characterized by stable recruitment of victims and an extensive network for distribution of the child pornography.),

24. See *id.*

25. See *id.* (noting that collectors have been held culpable for illegal possession in the U.S. since 1984).

26. See Jennifer Stewart, Comment, *If This Is the Global Community, We Must Be on the Bad Side of Town: International Policing of Child Pornography on the Internet*, 20 HOUS. J. INTLL. 205, 210 (1997).

27. See *id.* at 214.

28. See *id.*

29. See Bryant, *supra* note 4, at B3.

based organization with more than two hundred members³⁰ scattered throughout at least thirty-three,³¹ and perhaps as many as forty-seven, nations.³² The U.S. members of the Wonderland Club came from all walks of life.³³ They included a law school student, a medical school student, a retired U.S. Air Force pilot and a teacher.³⁴

The sophistication of the Wonderland Club, and its members, was apparent in the precautions it took. The club took three key actions to lower its potential for exposure: 1) limit membership,³⁵ 2) use sophisticated technology,³⁶ and 3) maintain strict anonymity.³⁷ Periodically, to satisfy their need for fresh images, the ring was forced to admit new members.³⁸ To deal with the risk this involved, they instituted stringent membership requirements.³⁹ First, the group required a senior member to sponsor, or vouch for, every new member.⁴⁰ Next, for consideration, candidates were required to possess in excess of 10,000 unique images of child pornography on their hard drive.⁴¹ As a final precaution, a formal membership committee reviewed the credentials of all candidates seeking membership.⁴² These requirements had the effect of limiting membership to the most hardcore of Internet pedophiles.⁴³

Like limited membership, sophisticated technology was instrumental in keeping the ring's images hidden from the prying eyes of international law

30. *See id.*

31. *See* Grunwald, *supra* note 9, at A12 (noting that investigators were aware of members in nations that did not partake in the raid, such as Japan, Israel and Brazil).

32. *See* Elaine Shannon, *Main Street Monsters: A Worldwide Crackdown Reveals That Child Pornographers Might Just Be the People Next Door*, *TIME*, Sept. 14, 1998, at 59, available at 1998 WL 14835441 (noting that the Wonderland club was active in 47 countries).

33. *See* Millar, *supra* note 5.

34. *See* Chris Allbritton & Larry McCshane, *Suicides follow huge raid on online child pornographers*, *ORANGE COUNTY REG.*, Nov. 15, 1998, at A22, available at 1998 WL 21279602 (the law student in question attended Brooklyn Law School). As a side note, several of the suspects arrested as a result of the raids have since committed suicide, an apparently common response among pedophiles when their secret life is revealed. *See id.*

35. *See* Millar, *supra* note 5.

36. *See id.*

37. *See* Naftali Bendavid, *Child-Porn Fighters Bust Internet Ring*, *CHI. TRIB.*, Sept. 3, 1998, §1, at 3.

38. *See* Allbritton & McCshane, *supra* note 34, at A22.

39. *See id.*

40. *See id.*

41. *See id.* (noting that none of the 10,000 images of child pornography could be duplicates of those already held by a member).

42. *See* Bryant, *supra* note 4, at B3.

43. *See* Millar, *supra* note 5, at 15.

enforcement.⁴⁴ The Wonderland Club used a closed network to ensure secure transmission of files through the Internet.⁴⁵ As an added measure of security, this network was also equipped with advanced encryption originally developed by the Soviet KGB.⁴⁶ This encryption was so strong, in fact, that it proved impenetrable to authorities attempting to break into it.⁴⁷

Anonymity was the Wonderland Club's final line of defense.⁴⁸ Members knew only the screen names of their associates.⁴⁹ Knowing only pseudonyms, such as Bart, Egg Man, Mack Ten, HeVy MeTal, and Sheepy,⁵⁰ these pedophiles must have believed they themselves were safe. Indeed, within the dark ephemeral places of cyberspace they must have had faith that their true identities were completely concealed.⁵¹ As it turned out, fortunately for many children, these security measures were insufficient to keep them truly hidden from the world.⁵²

2. *The Investigation*

The fall of the Wonderland Club resulted from diligent investigation and cooperation among the police forces of several nations.⁵³ The investigation began in 1996 with the arrest by U.S. authorities of two members of the Orchid Club, a small California-based Internet child-pornography ring.⁵⁴ As a result of information gained through that arrest, U.S. Customs officials

44. *See id.*

45. *See id.* (noting that reports claimed the Wonderland Club used an encryption code originally developed by the KGB); Stanley Ziemba, *Agents unravel child porn net site*, CHI. TRIB. (Metro Southwest), Dec. 11, 1998, at 1, available at 1998 WL 23514831 (quoting Nick Berg of the U.S. Customs Service as stating: "Those who operated the . . . [the Wonderland Club] employed high-tech devices that had been used by the KGB to codify their transmissions.").

46. *See* Millar, *supra* note 5, at 15.

47. *See* Grunwald, *supra* note 9, at A12.

48. *See* Millar, *supra* note 5.

49. *See id.* (noting that members were not identified by their names in club communications but by nicknames instead).

50. *See* Tim Bryant, *Prosecutor Tells How Child-pornography ring Unraveled*, ST. LOUIS POST-DISPATCH, Feb. 20, 1999, at 9, available at 1999 WL 3011840.

51. *See* Sarah Wyatt, *Probe Uncovers Child Porn Ring*, ASSOCIATED PRESS, Sept 2, 1998, available at 1998 WL 6716931 (quoting U.S. Customs Commissioner Raymond Kelly as saying "The people who exploit children in this way think they can hide in cyberspace.").

52. *See* Bennetto, *supra* note 3.

53. *See id.* (eleven nations were involved in the investigation: United Kingdom, U.S., Australia, Germany, Italy, Finland, Belgium, Austria, France, Sweden and Portugal).

54. *See Dozens Arrested Worldwide in Internet Child-porn Sting*, STAR-TRIBUNE (Minneapolis-St. Paul), Sept. 3, 1998, at O6A [hereinafter *Dozens Arrested*].

alerted British authorities of the existence of a member of the Orchid Club living in East Sussex, England.⁵⁵ The Sussex police seized this individual's computer and soon computer forensic experts unearthed evidence of the Wonderland Club on its hard drive.⁵⁶

Investigators with the British National Crime Squad, U.S. Customs and Interpol, the international crime prevention organization, worked together but were unable to infiltrate the club's security and encryption programs.⁵⁷ Instead they, and the authorities of several other nations, used old-fashioned investigative techniques to find the true identities of the screen names found on the Sussex computer.⁵⁸ Officials then tracked these individuals through Internet service providers, servers, and screen names,⁵⁹ relying primarily upon wiretaps, records of on-line transmissions and undercover participation in more public child sex chatrooms to complete the identification of the members.⁶⁰

3. *The Wonderland Raid*

The primary concern of the planners of the Wonderland raid was to maintain the element of surprise.⁶¹ Recognizing the fact that this is a global problem requiring a global approach,⁶² in May 1998, an international task force began planning a coordinated raid on the homes of club members.⁶³ Officials viewed coordination as essential to prevent members in different parts of the world from having advance warning,⁶⁴ allowing them time to erase their hard drives.⁶⁵

55. See Bennetto, *supra* note 3, at 2.

56. See *id.*

57. See *id.* at 2 (quoting a detective superintendent of the British National Crime Squad, the leader of the British raids on the Wonderland Club, as saying "they had a number of security measures which made it virtually impossible to break into the system without the right information").

58. See Grunwald, *supra* note 9, at A12.

59. See Bendavid, *supra* note 37, at 3 (quoting U.S. Customs Commissioner Raymond Kelly as stating, "[a]gents tracked these people through cyberspace as they hid behind Internet providers, servers, and screen names").

60. See *id.*

61. See Bennetto, *supra* note 3, at 2 (noting that "[s]urprise was essential").

62. See Adrian Brown, *Biggest Global Police Operation Smashes Internet Pedophile Ring*, AGENCE FRANCE-PRESSE, Sept. 2, 1998, available at 1998 WL 16590847.

63. See *Dozens Arrested*, *supra* note 54, at 06A.

64. See Fine, *supra* note 7, at A01 (noting that suspects can instantly tip one another if contacted by the police).

65. See Grunwald, *supra* note 9, at A12 (reporting that simultaneous raids were designed to prevent club members from warning each other to destroy their files).

The raids, around the world, were keyed to English time and began at 5:30 a.m. on September 2, 1998.⁶⁶ European and Australian police arrested forty suspects as a result of the raids.⁶⁷ Similarly, U.S. Customs agents seized computers from thirty-two suspects in twenty-two states,⁶⁸ yielding at least fourteen arrests.⁶⁹ The Wonderland Club, the most extensive Internet child-pornography ring ever uncovered, was thus effectively dismantled.⁷⁰

E. Why Child-Pornography Rings Use the Internet

As the Wonderland Club makes clear, the Internet offers three principal advantages to child-pornography rings which did not exist when child pornography was exclusively in print or film form. These advantages are (1) the rapid transfer of files/images, (2) relatively high security, and, of course, (3) almost complete anonymity, all of which significantly lower the risk of arrest to the child pornographer.⁷¹

Speed is the first advantage. The Internet is the fastest, easiest and most efficient way to transfer images over long distances.⁷² Sending child pornography through the mail is slower and inherently more risky; the longer the material is in a carrier's hands the higher the chance of the contents being discovered. Hence, high speed transmission via the Internet limits the possibility of discovery and lowers the risk to the child-pornography ring.⁷³

Second, as the *Wonderland* case makes clear, the Internet offers rings several ways to make their activities more secure.⁷⁴ The first security measure that these groups use is one most of us are familiar with: password protection.⁷⁵ By installing multiple passwords on their systems and chat-sites,

66. See *Dozens Arrested*, *supra* note 54, at 06A.

67. See Grunwald, *supra* note 9, at A12.

68. See *id.* (police in the following states cooperated in the search and seizures: Michigan, Texas, Oklahoma, Florida, Pennsylvania, California, Missouri, Kansas, North Carolina, Utah, New York, Minnesota, Maine, Massachusetts, Colorado, Virginia, New Jersey, Georgia, Illinois, Connecticut, Indiana and Mississippi).

69. See Mark Fritz & Solomon Moore, *Suspects in Net Child-Porn Ring Killing Selves Officials Think More Suicides Will Take Place*, ARIZ. REPUBLIC, Oct. 25, 1998, at A25.

70. See Ziembra, *supra* note 45, at 1 (reporting: "As for the Wonderland Club, Berg [a special agent in charge of the U.S. Customs office in Chicago] said he believes the Internet ring is 'pretty much out of business.'").

71. See Fine, *supra* note 7, at A01 (noting that the Internet gives pedophiles anonymity, privacy and immediate duplication capability for images, around the world).

72. See Stewart, *supra* note 26, at 213.

73. See *id.*

74. See *id.* at 216.

75. See *id.*

child pornographers can limit accidental exposure to their content.⁷⁶ In addition, some rings, like the Wonderland Club, use sophisticated encryption, making computer files unobservable to others.⁷⁷ Lastly, they apply these protections not only to Internet transmissions but also to the files on their hard drives.⁷⁸ In these ways, the rings strictly control who has access to their files and chat rooms.⁷⁹

Finally, the most important aspect of the Internet, to child pornographers, is anonymity. On the Internet, users may be known exclusively by pseudonyms.⁸⁰ Ring members may never know anything but the screen names for the other members, thus minimizing their ability to inform on others if they are caught.⁸¹ In this way, though they are sometimes unsuccessful,⁸² child-pornography rings use the shadowy nature of cyberspace as their last line of defense to avoid prosecution.⁸³

II. LAWS TARGETING CHILD PORNOGRAPHERS

A. Recent History

International concern for the exploitation of children began in the 1920s and culminated in the 1924 International Declaration on the Rights of Children.⁸⁴ Child pornography, however, was not recognized as a wide spread problem within the United States until the 1970s.⁸⁵ Congress, reacting to this rising problem,⁸⁶ passed the Protection of Children Against Sexual

76. *See id.*

77. *See* Ziemba, *supra* note 45, at 1.

78. *See* Stewart, *supra* note 26, at 216.

79. *See id.*

80. *See* Matt McKinney, *R.I. man arrested in global child porn network*, PROVIDENCE J.-BULL. (Rhode Island), Oct. 29, 1998, at BO 1, available at 1998 WL 19873211 (reporting on a child-pornography ring named Pedo University where members were known only by their screen names, one such screen name was "POPPA3").

81. *See* Stewart, *supra* note 26, at 216.

82. *See* Millar, *supra* note 5, at 15.

83. *See* Stewart, *supra* note 26, at 216.

84. *See* Esposito, *supra* note 12, at 558.

85. *See* Tina M. Beranbaum et al., *Child Pornography in the 1970s*, in CHILD PORNOGRAPHY AND SEX RINGS 7 (Ann Wolbert Burgess & Mary Case Lindequist Clark eds., 1984) (stating that "production, distribution, and availability of child pornography gained increased visibility in the mid-1970s"); Esposito, *supra* note 12, at 545 (noting that child pornography availability grew suddenly in the 1970s).

86. *See* Beranbaum, *supra* note ?, at 9 (indicating that the Washington Star indicated the rising availability of child pornography in 1977 by reporting that 264 different child pornography magazines were available to consumers).

Exploitation Act in 1977.⁸⁷ This law criminalized the distribution of child pornography, if it was determined to be legally obscene.⁸⁸ In 1984, Congress amended the statute to eliminate the obscenity requirement, thus making the possession of *any* child pornography a criminal offense.⁸⁹ This amended act successfully controlled child pornography in the print media by the end of the 1980s.⁹⁰ However, like the mythological phoenix, child-pornography rings have arisen from the ashes, adapted to a new medium and become more dangerous than ever.⁹¹

B. Domestic Child Pornography Law

1. U.S. Federal Law

Currently, the two most important federal laws that deal with child pornography are the Communication Decency Act (CDA)⁹² and the Child Pornography Prevention Act (CPPA),⁹³ both passed by Congress in 1996. The CDA is part of a larger law known as the Telecommunications Act of 1996.⁹⁴ The CDA, in pertinent part, prohibited individuals from making available either *obscene* or *indecent* materials through the Internet, or other telecommunications.⁹⁵ The United States Supreme Court, in *Reno v. American Civil Liberties Union*,⁹⁶ struck down the provision that prohibited the display of *indecent* material, due to its vagueness and overbreadth.⁹⁷ The Court, however, preserved the provision that prohibits individuals from making *obscene* materials available over the Internet.⁹⁸ Thus, child

87. 18 U.S.C. §§2251-2253(1994).

88. See Chad B. Fears, *Shifting the Paradigm in Child Pornography Criminalization: United States v. Maxwell*, 1998 B YU L. REV. 83 5,840 n.29 (1998) (Congress feared that a law prohibiting the distribution of child pornography that did not follow the *Miller* obscenity test would be unconstitutional).

89. See *id.* at 844 n.44 (the 1984 amendment outlawing the mere possession of child pornography was passed in response to *New York v. Ferber*, 458 U.S. 747 (1982), in which the United States Supreme Court found child pornography to be wholly unprotected speech).

90. See generally Fears, *supra* note 88.

91. See Esposito, *supra* note 12, at 547 (the Internet has caused a rise in child pornography production).

92. 47 U.S.C. § 223 (1994 & Supp. 1997).

93. 18 U.S.C. § 2252 (1994 & Supp. 1997).

94. 47 U.S.C. § 251 (1994 & Supp. 1997).

95. See 47 U.S.C. § 223(a) (1994 & Supp. 1997).

96. 521 U.S. 844(1997).

97. See *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870-80 (1997).

98. See *Reno*, 521 U.S. at 882-84.

pornography, which has been defined by the Court as unprotected *obscene* speech," remains banned by the CDA.

Where the CDA broadly prohibits all obscene material on the Internet, the CPPA of 1996 is more targeted; it deals only with child pornography.¹⁰⁰ The CPPA is the latest adaptation of a 1977 federal statute known as the Protection of Children Against Sexual Exploitation Act.¹⁰¹ The 1996 version has generated much controversy in legal circles,¹⁰² for it broadens the definition of child pornography.¹⁰³ Under the CPPA, the definition of child pornography includes not only images of actual sexual abuse of children but also computer-generated child pornography that does not use real children for its production.¹⁰⁴

Some commentators argue that a prohibition of virtual child pornography is unnecessary for no children are harmed in its creation.¹⁰⁵ Adopting this reasoning, the Ninth Circuit has recently ruled this prohibition unconstitutionally vague and overbroad.¹⁰⁶ That court found that Congress' rationale, the protection of children from the predatory practices of pedophiles, was insufficient to overcome First Amendment protections.¹⁰⁷

On the other hand, some commentators continue to defend the validity of the congressional prohibition banning virtual child pornography possession.¹⁰⁸ These scholars stress that the importance of combating child

99. See *New York v. Ferber*, 458 U. S. 747 (1982).

100. See 18 U.S.C. §§ 2251-2253 (1994).

101. See *id.*

102. See Samantha L. Friel, *Porn by Any Other Name? A Constitutional Alternative to Regulating "Victimless" Computer-Generated Child Pornography*, 32 VAL. U. L. REV. 207, 208 (1997) (arguing that "although current child pornography statutes need to be amended to address the issue of computer-generated pornography, statutes that merely equate virtual pornography with traditional child pornography [such as the federal statute] . . . are unconstitutional under the First Amendment").

103. See Wasserman, *supra* note 14, at 249 (noting that the CPPA substitutes "child pornography [for] visual depictions involv[ing] the use of a minor engaging in sexually explicit conduct. [Thus,] Congress explicitly criminalized the possession of virtual child pornography.").

104. See *id.*

105. See Friel, *supra* note 102, at 261 (proposing an amendment to 18 U.S.C. § 2252 to create a defense to the charge of possession of child pornography requiring proof that the subject was either an imaginary computer-generated image or was actually 18 years or older); Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439 (1997) (finding that the reasons for prohibiting virtual child pornography do not rise to compelling).

106. See *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999).

107. See *Free Speech Coalition*, 198 F.3d at 1083.

108. See Wasserman, *supra* note 14, at 281.

pornography's secondary harms.¹⁰⁹ Contrary to the Ninth Circuit, the First and Eleventh Circuits have both embraced this argument.¹¹⁰ Thus, it is likely the U.S. Supreme Court will take on this issue in the near future to resolve this split in federal authority. In the interim, however, the federal statute continues to prohibit the transportation, production and possession of any type of child pornography, real or virtual, in all jurisdictions, except within the Ninth Circuit, where child pornography is banned only if the prosecution can prove an actual child was harmed in its production.¹¹¹

2. *State Law*

Like Congress, state lawmakers reacted to the rising tide of child pornography by passing legislation. Almost every state now prohibits the production and sale of child pornography.¹¹² In addition, many states,

109. *See id.* (supporting the need to ban virtual child pornography, he states two reasons for the prohibition: 1) to do otherwise would allow "real" child pornography to be protected, for it is often indistinguishable from virtual child pornography and, 2) it is necessary to combat the "well-documented use of virtual child pornography by pedophiles to seduce their victims").

110. *See id.*; *see also* *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999) (ruling that the Child Pornography Protection Act of 1996 is not unconstitutionally vague or overbroad); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999) (ruling that the CPPA is not unconstitutionally vague or overbroad); *see also* *United States v. Fox*, 74 F. Supp. 2d 696 (E.D. Tex. 1999) (ruling that the CPPA is not unconstitutionally vague or overbroad).

111. *See* 18 U.S.C. § 2252 (1994); *Free Speech Coalition*, 198 F.3d at 1096.

112. *See generally* Alabama- ALA. CODE §§ 13A-12-190 to 13A-12-198 (1994); Alaska - ALASKA STAT. § 11.41.455 (Michie 1998); Arizona - ARIZ. REV. STAT. ANN. § 13-3553 (West 1956); Arkansas-ARK. CODE ANN. §§ 5-27-301 to 5-27-305 (Michie 1997); California - CAL. PENAL CODE § 311 to 311.11 (West 1999); Colorado - COLO. REV. STAT. § 18-6-403 (1999); Connecticut-CONN. GEN. STAT. ANN. §§ 53a-196 to 53a-196b (West 1993); Delaware - DEL. CODE ANN. tit. 11 §§ 1108 to 1109 (1995); Florida- FLA. STAT. ANN. § 827.071 (West 2000); Georgia.- GA CODE .ANN. § 16-12-100 (Harrison 1998); Hawaii - HAW. REV. STAT. §§ 707-750 to 707-751 (1999); Idaho - IDAHO CODE § 44-1306 (Michie 1949); Illinois- ILL. COMP. STAT. ANN. 5/11-20.1 to 5/11-20.1 A (West 1993); Indiana -IND. CODE ANN. 35-49-1-1 to 35-49-1-10 (1998); Iowa-IOWA CODE ANN. § 728.12 (West 1993); Kansas-KAN. STAT. ANN. § 21-3516 (1995); Kentucky - KY. REV. STAT. ANN. §§ 531.320, 531.340 to 531.360 (Michie 1999); Louisiana - LA. REV. STAT. ANN. § 14:81.1 (West 1986); Maine- ME. REV. STAT. ANN. tit. 17, §§ 2921 to 2923 (West 1946); Maryland - MD. ANN. CODE art. 27, § 419A (1957); Massachusetts - MASS. GEN. LAWS ANN. ch. 272, §§ 29A to 29B (West 1990); Minnesota - MINN. STAT. ANN. § 617.246 (West 1987); Mississippi - MISS. CODE ANN. § 97-5-33 (1994); Missouri-Mo. ANN. STAT. § 568.060 (West 1999); Montana-MONT. CODE ANN. § 45-5-625 (1979); Nebraska - NEB. REV. STAT. § 28-1463.03 (1995); Nevada-NEV. REV. STAT. 200.700 to 200.760 (2000); New Hampshire - N.H. REV. STAT. ANN. § 650:2 (1996); New Jersey-N.J. STAT. ANN. § 2C:24-4(b)(5) (West 1995); New Mexico-N.M. STAT. ANN. § 30-6-1 (Michie 1978); New York - N. Y. PENAL LAW § 263 (MCKINNEY 2000); North Carolina-N.C. GEN. STAT. § 14-190.6 (1985); North Dakota-N.D. CENT. CODE 12.1-27.1-01;

following the federal government's lead,¹¹³ are now amending their existing laws to also prohibit the possession of child pornographic images.¹¹⁴ These laws allow state police and prosecutors to add their talents and resources to those of U.S. Customs and F.B.I, agents¹¹⁵ to investigate and punish child pornographers within their own states.

C. International Law

1. *Treaties*

Treaties are the most concrete form of international law. Unfortunately, few U.S. treaties specifically deal with child pornography. The ones that do exist are recent achievements and primarily address the extradition of

Ohio-OHIO REV. CODE ANN. § 2907.32.1 (Anderson 1999); Oklahoma-OKLA. STAT. ANN. tit. 21, § 1021.2 (West 1983); Oregon-OR. REV. STAT. § 163.485 (1999); Pennsylvania- PA. CONS. STAT. ANN. § 63 12(c) (West 1983); Rhode Island - R.I. GEN. LAWS, § 11-9-1.1 (1994); South Dakota - S.D. CODIFIED LAWS §§ 22-22-24 to 22-22-25 (Michie 1998); Tennessee-TENN. CODE ANN. § 39-17-1002 to 39-17-1014 (1997); Texas-TEX. PENAL CODE ANN. § 43.25 (Vernon 1994); Utah-UTAH CODE ANN. §§ 76-5a-1 to 76-5a-4(1999); Virginia - VA. CODE ANN. § 18.2-374.1 (Michie 1996); Washington - WASH. REV. CODE ANN. § 9.68A.060 (West 1998); West Virginia - W. VA. CODE ANN. § 61-8C-3 (Michie 1997); Wisconsin-Wis. STAT. ANN. § 948.05 (West 1996); Wyoming-WYO. STAT. ANN. § 27-6-114 (Michie 1999).

113. See 18 U.S.C. §2252(1994).

114. See MASS GEN. LAWS ANN. ch. 272, § 29B (West 1990) (which makes possession of child pornography a crime in Massachusetts); N.Y. PENAL LAW § 263.16 (McKinney 2000) (which makes possession of child pornography a crime in New York); see also Jessica Heslam, *Child Pornographers Increasingly Using the Internet*, PATRIOT LEDGER (Quincy, MA), Sept. 4, 1998, at 01, available at 1998 WL 8099925 (noting that Massachusetts made possessing child pornography a crime in December 1997. The governor, Paul Cellucci, signed the law making possession of child pornography a felony punishable by up to five years in prison and up to \$ 10,000 in fines.); Michael Gormley, *State Police Note Alarming Increase in Kiddie Porn Because of Videotape*, BUFFALO NEWS, May 20, 1998, at A14, available at 1998 WL 6017394 (noting that New York made possession of child pornography illegal in 1996).

115. See William T. Quinn, *Task Force Will Go Online to Surf and Protect Kids*, STAR-LEDGER (Newark, N.J.), Jan. 27, 1999, at 029, available at 1999 WL 2951311 (noting that the F.B.I. is in charge of investigating violations of federal child pornography laws within the United States); Aliah D. Wright, *Web Sleuths Fight Child Pornography // Vigilante Computer Experts Assisting Law Enforcement*, HARRISBURG PATRIOT & EVENING NEWS (PA), Dec. 20, 1998, at A08, available at 1998 WL 6490399 (identifies the U.S. Customs Service's CyberSmuggling Center, in Sterling, Va., as the government arm charged with stopping the international flow of child pornography to the United States); see generally Bill Pietrucha, *US Customs Releases Scorecard On Child Porn Arrests*, NEWSBYTES, Apr. 30, 1998, available at 1998 WL 11721538 (noting the duties of the U.S. Custom Service to find and punish those who import child pornography into the United States).

criminals, including child pornographers."⁶ The United States currently has such treaties with Hong Kong, Russia and Korea."⁷

2. *International Custom*

Where there is no treaty regarding a particular issue, international law fills this gap with international custom. International custom may be pinpointed by examining what has been accepted and practiced by the majority of nations in the past. "[M]ost nations have enacted legislation against child pornography" and, hence, it is likely that international custom would consider the sale, distribution and possession of child pornography to be criminal due to "cross-cultural attitudes against the sexual exploitation of children."¹¹⁸

Aside from the U.S., several nations have mounted aggressive counter offenses to the proliferation of child pornography on the Internet.¹¹⁹ Canada, the United Kingdom, Sweden, Singapore, Germany and Australia all have taken a tough stand on this issue.¹²⁰ German law allows criminal charges to be brought against Internet service providers that permit the posting of child pornography.¹²¹ Sweden has gone even further and debated whether to insert a provision outlawing the possession of child pornography into its constitution.¹²²

Some nations, however, lag behind on this issue.¹²³ Asian nations have been largely reluctant to institute the same types of anti-child pornography laws as other parts of the world.¹²⁴ Emphasizing this point, it was legal to

116. *See* Agreement For The Surrender of Fugitive Offenders, Dec. 20, 1996, H.K.-U.S., 361 L.M. 842, 849 (1997); Agreement on Cooperation in Criminal Law Matters, with Annex, June 30, 1995, U.S.-Russ., available at 1995 WL 831037 (Treaty); Treaty on Mutual Legal Assistance in Criminal Matters, Nov. 23, 1993, U.S.-S. Korea, available at 1993 WL 796842 (Treaty).

117. *See id.*

118. John T. Soma et al., *Transnational Extradition For Computer Crimes: Are New Treaties And Laws Needed?*, 34 HARV. J. ON LEGIS. 317, 333 (1997).

119. *See* Stewart, *supra* note 26, at 219.

120. *See id.*

121. *See Interpol ties 80% of world's child pornography to Japan*, ASAHI SHIMBUN/ASAHI EVENING NEWS, Dec. 4, 1998, available at 1998 WL 22369868 [hereinafter *Interpol ties*] ("Germany . . . [has] amended laws to enable police to charge Internet service providers that allow child pornography to be distributed electronically").

122. *See* Stewart, *supra* note 26, at 222-23 (noting that, although eventually rejected, "[t]he Swedish Parliament, in 1994, considered an amendment to the Swedish constitution that would make the possession of child pornography illegal").

123. *See id.* at 239.

124. *See id.* (stating that "[m]any victims of child pornography come from Asian

produce and distribute child pornography in Japan as recently as November 1, 1999.¹²⁵ Noting the extent of the problem, Interpol, the international law enforcement organization, estimated last year that eighty percent of the child pornography available over the Internet was produced in or distributed through Japan.¹²⁶ Finally, although the new Japanese law prohibits production and sale, it sadly preserves the individual's right to possess child pornography and distribute it, recreationally, online.¹²⁷

III. CONTINUING ISSUES FOR CHILD PORNOGRAPHY ON THE INTERNET

A. Freedom of Speech

Should regulation which prohibits the possession and dissemination of child pornography over the Internet violate the disseminator's right to free speech? This question must be analyzed in light of the extraordinarily high value which is placed upon this freedom.¹²⁸ Freedom of speech is cherished both within the United States and many nations around the world.¹²⁹

The First Amendment of the U.S. Constitution commands that "Congress shall make no law . . . abridging the freedom of speech."¹³⁰ In practice, however, the Supreme Court has not been quite so rigid.¹³¹ The Court has, over time, recognized that some speech falls outside the protection of the First Amendment.¹³² "[O]bscenity and child pornography have been enumerated as areas outside this protected marketplace" of ideas.¹³³

The U.S. Supreme Court, in *Miller v. California*,TM ruled that obscenity could be prohibited if the material in question meets the requirements of a three-

nations, which generally have fewer restrictions on the production, distribution or possession of child pornography than many European countries, Australia, or the United States").

125. See Doug Stmck, *Japan Hoping New Law Fights Child-Sex Image*, HOUS. CHRON., Jan. 28, 2000, at 19, available at 2000 WL 4277656; see also Cameron W. Barr, *Why Japan Plays Host to World's Largest Child Pornography Industry Legal laxity, culture let industry flourish. Foreign girls used*, CHRISTIAN SCI. MONITOR, Apr. 2, 1997, at 1, available at 1997 WL 2800253.

126. See *Interpol ties*, supra note 121.

127. See Taro Karasaki, *Japan: Global network urged in battle against child cyber porn*, ASAHI SHIMBUN/ASAHI EVENING NEWS, Oct. 16, 1999, available at 1999 WL 17701068.

128. See Edick, supra note 17, at 441.

129. See *id.*

130. U.S. CONST., amend. I.

131. See Friel, supra note 102, at 215.

132. See Fears, supra note 88, at 839.

133. *Id.*

134. 413 U.S. 15, *reh'g. denied*. 414 U.S. 881 (1973).

part test.¹³⁵ If sexual speech, or pornography, is not obscene under the *Miller* test, it is entitled to First Amendment protection.¹³⁶ This *Miller* standard for obscenity, however, is not the standard used for child pornography.¹³⁷

Unlike adult pornography, child pornography does not enjoy *any* constitutional protection.¹³⁸ In *New Yorkv. Ferber*,¹³⁹ the Court held that a statute that prohibits the distribution of child pornography may be constitutional even if it fails to satisfy any element of the *Miller* test, provided it is designed to prevent the abuse of children.¹⁴⁰ The Court reasoned that the state's compelling interest in safeguarding children clearly outweighs any value child pornography might possess as expression.¹⁴¹ Eight years later in *Osborne v. Ohio*,¹⁴² the Court went one step further and held that, unlike adult obscenity,¹⁴³ authorities could prohibit the possession of child pornography in an individual's home.¹⁴⁴ In this way, the Court showed that freedom of expression may be subordinated to the overriding state concern of prevention of child abuse.

Is this the right result? One Canadian court has ruled it is not.¹⁴⁵ The British Columbian Supreme Court, the highest court of that province, recently

135. See *Miller v. California*, 413 U.S. 15,24-25 (1973).

The basic guideline for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24 (citations omitted).

136. 5ec JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 1207(5thed. 1995).

137. See *id.* at 1206-07.

138. See Edick, *supra* note 17, at 445 (noting that "[a]ny material that portrays minors in a sexually explicit fashion is considered child pornography and is therefore illegal... [s]ince child pornography is illegal in all cases, the *Miller* standard does not apply to child pornography").

139. 458 U.S. 747(1982).

140. See NOWAK & ROTUNDA, *supra* note 136, at 1206-07 (quoting *Miller*, 413 U.S. at 764-65).

141. See Wasserman, *supra* note 14, at 252.

142. 495 U.S. 103, *reh g denied*, 496 U.S. 913 (1990).

143. See *Stanley v. Georgia*, 394 U.S. 557, 558 (1969) (holding that possession of obscene materials was constitutionally protected in the home).

144. See NOWAK & ROTUNDA, *supra* note 136, at 1207.

145. See *Feds Will Fight For Porn Law*, CALGARY SUN, Jan. 27, 1999, at 25, available at 1999 WL 3455464 (reporting that the B.C. Supreme Court ruling of January 15, 1999, "effectively struck down laws on possession of child" pornography because they invaded an individual's right to free expression).

ruled that a law prohibiting the possession of child pornography violated an individual's right to freedom of expression.¹⁴⁶ Writing for that court, Justice Duncan Shaw found that "[t]he intrusion into freedom of expression and the right of privacy is so profound that it is not outweighed by the limited beneficial effects of the prohibition."¹⁴⁷

The question of whether freedom of expression outweighs the right of society to protect children from potential abuse, however remote that potential might be, must be seen fundamentally as a question of policy. Is it in society's best interest to recognize the right of an individual to possess what is often a permanent record of child abuse? Should we tolerate the proliferation of graphic, child pornographic images to protect the overarching supremacy of freedom of expression? The clear answer must be no. The British Columbian court failed to adequately appreciate the fact that child pornography does real, and often irreparable, harm to many children around the world.¹⁴⁸ Freedom of expression, though prized, must be balanced against this harm to yield boundaries for acceptable conduct. The U.S. Supreme Court has made this assessment and correctly found that child pornography falls outside the scope of First Amendment protection.¹⁴⁹

B. Right to Privacy

Closely related to the issue of freedom of expression is that of privacy rights. An important and current "right to privacy" question that affects child pornography is: should individuals have the right to use encryption so sophisticated that law enforcement is unable to enforce the laws?¹⁵⁰ This is

146. *See id*; *see also*, *B.C. Will Appeal Child Pornography Ruling*, PORTLAND OREGONIAN, Jan. 19, 1999, at A02 (reporting the facts of this case: a sixty-five year old Vancouver man, John Sharpe, was arrested after a police raid of his home found child pornography in his possession). The Supreme Court of Canada has since heard arguments and will soon decide whether the British Columbian court was correct in finding the possession prohibition constitutionally invalid. *See* Valerie Lawton, *Supreme Court grapples with child pornography*, TORONTO STAR, Jan. 19, 2000, at NE03, available at 2000 WL 3739017.

147. David Crary, *Canadian judge hated for child-porn ruling A "careful" jurist has to tread lightly amid nationwide outrage at his decision that possession should not be a crime*, GRAND RAPIDS PRESS, Jan. 25, 1999, at D8, available at 1999 WL 6402676.

148. *See supra* Part I.

149. *See* *New York v. Ferber*, 458 U.S. 747, 774 (1982).

150. *See* Ian C. Ballon, *Linking, Framing And Other Hot Topics in Internet Law And Litigation '87* (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series, No. 520, 1998), available at WL 520 PLI/PAT167 (defining encryption as "the process of converting data (stored in digital form as a series of 1s and 0s) into an incomprehensible code through use of an algorithm").

a hotly debated issue with wider implications than the confines of the prohibition against child pornography.¹⁵¹

The right to privacy has several interrelated meanings¹⁵² and may be viewed as three clusters of rights.¹⁵³ The first type of privacy right is that concerning physical space and is typified by the Fourth Amendment's prohibition against illegal search and seizure.¹⁵⁴ The second is the privacy to make self-defining choices, such as the freedom to choose an abortion.¹⁵⁵ Finally, the third area of privacy rights involves freedom from forced disclosure of the details of one's private life.¹⁵⁶ It is this third type of privacy right that has been discussed in connection with encryption.

Encryption is necessary to many enterprises on the Internet.¹⁵⁷ For example, businesses which conduct transactions over the Internet are vulnerable to computer-facilitated theft and piracy, thus, they need encryption.¹⁵⁸ Likewise, private individuals need encryption to prevent information theft while using on-line communications.¹⁵⁹ Hospitals also require encryption to prevent hackers from altering patients' records.¹⁶⁰ In short, our national infrastructure depends on encryption to keep important information safe.¹⁶¹

Encryption, however, becomes a problem when it is so secure that it prevents law enforcement from doing its job.¹⁶² Law enforcement agencies

151. See Kenneth P. Weinberg, *Cryptography: "Key Recovery" Shaping Cyberspace (Pragmatism and Theory)*, 5 J. INTELL. PROP. L. 667, 673 (1998); see generally J. Terrence Stender, *Too Many Secrets: Challenges to the Control of Strong Crypto and the National Security Perspective*, 30 CASE W. RES. J. INT'L L. 287 (1998); Joel C. Mandelman, *Lest We Walk into the Well: Guarding the Keys-Encrypting the Constitution: To Speak, Search & Seize in Cyberspace*, 8 ALB. L.J. SCI. & TECH. 227 (1998).

152. See NOWAK & ROTUNDA, *supra* note 136, at 795.

153. See Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193(1998).

154. See *id.* at 1202; NOWAK & ROTUNDA, *supra* note 136, at 796.

155. See NOWAK & ROTUNDA, *supra* note 136, at 796; Kang, *supra* note 153, at 1202-03.

156. See NOWAK & ROTUNDA, *supra* note 136, at 795; Kang, *supra* note 153, at 1203.

157. See Weinberg, *supra* note 151, at 680 (many need encryption on the Internet, both businesses and individuals).

158. See *id.*

159. See *id.*

160. See *id.*

161. See *id.*

162. See *id.* (stating that "[t]he same technologies that allow consumers and businesses to scramble financial information, thereby diminishing the risk of piracy, can also help thieves commit different types of crimes . . . such as money laundering, fraud, stalking, gambling, terrorism, the commission of hate crimes, and the distribution of child pornography").

are, of course, quite alarmed about strong encryption programs.¹⁶³ Understandably, they have sought ways to minimize its impact on the control of crime. One such proposal that has received a fair amount of attention is known as key escrowed encryption.¹⁶⁴

Key escrowed encryption, as it has been proposed, would require all parties selling encryption to furnish a trusted third party with the key to their encryption code.¹⁶⁵ Unfortunately, this proposal has been hugely unpopular with the computer industry, which feels that such a requirement puts it at a competitive disadvantage to software makers overseas.¹⁶⁶ Reacting to these concerns, the Clinton administration has recently decided to drop its proposal for key escrowed encryption in favor of a new proposal to fund an FBI code breaking unit.¹⁶⁷

One question rises naturally from this discussion, regardless of whether or not the present administration chooses to pursue key escrowed encryption. Do individuals have a constitutionally protected privacy interest in the encryption of their Internet communications? It is this commentator's contention that no such constitutional right exists. No one should have a privacy right to hide illegal communications behind a code impenetrable to reasonable law enforcement. To allow such a privilege would, in effect, allow one to use his or her right as a sword to commit Internet wrongdoing, rather than as a shield to prevent unreasonable governmental intrusion. Such a right must never be recognized.

James X. Dempsey, an attorney for the Center for Democracy and Technology, argues that successful police operations, like the Wonderland raids, are proof positive that law enforcement does not need access to encryption keys,¹⁶⁸ for these agents were able to gather incriminating evidence through traditional investigative means.¹⁶⁹ This argument, however, is unavailing. Although the police were savvy enough to gather independent evidence in this case, there is little reason to permanently handicap future law

163. See Mandelman, *supra* note 151, at 231 -32.

164. See Stender, *supra* note 151, at 297.

165. See *id.*

166. See David M. Nadler & Valerie M. Furman, *Administration Relaxes Restrictions on Encryption Software*, 17 No. 3 ANDREWS COMPUTER & ONLINE INDUS. LITIG. REP. 3, Nov. 2, 1999, available at WL No. 3 ANCOILR 3.

167. See *id.* (noting that the Clinton administration has proposed a piece of legislation, entitled the Cyberspace Electronic Security Act of 1999 (CESA), that would give \$80 million to the FBI over the next four years to create the code-breaking unit).

168. See Grunwald, *supra* note 9, at A12.

169. See Grunwald, *supra* note 9, at A12 (noting that James X. Dempsey, an attorney for the Center for Democracy and Technology, has said the Wonderland raids show that law enforcement already has plenty of power without escrowed encryption).

enforcement when it is clear that encryption and the evasive tactics of computer criminals will continue to increase in sophistication.¹⁷⁰

It follows from the freedom of speech discussion above that if there is no right to possess or distribute child pornography, as the U.S. Supreme Court has stated,¹⁷¹ then logically we must allow law enforcement a mechanism to bring about this effect. Encryption must yield, as all locked doors do in the physical world, to *reasonable* law enforcement efforts.

C. International Jurisdiction

Continuing this line of argument, if we agree that the right to privacy should not act as a sword for Internet crime, in general, and child pornography in particular, we must then ask the following question: who has jurisdiction over these cyber-criminals and their crimes? Many commentators have sought to sort this cyber-age jurisdictional question out, with varying degrees of success.¹⁷²

International jurisdiction law, like most international law, is not rigid.¹⁷³ It is primarily based upon notions of moderation, restraint and non-encroachment.¹⁷⁴ International jurisdiction is typically divided into three types: jurisdiction to legislate, jurisdiction to adjudicate and jurisdiction to enforce.¹⁷⁵ These three are interrelated and bound by the requirement of reasonableness.¹⁷⁶

According to the U.S. Supreme Court in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,¹⁷⁷ a "court may exercise 'general jurisdiction' over a

170. See David E. Kalish, *Software provides privacy on net, but also worries law enforcement*, THE COLUMBIAN (Clark County, Washington), Dec. 15, 1999, at C3, available at 1999 WL 30742826 (noting that one Canadian firm, Zero-Knowledge Systems, Inc., has just begun to market a service that claims to "let people remain completely anonymous while sending e-mail, chatting and visiting websites." *Id.* The service purposefully scrambles and destroys all tracing data which would be of use to law enforcement.).

171. See *New York v. Ferber*, 458 U.S. 747 (1982).

172. See Ballon, *supra* note 150, at 167; Jack E. Brown, *Jurisdiction to Prosecute Crimes Committed by Use of The Internet*, 38 JURIMETRICS J. 611 (1998); Susan J. Drucker, *The Tenets of Jurisdiction: Lost in Cyberspace?*, 69 N.Y. ST. B.J. 30 (Dec. 1997); Stephan Wilske & Teresa Schiller, *International Jurisdiction in Cyberspace: Which States May Regulate the Internet?* 50 FED. COMM. L.J. 117 (1997).

173. See Wilske & Schiller, *supra* note 172, at 126.

174. See *id.* (noting that "[e]very State has an obligation to exercise moderation and restraint in invoking jurisdiction over cases that have a foreign element, and they should avoid undue encroachment on the jurisdiction of other States").

175. See *id.*

176. See *id.*

177. 466 U.S. 408 (1984).

defendant if the nonresident defendant's activities within the forum are 'substantial' or 'continuous and systematic.'"¹⁷⁸ In addition, courts may exercise "specific jurisdiction"¹⁷⁹ over any defendant that has had "minimum contacts" with a forum.¹⁸⁰ The Restatement of Foreign Relations Law of the United States puts it this way: "A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable."¹⁸¹

From the discussion above, regarding the harms of child pornography, it is clear that the United States has the legislative jurisdiction to make the production and possession of child pornography a crime. Is it also reasonable for a U.S. court to then assert jurisdiction over a child pornographer halfway around the globe? The answer is a qualified yes. Minnesota's Attorney General, Hubert Humphrey III, analogized that if "someone outside the state . . . fires a rifle at someone in the state... [that state] has the power to enforce its laws . . . [thus this power also must exist] against purveyors of on-line fraud."¹⁸² This analogy applies equally well to online child pornography, which, of course, crosses the same borders. If a child pornographer's activities touch U.S. jurisdiction, including making child pornography observable online, we have an obligation to enforce U.S. law. Following these doctrines, many U.S. courts currently assert jurisdiction over civil defendants who maintain interactive websites accessible in their jurisdictions.¹⁸³ Courts have found these defendants to have purposefully injected themselves into the forum, thus satisfying the minimum contacts test.¹⁸⁴ Thus, the minimum contacts test may be used to establish criminal adjudicative jurisdiction over computer criminals.

This leads to the final jurisdictional issue. If *adjudicative* jurisdiction is reasonable for international child pornographers, is *enforcement* jurisdiction reasonable? International enforcement jurisdiction is justified when the crime in question may reasonably be characterized as a universal crime.¹⁸⁵ The vast

178. Ballon, *supra* note 150, at 308.

179. *See id.*

180. *See id.* (citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

181. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 421(1) (1987).

182. Wilske & Schiller, *supra* note 172, at 136.

183. *See* Drucker, *supra* note 172, at 32.

184. *See* Wilske & Schiller, *supra* note 172, at 160.

185. *See id.* at 170 ("The universality principle is not only a legitimate basis for jurisdiction to prescribe. It also allows a State to exercise jurisdiction through its courts to enforce its criminal laws that punish universal crimes.").

majority of the world's citizens view child pornography as such a crime.¹⁸⁶ Thus, since child pornography enters U.S. forums "like a shot from a rifle" and is reasonably considered a universal crime, U.S. agents are justified in exercising jurisdiction over international child pornographers.

D. Entrapment

The final constitutional issue that this Comment explores is how far law enforcement officials may go to catch online child pornographers before those same officials are guilty of entrapment. Entrapment is a criminal defense which emanates from the constitutional rights of due process and equal protection.¹⁸⁷ It is defined as "the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting a criminal prosecution against him."¹⁸⁸

Recently, to fight cyber-crime, law enforcement has been forced to develop new techniques, which look a lot like the old techniques.¹⁸⁹ That is, police are adapting the practice of undercover investigation to the Internet, in an attempt to find lawbreakers and bring them to justice.¹⁹⁰ From the U.S. Customs Cybersmuggling Center¹⁹¹ to small-town police stations,¹⁹² law enforcement is increasingly logging onto sites where criminals congregate, giving them the opportunity to break the law.¹⁹³ These officers, however, are sometimes accused of crossing the line between offering opportunity and deliberately encouraging lawbreaking.¹⁹⁴

186. See Soma et al., *supra* note 118, at 333 (stating that "[f]or certain activities, such as child pornography and pedophilia, there is a general consensus among nations that the behavior should be illegal. Since countries also agree as to the proper severity of punishment, extradition can proceed with little difficulty.").

187. See JOHN M. SCHEB & JOHN M. SCHEBII, *CRIMINAL LAW AND PROCEDURE* 357-60 (2ded. 1994).

188. 21 AM. JUR. 2D *Criminal Law* § 202 (1981).

189. See Ron Scherer, *New vice squads troll the web for child porn*, CHRISTIAN SCI. MONITOR, Dec. 17, 1998, at 1, available at 1998 WL 2372713.

190. See *id.* (reporting that senior special agent for the U.S. Customs' Cybersmuggling Center Claude Davenport prowls the Internet looking for rings that are trading child-porn images).

191. See *id.*

192. See J.M. Hirsch, *Cyber-Cop Searches For Pedophiles*, SEATTLE TIMES, Sept. 6, 1998, at A20, available at 1998 WL 3170400.

193. See *id.* (reporting that officer James McLaughlin, of the Keene, N.H., police department, logs onto chat rooms as a 15-year-old boy who is looking for sex with older men).

194. See *id.* (reporting that some believe that posing as a child online is entrapment).

In *Jacobson v. United States*¹⁹⁵ the leading case regarding entrapment on child pornography charges, the U.S. Supreme Court expressed concern about over-zealous undercover law enforcement officers crossing the line.¹⁹⁶ In that case, originating in Nebraska, Keith Jacobson purchased a child pornographic magazine at a time when doing so was legal.¹⁹⁷ Subsequently, laws were passed making such a purchase illegal.¹⁹⁸ Thereafter, undercover law enforcement officers repeatedly contacted Jacobson and encouraged his purchase of child pornography.¹⁹⁹ Jacobson purchased a magazine and was prosecuted under the new child pornography law.²⁰⁰

The *Jacobson* court held that law enforcement failed to show that Jacobson was "predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails."²⁰¹ The Court added: "In their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute."²⁰²

Thus, the boundaries for law enforcement have been made clear.²⁰³ In the course of investigating, officers may completely misrepresent who they are and what they enjoy without fear of entrapping their suspect.²⁰⁴ They must, however, remain ever-vigilant to avoid actually encouraging wrongdoing, for that could be the technical defense that sets a producer or collector of child pornography free.²⁰⁵

IV. RECOMMENDATIONS

Drawing on this discussion, this author has targeted six areas which, if improved, would significantly increase the ability of law enforcement to locate and prosecute child pornographers and child-pornography rings on the Internet. Domestically, there are four vital steps that must be taken to rid the Internet of child pornography. We must: (1) increase cyberspace patrols, (2)

195. 503 U.S. 540(1992).

196. *See Jacobson v. United States*, 503 U.S. 540 (1992).

197. *See Jacobson*, 503 U.S. at 540.

198. *See id*

199. *See id*

200. *See id.*

201. *Id.*

202. *Id.*

203. *See Jacobson*, 503 U.S. at 540.

204. *See* 21 AM. JUR. 2D *Criminal Law* § 202 (1981).

205. *See Jacobson*, 503 U.S. at 540.

provide better police training, (3) develop escrowed encryption and (4) use universal crime enforcement jurisdiction. In addition, internationally, the nations of the world must: (1) forcefully encourage those nations who tolerate the possession and/or sale of child pornography to rethink their position and amend their laws and (2) continue to cooperate and coordinate law enforcement efforts.

A. Increased Patrolling of the Internet

As indicated in Part III, U.S. law enforcement is slowly beginning to increase its oversight of the Internet.²⁰⁶ This is a positive step, but it must be expanded in order to be effective. In the words of Glenn Nick, a U.S. Customs agent who worked on the Wonderland case, "[t]here's much more activity than we're aware of,²⁰⁷ [and Internet child pornographers] are going to get more sophisticated, get hidden deeper."²⁰⁸ To combat this, we, as a nation, must commit personnel and budget dollars²⁰⁹ to diligent investigation.

B. Better Police Training

1. *Better Technical Training*

Because law enforcement has entered the Internet rather late in the game, police are far behind Internet criminals in terms of technical sophistication.²¹⁰ Agencies must do everything in their power to overcome this experience gap. This includes learning as much as possible from the mischievous, and sometimes malicious, computer experts known as hackers.²¹¹ In addition, police should take every possible opportunity to learn techniques directly from apprehended Internet child pornographers.²¹²

206. See Claire Ann Koegler, *The Information Highway Patrol: Here Come the Cybercops*, 22 NOVA L. REV. 513, 513 (1998) ("As communications on the Internet become more and more a part of American culture, the law is evolving to regulate activities on the Internet ("Net"). Various government agencies and private entities are patrolling the Net to crack down on tortious and criminal activities.").

207. Allbritton & McCshane, *supra* note 34, at A22.

208. *Id.*

209. See Deborah Radcliff, *COMPUTER WORLD*, Aug. 17, 1998, at 59, available at 1998 WL 8437759 ("U.S. Customs and most local agencies sorely lack human resources, training and funds").

210. See Allbritton & McCshane, *supra* note 34, at A22 ("The Customs Cyber Smuggling operation only opened a year ago, and authorities acknowledge they are behind").

211. See Radcliff, *supra* note 209, at 58 ("RSnake [a hacker] says he has passed on tracking programs and training materials to law enforcement agencies. Another group, www.pedowatch.com, offers a free, downloadable tool called Digger Engine, along with detailed techniques, to trace Internet Relay Chat users and Usenet posts.").

212. See *id.* (reporting that in 1992, agents were at a loss as to how to combat child

2. Continued Sharing of Investigative Techniques

Because law enforcement, as a whole, lacks expertise in the investigation of Internet child poraographers and child-pornography rings, they must be especially conscious of the importance of sharing whatever techniques they do learn with each other. Simple things like reminding a fellow police investigator to specifically list computers and disks on search warrant applications when searching suspects' homes, could make the difference between conviction and acquittal due to insufficient evidence.²¹³ The U.S. Customs Service, which knows the most about these investigations, commendably is leading the charge by training local police in its techniques.²¹⁴ This type of information exchange must continue in order to provide officers with this vital training.²¹⁵

3. Better Use of Tips

The Internet is a world-wide phenomenon, hence many tips regarding wrongdoing may come from sources outside our borders. Some authorities involved in the fight to rid the Internet of child pornography have observed that "[t]oo many agencies, here and around the world, play a turf war with leads . . . [i]f they didn't come up with the tip, they wouldn't follow up on it."²¹⁶ U.S. law enforcement must do its part to follow up on leads provided by other governmental, non-governmental and private entities.

C. Key Escrowed Encryption

Key escrowed encryption is controversial.²¹⁷ So controversial, in fact, that the politicians are now seeking other, more politically expedient, means to get the same information.²¹⁸ This, however, is a mistake. Key escrowed encryption is a constitutionally viable plan that should be implemented as part

pornographers until they received the help of a perpetrator who showed agents where to go and how to download images).

213. See Durkin, *supra* note 15, at 14 (urging law enforcement to always list computers and disks as items to be searched and seized in a pedophile's home).

214. See Pietrucha, *supra* note 115 ("Customs . . . operates a 'very active' training program in computer child pornography investigations for law enforcement officials, both in the U.S. and in foreign countries").

215. See Marc D. Goodman, *Why The Police Don't Care About Computer Crime*. 10 HARV. J.L. & TECH. 465, 492 (1997).

216. Fine, *supra* note 7, at AO1.

217. See Weinberg, *supra* note 151, at 699.

218. See Nadler & Furman, *supra* note 166, at 3.

of a reasonable research procedure. If the keys to all encryption codes are placed in the hands of a "trusted third party," and government access is strictly limited to situations when a valid search warrant has been issued, as has been proposed, then individual privacy is no more encumbered than under pre-existing wiretap laws.²¹⁹ Thus, since it would not be detrimental to the accused and would facilitate law enforcement by enabling them to descramble transmissions by child pornographers, escrowed encryption should be developed and used.

D. Universal Enforcement Jurisdiction

Based upon this Comment's jurisdictional analysis, it is clear that child pornography is within the adjudicative jurisdiction of U.S. law enforcement due to the minimum contacts and the effect of child pornography on the forum.²²⁰ Furthermore, it is within the U.S. authorities' enforcement jurisdiction because it is universally recognized as illegal conduct.²²¹

Thus, U.S. law enforcement should pursue the extradition of child pornographers with determination and vigor wherever they reside, subject only to the consent of that foreign state.

E. Develop Standard International Child Pornography Laws

Because some nations treat child pornography and its possessors differently than others, there is inconsistency in international law. To alleviate this inconsistency, the U.S. should use its place of power in the international community to impress on other nations that the eradication of Internet child pornography will happen only if nations are unified in their condemnation of it. This "harmonization of law"²²² would leave child pornographers nowhere to hide.

F. International Cooperation

International cooperation, as of late, has resulted in great success, as the Wonderland Club case and other raids show.²²³ Law enforcement agencies,

219. See Mandelman, *supra* note 151, at 284; But see Weinberg, *supra* note 151, at 699.

220. See Drucker, *supra* note 172, at 32.

221. See Soma et al., *supra* note 118, at 333.

222. *Sexual Abuse of Children, Child Pornography and Paedophilia on the Internet: An International Challenge - Expert Meeting, UNESCO, Paris, 18-19 January, available at* <http://www.unesco.org/webworld/child_screen/conf_index.html>.

223. See Fine, *supra* note 7, at A01; Scherer, *supra* note 189, at 1 (reporting how New Zealand authorities cooperated with British and Northern Irish authorities to break up a child-pornography ring).

however, must continue to foster this type of cooperation to be effective against child pornography around the globe. This is especially true when a particular nation's law enforcement targets an international child-pornography ring, as opposed to an individual child pornographer. In a ring, members will warn one another, in other nations, to destroy evidence, thereby eliminating a valuable opportunity to locate and prosecute members.²²⁴ If the end goal is to eliminate child pornography, which it must be, we cannot afford law enforcement agents in one nation impeding child pornography law enforcement in another nation. To modify a popular phrase, Law enforcement must learn to think globally, *then* act locally.

CONCLUSION

As it began, this Comment ends by recognizing the heroic international effort that resulted in the detection, investigation and ultimate destruction of the Wonderland Club. But even as the members of this child-pornography ring are sentenced, other rings are forming and other "Cheshire Cats" are grinning. U.S. law enforcement must attack this scourge as the universal crime it is, while remaining within the bounds of constitutional law. This might seem too daunting a task, but law enforcement must be determined; they must not fail. For if they do, who will save Alice from "Wonderland?"

224. See Grunwald, *supra* note 9, at A12.