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## The Use of Computers in the Sexual Exploitation of Children and Child Pornography, 7 *Computer L.J.* 383 (1987)

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## NOTES

# THE USE OF COMPUTERS IN THE SEXUAL EXPLOITATION OF CHILDREN AND CHILD PORNOGRAPHY

While the sexual exploitation of children and child pornography have been the targets of Congressional legislation for several years, the use of computers for these purposes has only recently been recognized as a problem. Previously enacted legislation forced those who sexually exploit children into an underground subculture. Computer technology has provided this largely unorganized subculture with a clandestine and anonymous form of communication. More insidiously, communication through computers has enabled individuals to form special interest groups which could provide the organizational structure for a nationwide network. Congress responded to this escalating problem with S. 1305, the Computer Pornography and Child Exploitation Prevention Act of 1985.<sup>1</sup>

This Note will first discuss the problem of child sexual exploitation and pornography. A discussion of the legislative responses to date will follow. The nature of the problems created when computers are used in child sexual exploitation and pornography will then be discussed. The conflicting interests of the government, individual, and computer communication businesses affected by legislation on computer-assisted sexual exploitation and pornography will be examined next. Finally, S. 1305 will be analyzed and suggestions for modifications will be presented.

### I. THE PROBLEM OF CHILD SEXUAL EXPLOITATION AND CHILD PORNOGRAPHY

#### A. GENERAL BACKGROUND

The sexual exploitation of children and the attendant production, exchange/distribution, and use of child pornography are problems of

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1. S. 1305, 99th Cong., 1st Sess., 131 CONG. REC. S8244 (daily ed. June 17, 1985).

national concern. Children are being abused by adults who directly engage them in sexual activity. Children are also victimized by adults who make and distribute visual depictions of the children's sexual acts. Long after the actual sex act has occurred, these materials continue to circulate, providing a permanent record of the sex act which can haunt the children for years to come.

While many of the child victims are runaways, others live apparently normal lives with their families.<sup>2</sup> A typical child victim displays the following characteristics: (a) comes from a home deficient in parental love and attention; (b) lacks proper parental supervision; (c) has no strong moral or religious values; (d) is an under-achiever in school or at home; and (e) is eight to sixteen years old.<sup>3</sup> In their search for parental love and attention outside of the home, these children become easy targets for sexual exploitation by adults, who are more than willing to fulfill the children's emotional needs in exchange for sex. Such adults are labeled "pedophiles."<sup>4</sup>

Pedophiles are adults who use children as sexual objects. While child molesters, who may use force with the child, and parents, who may use force or duress with their child, are both lumped together under the term pedophile, the true pedophile is considered to be an adult who seduces the child.<sup>5</sup> True pedophiles use affection, attention, and gifts to build a relationship with the child; sexual contact generally takes place with the "consent" of the child.<sup>6</sup> A pedophile may be

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2. SENATE COMM. ON THE JUDICIARY, PROTECTION OF CHILDREN AGAINST SEXUAL EXPLOITATION ACT OF 1977, S. REP. NO. 438, 95th Cong., 1st Sess. 8, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 40, 45 [hereinafter 1977 S. REP.].

3. Los Angeles Police Dep't, The Sexually Exploited Child Unit of the Los Angeles Police Department 3 (1982), *reprinted in Child Pornography and Pedophilia: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 98th Cong., 2d Sess. 131, 132 (1984) [hereinafter 1984 Hearings]. *See also* Similes, *Scope of the Problem: Investigation and Prosecution—Postal Inspection Service*, in CHILD PORNOGRAPHY AND SEX RINGS 25, 37-38 (A. Burgess & M. Clark eds. 1984).

4. Los Angeles Police Dep't, *supra* note 3, at 3, 1984 Hearings at 132.

5. 1984 Hearings, *supra* note 3, at 53 (testimony of Lt. William G. Thorne, Bergen County Prosecutor's Office, Hackensack, N.J.).

6. 1984 Hearings, *supra* note 3, at 45 (testimony of William Dworin, Los Angeles Police Dep't); *id.* at 53 (testimony of Lt. William G. Thorne, Bergen County Prosecutor's Office, Hackensack, NJ).

The pure pedophile is the outstanding problem to the sexual safety of our society's children. The pure pedophile uses all the persuasive powers at his disposal to lure and coerce his victims and sometimes even his victims' parents to commit or allow sexual exploitation to exist. . . . His association is very similar to that of a man-woman dating relationship. He spends money, gives gifts and generally buys the companionship of the victim.

*Id.* *See generally* Note, *Child Pornography Act of 1984—Enforceable Legislation to Prevent Sexual Abuse of Children*, 10 OKLA. CITY U. L. REV. 121, 132-33 (1985) (discussing the seduction process).

(a) young or old; (b) male or female; (c) laborer or professional. Pedophiles tend to get along better with children than with other adults. They often volunteer to work in children's programs and may be found in areas where children spend their time (*e.g.*, arcades, malls, recreational areas).<sup>7</sup> Pedophiles are often people in trusted positions, such as family friends, Big Brothers, religious leaders, and physicians.<sup>8</sup> While there are highly visible advocacy organizations such as the Rene Guyon Society and the North American Man-Boy Love Association,<sup>9</sup> most pedophiles are believed to comprise an unorganized, unlinked subculture.<sup>10</sup>

Most pedophiles find children to be attractive only when they are within a limited age range. As a result, pedophiles' sexual relationships with their victims tend to be transitory. In order to create a visual record of the relationship, most pedophiles take photographs or make movies of their victims, thereby creating home-made child pornography.<sup>11</sup> In fact, pedophiles are considered to be the main source of child pornography.

Child pornography is produced by the pedophile. He is the individual who is the main producer of this material. He is the individual who is exchanging material with one another [sic] through underground networks, and although child pornography has been estimated at anywhere from a multi-million to a \$2 billion yearly industry, more child pornography is distributed noncommercially through pedophile

7. Los Angeles Police Dep't, *supra* note 3, at 2, 1984 Hearings at 131.

8. L. MARTIN & J. HADDAD, WE HAVE A SECRET 11, 17-25 (1982).

9. *Id.* at 89-103.

10. Child pornographers, those who collect, distribute, sell, or trade materials, like pedophiles, are also a varied group.

Only rarely does the child pornographer measure up to the stereotype image of the "dirty old man." Many of those displaying an interest held respected positions within their communities and have been able to conceal their interest in child pornography for years. There have been the professional dealers identified in our investigations, but there have also been clergymen, teachers, psychologists, journalists and businessmen.

*Exploited and Missing Children: Hearings on S. 1701 Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 46 (1982) [hereinafter 1982 Hearing] (statement of Charles P. Nelson, Assistant Chief Postal Inspector, United States Postal Inspection Service). See generally, Lanning, *Collectors*, in CHILD PORNOGRAPHY AND SEX RINGS, *supra* note 3, at 83; Hartman, Burgess & Lanning, *Typology of Collectors*, *id.* at 93.

11. Lanning, *Collectors*, in CHILD PORNOGRAPHY AND SEX RINGS, *supra* note 3, at 85-86. "[I]n a photograph, a 9-year old boy stays young forever." *The Use of Computers to Transmit Material Inciting Crime: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 52 (1985) (statement of Special Agent Kenneth V. Lanning, Fed. Bureau of Investigation) [hereinafter 1985 Crime Hearing].

networks.<sup>12</sup>

Child pornography is available in magazines, "loops" (short films), photographs, slides, playing cards, and videocassettes.<sup>13</sup>

Child pornography contributes to the sexual exploitation of children in several ways. At the time it is produced, child pornography creates harm to the children who appear in the material. The sexual abuse inflicted by the pedophile is compounded by the fact that the children must live with the knowledge that the child pornography will be circulated for years to come.<sup>14</sup> Additionally, child pornography may be used to coerce the child to continue the relationship and to maintain secrecy. "The pedophile threatens to show the pictures to parents, friends, or teachers if the child reveals their secret."<sup>15</sup>

Child pornography may also be used by pedophiles to seduce their victims and produce more child pornography.<sup>16</sup> "One of the prime uses of child pornography is to display the material to lower the child's inhibition; to show the child that other children are engaged in similar activity and that it's a normal and natural thing and also it encourages the child to pose for the pedophile."<sup>17</sup> The pedophile can then use this new child pornography to seduce still other children; the process is seemingly endless.

#### B. LEGISLATIVE AND JUDICIAL RESPONSES

Congress has addressed the problems of child sexual exploitation and pornography by enacting legislation to make criminal the production, distribution, transportation, and exchange of visual depictions of children under eighteen years of age, engaged in or assisting in sexually explicit conduct, which moves in interstate or foreign commerce, or is mailed.<sup>18</sup> The Supreme Court has discussed these problems extensively in *New York v. Ferber*.<sup>19</sup> In addition, virtually all of the states have enacted legislation to deal with child sexual exploitation and pornography.<sup>20</sup>

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12. 1984 Hearings, *supra* note 3, at 46 (testimony of William Dworin, Los Angeles Police Dep't).

13. 1977 S. REP., *supra* note 2, at 6, 1978 U.S. CODE CONG. & ADMIN. NEWS at 43.

14. 1985 Crime Hearing, *supra* note 11, at 48-49 (statement of Special Agent Kenneth V. Lanning, Fed. Bureau of Investigation).

15. *Id.* at 53.

16. 1984 Hearings, *supra* note 3, at 45-46 (testimony of William Dworin, Los Angeles Police Dep't).

17. *Id.* See also L. MARTIN & J. HADDAD, *supra* note 8, at 85.

18. 18 U.S.C. §§ 2251-2255 (Supp. II 1985).

19. 458 U.S. 747 (1982).

20. NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, AMERICAN BAR ASSOCIATION, CHILD SEXUAL EXPLOITATION—BACKGROUND AND LEGAL ANALYSIS 30-38 app., reprinted in *Exploitation of Children: Hearing on Problems of Ex-*

Congress first considered these problems in 1977. As a result of their hearings and investigations, the Senate concluded:

That child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.

That the use of children as prostitutes or as the subjects of pornographic materials is very harmful to both the children and the society as a whole.

That such prostitution and the sale and distribution of such pornographic materials are carried on to a substantial extent through the mails and other instrumentalities of interstate and foreign commerce, and

That existing federal laws dealing with prostitution and pornography do not protect against the use of children in these activities and that specific legislation in this area is both advisable and needed.<sup>21</sup>

As a result, the Protection of Children Against Sexual Exploitation Act of 1977 was passed.<sup>22</sup> This Act established criminal penalties for the production of visual depictions of children under sixteen years of age engaging in or assisting in sexually explicit conduct. It also extended the scope of the Mann Act<sup>23</sup> by prohibiting the transportation of juvenile males across state lines to engage in prostitution. Finally, the 1977 Act increased penalties for the commercial sale or distribution of obscene materials mailed or transported in interstate commerce, depicting sexually explicit conduct by children under sixteen.

In *New York v. Ferber* the Supreme Court announced that, like obscene materials, certain non-obscene child pornography would not be afforded first amendment protection.<sup>24</sup> The Court announced a four-part test for child pornography legislation. First, the prohibited conduct must be adequately defined. Second, the offense must be limited to visual depictions. Third, the visual depictions must be of sexual conduct by children whose age is specified. Additionally, the category of "sexual conduct" must be suitably limited and described. Finally, there must be "some element of scienter on the part of the defendant."<sup>25</sup> Applying this test, the Court stated: "[A] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not re-

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*exploited Children Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 1, 133-41 (1981) [hereinafter *1981 Hearing*].

21. 1977 S. REP., *supra* note 2, at 5, 1978 U.S. CODE CONG. & ADMIN. NEWS at 42-43.

22. The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-2253, 2423 (1982)) [hereinafter 1977 Act].

23. White-Slave Traffic (Mann) Act, ch. 2423, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424).

24. 458 U.S. 747, 765 (1982).

25. *Id.* at 764-65.

quired that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole."<sup>26</sup>

The Court linked distribution of child pornography to the harms created by child sexual exploitation in two ways.<sup>27</sup> First, child pornography creates a permanent product, preserving the original harm to the child beyond the initial act of production through the reproduction and circulation of the product. Second, the control of child pornography itself depends on the eradication of its networks of distribution. The Court observed that:

While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.<sup>28</sup>

In response to the *Ferber* ruling, Congress, in 1984, considered amendments to the 1977 Act. One of the major problems with the 1977 Act was the absence of criminal penalties for persons who were producing, trading, and exchanging child pornography for non-commercial purposes.<sup>29</sup> The United States Postal Inspection Service reported on the two available prosecutorial methods used when a non-commercial exchange of child pornography is detected.<sup>30</sup> The federal postal obscenity law could be used to prosecute the offenders directly.<sup>31</sup> But in order to reduce federal prosecutorial expenditures and to avoid charges of selective prosecution, the Department of Justice has established guidelines to identify which cases should be prosecuted.

These guidelines call for the Federal prosecution of child pornography offenders under title 18, United States Code, section 1461, when a combination of the following factors exist: More than three seizures over the past years; a large quantity of child pornography imported at one time; an arrest history of crimes against children; known membership in a family sex group; employment involving children; photographs depicting the recipient involved in sexual activity with children; correspondence with other pedophiles or undercover agents relating to sexual involvement with children; and, distribution of material. With

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26. *Id.* at 764. The Court offered this analysis to differentiate the child pornography test from the obscenity test announced in *Miller v. California*, 413 U.S. 15 (1973).

27. *Ferber*, 458 U.S. at 759.

28. *Id.* at 760.

29. HOUSE COMM. ON THE JUDICIARY, CHILD PROTECTION ACT OF 1984, H.R. REP. NO. 536, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 492, 493 [hereinafter 1984 H.R. REP.].

30. *Id.* at 17, 1984 U.S. CODE CONG. & ADMIN. NEWS at 508 (statement of Charles R. Clauson, Assistant Chief Postal Inspector for Administration).

31. 18 U.S.C. § 1461 (1982).

these guidelines, only a handful of our noncommercial cases have been prosecuted federally.<sup>32</sup>

Alternatively, the information could be shared with state and local governments. If a state or a local law has been violated, these laws would be used by the local authorities to prosecute the offenders.<sup>33</sup>

A second major problem was the law's apparent inability to reach people who were reproducing existing child pornography.<sup>34</sup> The United States Postal Inspection Service observed that "once an item of child pornography begins to circulate, it is reproduced for further distribution, time and time again."<sup>35</sup> The current law appeared to require the direct participation of the producer with the visually depicted child; the reproducer, being one process removed, seemed to escape liability.<sup>36</sup>

The Child Protection Act of 1984 was designed to address these and other problems.<sup>37</sup> Its passage produced the following changes: the criminal penalties were raised; the "commercial purpose limitation" was removed to allow prosecution of individuals who produce and exchange child pornography without commercial motivation; the age range of protected children was increased to eighteen years; reproduction of child pornography was identified as a new offense; and, the obscenity requirement for the production of visual depictions of sexually explicit conduct by children was deleted. Simulated sexually explicit conduct which posed no possibility of harm to the child and which possessed redeeming social, literary, education, scientific, or art value was excluded from prosecution.<sup>38</sup>

Recent investigations have revealed that computers are being used to carry out the sexual exploitation of children. Since the 1984 Act does not directly address the use of computers, legislation may be necessary to ensure that criminal penalties are extended to computer-assisted child pornography and sexual exploitation.

### C. USE OF COMPUTERS IN CHILD SEXUAL EXPLOITATION AND CHILD PORNOGRAPHY

Computers can and are being used in a variety of ways to facilitate

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32. 1984 H.R. REP., *supra* note 29, at 17, 1984 U.S. CODE CONG. & ADMIN. NEWS at 508 (statement of Charles R. Clauson, Assistant Chief Postal Inspector for Administration).

33. *Id.* Between 1980 and 1982, 53 of the United States Postal Inspection Service's 77 child pornography arrests were for state and local law violations. *Id.*

34. *Id.* at 3, 1984 U.S. CODE CONG. & ADMIN. NEWS at 494.

35. *Id.* at 17, 1984 U.S. CODE CONG. & ADMIN. NEWS at 508 (statement of Charles R. Clauson, Assistant Chief Postal Inspector for Administration).

36. *Id.* at 3, 1984 U.S. CODE CONG. & ADMIN. NEWS at 494.

37. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251-2255 (Supp. II 1985) [hereinafter 1984 Act]).

38. *Id.*



communication among child pornographers, pedophiles, and their victims.<sup>39</sup> At a basic level, computers can be used as storage devices, performing functions such as: a file card system of information of child victims or other pedophiles; a diary of real and fantasized sexual experiences; and/or a catalog of child pornography. By adding a modem and a computer program, the computer can become a direct line of communication between two or more people.<sup>40</sup> Communication may take the form of a telephone-like discussion or a billboard listing. The billboard allows computer operators to establish a forum where their interest in children can be posted, and information can be exchanged with others who have access to the billboard.<sup>41</sup> In addition to the above communication functions, computer users may also have access to electronic mail and teleconferencing.<sup>42</sup> Finally, by subscribing to a legitimate computer service (e.g., CompuServe, The Source), the computer can be linked to a communications network.

Electronic mail and teleconferencing differ from the previously described communication functions in that they allow the user to screen out other users. An electronic letter can be sent either to a specifically designated recipient's computer screen, or on paper to the recipient's address.<sup>43</sup> A teleconference can be set up so that only specific users have access. The conference program can also be written to limit the materials that the individual participants may access.<sup>44</sup>

Computers have enhanced the possibility of greater organization and communication among the child pornography and exploitation subculture. Computers provide a method of communication which can be both private and anonymous. These desirable features allow a pedophile, collector, or distributor to establish contact and to develop a

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39. "In a bizarre, and apparently legal computer game, thousands of pedophiles nationwide are using home computers to discuss ways to woo children, advertise their preferences, exchange lists of 'available' victims and arrange meetings to trade pornography and even youngsters." Kraft, *Computer Game Helps Pedophiles Woo Children for Sex*, Los Angeles Times, Sept. 16, 1985, § 1, at 3, col. 2.

40. See generally W. COOK, *THE JOY OF COMPUTER COMMUNICATION* (1984); A. GLOSSBRENNER, *THE COMPLETE HANDBOOK OF PERSONAL COMPUTER COMMUNICATIONS* (1983).

41. *Computer Pornography and Child Exploitation Prevention Act, S. 1305: Hearing Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 28 (1985) [hereinafter *1985 Computer Hearing*] (testimony of Jack D. Smith, General Counsel, Federal Communications Commission). See also North American Man-Boy Love Association Member, *A Proposal for a Computer Bulletin Board*, 4(10) NAMBLA Bulletin, Dec. 1983, reprinted in *1985 Crime Hearing*, supra note 11, at 62-63 (discussing the establishment of a computer bulletin board to serve as a forum for NAMBLA views and to provide NAMBLA members with the opportunity to express their opinions and to share stories and poems with each other).

42. See generally A. GLOSSBRENNER, supra note 40, at 46-123, 208-27.

43. W. COOK, supra note 40, at 64-66.

44. *Id.* at 155.

relationship without the need to exchange names or other identifying information.

One suspect told his arresting officer that he would pursue his hobby and sexual appetites by using his home computer and his subscription to COMPUSERVE to identify others with a similar sexual preference for children through one of COMPUSERVE'S interactive discussion forums and then communicate directly with them through COMPUSERVE'S electronic mail capability. He would then exchange information on methods used to attract children, and if the correspondent resided in close geographical proximity, the names of willing children.<sup>45</sup>

The computer also provides a method of screening out law enforcement undercover agents if the user is sufficiently wary. Since users may conduct their business in relative anonymity, law enforcement agents often assume aliases in their attempts to make connections with pedophiles. In order to determine whether a contact is an undercover officer, a pedophile will often ask the contact to send a piece of child pornography. The more sophisticated pedophiles are aware that the Department of Justice will not allow undercover officers to use child pornography as bait.<sup>46</sup> Therefore, a refusal to exchange materials serves as a warning of law enforcement involvement. Additionally, the more organized groups also offer a feature called the "sting of the week," where the identity of an undercover officer is revealed.<sup>47</sup>

While the actual extent of the problem of computer-assisted child sexual exploitation and pornography is unknown due to the clandestine nature of the communications, Senator Tribble was so concerned about the problem that he introduced Senate Bill 1305.<sup>48</sup> Because existing legislation may not be construed by the courts to cover this problem, this Bill specifically addresses and makes criminal this type of computer use.<sup>49</sup>

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45. *1985 Computer Hearing, supra* note 41, at 3 (statement of Robert J. Humphreys, Chief Deputy Commonwealth's Attorney, Virginia Beach, Va.).

46. Interview with William Dworin, Detective, Los Angeles Police Dep't, Juvenile Division, Sexually Exploited Child Unit, in Los Angeles, Cal. (Jan. 17, 1986).

47. *Id.*

48. 99th Cong., 1st Sess., 131 CONG. REC. S8241-44 (daily ed. June 17, 1985) (statement of Senator Tribble).

49. Prior to introducing the Bill, Senator Tribble attempted to ascertain whether existing federal legislation could be used to prosecute persons engaged in computer-assisted child pornography and sexual exploitation of children. He sought clarification from the Federal Communications Commission and the Department of Justice. The lack of assurance of prosecution, due to the absence of court cases on the subject, resulted in the introduction of S. 1305. 131 CONG. REC. S8242-43 (daily ed. June 17, 1985) (letters between Senator Tribble and the Federal Communications Commission and between Senator Tribble and the Department of Justice).

## II. CONFLICTING INTERESTS AFFECTED BY LEGISLATION

Legislation to make criminal the use of computers to further child sexual exploitation and pornography is needed to extend the protection afforded by the Child Protection Act of 1984.<sup>50</sup> Such legislation must be responsive, not only to the government's compelling interest in the protection of the nation's children, but also to the legitimate interests of both computer users and computer communication businesses.

### A. GOVERNMENT INTEREST IN PROTECTION OF CHILDREN

The government has expressed its strong interest in protecting the nation's children from child sexual exploitation and pornography by enacting legislation to criminalize these acts.<sup>51</sup> In *New York v. Ferber*, the Supreme Court discussed the resulting harms suffered by children from such acts.<sup>52</sup> The Court, in discussing the effects on the child victims of sexual abuse, noted: "[T]he use of children as subjects of pornographic materials is harmful to the psychological, emotional and mental health of the child."<sup>53</sup> Children may also suffer self-degradation as a result of their participation in sexual acts with the pedophile. They may feel robbed of their childhood. Children may also suffer feelings of rejection and lack of respect for themselves as persons when the pedophile loses interest in them as they grow older.<sup>54</sup> The children may have difficulty establishing healthy relationships. They may suffer from sexual dysfunction, and may become pedophiles themselves.<sup>55</sup>

These harms are multiplied when the pedophiles (or commercial producers) visually record the children's sexual acts, and the children thereby become victims of child pornography. The *Ferber* court observed that child pornographic materials are "a permanent record of the child's participation and the harm to the child is exacerbated by their circulation."<sup>56</sup> The knowledge that the material is in circulation and the fear of exposure create ongoing and long-term emotional stresses that continue into adulthood.<sup>57</sup> The *Ferber* court also noted that pursuing only the producers of child pornography would not stop the sexual exploitation of children; criminal penalties for the distribution ("selling, advertising, or otherwise promoting the product") of these materials were also needed "to dry up the market."<sup>58</sup>

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50. See 1984 Act, *supra* note 37, and accompanying text.

51. 18 U.S.C. §§ 2251-2255 (Supp. II 1985).

52. 458 U.S. 747 (1982).

53. *Id.* at 758.

54. L. MARTIN & J. HADDAD, *supra* note 8, at 107-12.

55. *Ferber*, 458 U.S. at 758 n.9.

56. *Id.* at 759.

57. *Id.* at 759 n.10.

58. *Id.* at 760.

Computers can be used to advertise, solicit, and promote both child sexual exploitation and pornography. Additionally, some computers can be used to transmit visual images and can thereby be used to transmit the pornography itself. The government clearly has a compelling interest in curtailing such behavior.

The government has an interest in suppressing speech which might persuade its audience to take illegal action. In *Schenck v. United States*, Justice Holmes stated the criterion for determining when such speech would be unprotected by the first amendment.<sup>59</sup> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>60</sup>

This standard was refined in *Brandenburg v. Ohio*.<sup>61</sup> The Court differentiated between "mere advocacy," which was protected speech, and "incitement to imminent lawless action," which was unprotected speech. The factors to be evaluated in determining whether "incitement to imminent lawless action" is present are the likelihood of producing the harm and the significance of the harm.<sup>62</sup>

Computers can be used to exchange stories about child conquests and to exchange information about child victims.<sup>63</sup> It is unlikely that such an exchange of information would qualify as an "incitement to imminent lawless action." Since pedophiles operate through seduction, they must meet the child victim and establish a relationship before any sexual abuse occurs.<sup>64</sup> Thus, while the significance of the sexual abuse is enormous, the probability of immediate harm is low, so the transmission probably would be characterized as a mere exchange of information. Computers can also be used as interactive discussion forums and as billboards to advocate sex with minors. Again, although the harm is great, the likelihood of immediate harm is low.

Computers can be used to make direct contact with children. Adult sexual computer services are generally advertised and made available only to consenting adults. These services offer protection such as requiring written affirmation of adult status, credit card billing, and personal passwords.<sup>65</sup> Some messages, however, are being transmitted to

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59. 249 U.S. 47 (1919).

60. *Id.* at 52.

61. 395 U.S. 444 (1964).

62. *Id.* at 447.

63. 1985 *Computer Hearing*, *supra* note 41, at 49 (statement of Paul M. Hartman, United States Postal Inspection Service).

64. *See supra* note 4 and accompanying text.

65. 1985 *Computer Hearing*, *supra* note 41, at 74 (statement of Barry Lynn, American Civil Liberties Union).

child computer users. The ability of children to tap into computer communications ("hacking") is well known. "They see hacking as a game. They might see a sexual freedom message and communicate with the sender because they are curious."<sup>66</sup> The government has a strong interest on behalf of children and their parents in preventing the harms that may inure from such contact (*e.g.*, advertisements for child pornography; discussions of child-adult sex; solicitation of sex with the child; exposure to child pornography).

In *Rowan v. Post Office Department*, the Supreme Court balanced the right to be left alone with the right of advertisers to communicate and held:

In effect, Congress has erected a wall—or more accurately permits a citizen to erect a wall—that no advertiser may penetrate without his acquiescence. . . . Nor should the householder have to risk that offensive material come into the hands of his children before it can be stopped.

We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even "good" ideas on an unwilling recipient.<sup>67</sup>

Parents clearly have a strong interest in preventing advertisements about child-adult sex and child pornography from reaching their children through their computer terminals.

In *Ginsberg v. New York*,<sup>68</sup> the Supreme Court discussed the justifications for limiting the availability of sex materials to individuals under age seventeen, as provided by a New York statute.<sup>69</sup>

First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.<sup>70</sup>

The state also has an independent interest in the well-being of its youth.<sup>71</sup> But the government's interest in protecting children must be balanced against the adult's freedom of expression rights. In *Butler v. Michigan*, the Court found unconstitutional a statute forbidding the sale of materials tending to corrupt minors.<sup>72</sup> The end result of such regulation, according to the Court, would be to "reduce the adult population of Michigan to reading only what is fit for children."<sup>73</sup> But in

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66. Interview with William Dworin, *supra* note 46.

67. 397 U.S. 728, 738 (1970).

68. 390 U.S. 629 (1968).

69. N.Y. PENAL CODE § 484(h) (McKinney 1965).

70. 390 U.S. at 639-40.

71. *Id.* at 640.

72. 352 U.S. 380 (1957).

73. *Id.* at 383.

*Federal Communications Commission v. Pacifica*, the Court held that when alternative methods of enjoying the material were available (e.g., buying the record), the government could limit its broadcast on the radio.<sup>74</sup> The Court reasoned that because radio has a "uniquely pervasive presence in the lives of all Americans,"<sup>75</sup> and because radio is "uniquely accessible to children, even those too young to read,"<sup>76</sup> this limitation was justified. While computer use cannot yet claim a "uniquely pervasive presence," the "accessibility" of computers to children is increasing. Children are being trained to use computers at school. Furthermore, in an effort to insure that their child can successfully compete in the educational setting, more and more parents are purchasing home computers for their children. Consequently, parents have a strong interest in preventing computer transmission of information about adult-child sex and child pornography.<sup>77</sup>

#### B. INDIVIDUAL INTEREST IN FREEDOM OF EXPRESSION AND PRIVACY

The individual computer user has a first amendment freedom of expression interest in communicating with other users. Computers can be used in much the same manner as newspapers, advertisements, letters, telegraphs, and telephones to transmit information. "It is now well established that the Constitution protects the right to receive information and ideas."<sup>78</sup> In *Cohen v. California*, the Supreme Court discussed the constitutional context in which it decides freedom of speech cases.<sup>79</sup>

The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.<sup>80</sup>

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74. 438 U.S. 726, 748 (1978).

75. *Id.* at 748.

76. *Id.* at 749.

77. A similar issue has been raised by Dial-a-Porn. Dial-a-Porn is a telephone service which provides prerecorded messages "describing actual or simulated sexual activity apparently in explicit terms." Note, *Telephone Pornography: First Amendment Constraints on Shielding Children from Dial-a-Porn*, 22 HARV. J. ON LEGIS. 503 (1983). Dial-a-Porn systems have protections similar to those used by adult sexual computer services. Attempts to promulgate regulations which would protect children are ongoing. Regulations attempting to limit the time at which such services are available have been found unconstitutional. *Carlin Communications, Inc. v. Federal Communications Comm'n*, 749 F.2d 113, 114 (1984).

78. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

79. 403 U.S. 15, 24 (1971).

80. *Id.* at 24.

The Court, while recognizing the importance of free expression, has carved out certain exceptions. In *Roth v. United States*, Justice Brennan noted:

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.<sup>81</sup>

This exception for obscenity was originally presented in *Chaplinsky v. New Hampshire*. "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>82</sup>

In *New York v. Ferber*, the Supreme Court identified another exception to the right of free expression.<sup>83</sup> The Court held that a New York statute prohibiting child pornography "sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection."<sup>84</sup> Thus, a user's First Amendment right of free expression in computer use is limited by these exceptions.

Individual users also have a constitutional privacy interest in using computers for personal purposes in their own homes. In *Stanley v. Georgia*, the Supreme Court held that individuals have the right to read or view obscene materials in their own homes.<sup>85</sup> Justice Marshall noted that:

If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.<sup>86</sup>

Computers may be used to store information and display it for viewing in the same way that books and films may be viewed. The same expectation of privacy may arise for such computer use as has been protected by the ruling in *Stanley*.

The right of privacy has been narrowly construed, however, and

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81. 354 U.S. 476, 484 (1957).

82. 315 U.S. 568, 572 (1942) (cited in *Roth*, 354 U.S. at 485 and *New York v. Ferber*, 458 U.S. 747, 754 (1982).

83. 458 U.S. at 747.

84. *Id.* at 765.

85. 394 U.S. 557 (1969).

86. 394 U.S. at 565.

would probably not be extended to any private transmissions of computer stored, unprotected material. In *Paris Adult Theater I v. Slaton*,<sup>87</sup> Justice Burger differentiated the right to privacy guaranteed by the fourteenth amendment from that accorded by *Stanley v. Georgia*.

This privacy right [the fourteenth amendment right] encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing . . . .

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle . . . . Moreover, we have declined to equate the privacy of the home relied on in *Stanley* with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes.<sup>88</sup>

In other words, while individuals have a constitutional right to read or view obscene material within the privacy of their own homes, the Court has not recognized a concomitant right to receive or distribute such material. When a computer user transmits unprotected materials by computer, those materials can be viewed as going outside the home, exceeding the zone of protected privacy articulated in *Stanley*.

### C. COMPUTER COMMUNICATION BUSINESS INTEREST IN FREE TRANSMISSION AND INFORMATION

Computer communication businesses ("CCBs"), such as CompuServe, The Source, and MCI Mail, provide a wide range of computer services to their subscribers for a fee. CCBs have a strong interest in operating without unreasonable government interference. While a CCB may provide services similar to the press, transmitting news and information,<sup>89</sup> the primary services used by pedophiles and child pornographers are the billboards, mail, conferencing, and interactive forums.<sup>90</sup> When providing the latter services, a CCB acts like a telephone, telegraph, mail, or cable service. In fact, to make its transmissions, a CCB uses these and similar mechanisms, which are instruments of interstate commerce or are common carriers. It is well accepted that Congress has sweeping powers to regulate such interstate commerce.<sup>91</sup> The Federal Communications Commission (FCC) claims

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87. 413 U.S. 49 (1973).

88. 413 U.S. at 65-66.

89. See W. COOK, *supra* note 40, at 62-80 (Services such as United Press International Wires, Dow Jones News/Retrieval, Reader's Digest Almanac, weather reports, and an encyclopedia are provided.)

90. See generally, 1985 Computer Hearing, *supra* note 41.

91. A discussion of the Commerce clause is beyond the scope of this paper.



the authority to regulate computer communication, but has chosen not to do so, preferring to identify a special group of "enhanced communication" carriers, subject to deregulation.<sup>92</sup> In any case, a CCB has a strong interest in avoiding criminal liability for the misuse of its services by its subscribers.

The question of whether a service provider incurs criminal liability for misuse of its services by its users was raised by *In re Peter F. Cohalan and the County of Suffolk, New York v. New York Telephone Company*.<sup>93</sup> In *Cohalan*, the New York Telephone Company was charged with knowingly permitting a "dial-a-porn"<sup>94</sup> service to use its lines, a violation of 47 U.S.C. § 223.<sup>95</sup> While the FCC considered the complaint, Congress considered amendments to section 223. Although the statute itself was not amended to remove liability from the common carrier, Congress' intent to do so was expressed by the bill's author. "[I]t is not the intent of Congress that a common carrier be prosecuted under this amendment when it is otherwise abiding by the law . . ."<sup>96</sup> Such a statement from Congress is a desirable adjunct to any bill which would similarly regulate computer service providers.

If the government decides to impose criminal liability on CCBs for allowing their services to be used to transmit material which could be considered material resulting from or leading to child sexual exploitation and pornography, then the CCB will be faced with three options. The CCB could do nothing and risk incurring liability; the CCB could eliminate these services and avoid liability altogether; or the CCB could monitor these services in an attempt to comply with government's regulatory requirements, and thereby continue providing the services. Monitoring the services, however, may invade the subscribers' expectations of privacy,<sup>97</sup> would be extremely costly and time consuming,<sup>98</sup> and would place the CCB in several unwanted and undesirable quasi-

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92. *In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC Rep. 384, 423 (1980).

93. FCC file No. E-83-14 (Mar. 31, 1983). This case is discussed in detail in *In re* Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, FCC 86-322, Docket No. 83-989 (1986) (WESTLAW, FCOM file).

94. *See supra* note 77.

95. Amendment to the Communications Act of 1934, Pub. L. No. 90-299, 82 Stat. 112 (1968).

96. 129 CONG. REC. S16,867 (daily ed. Nov. 18, 1983) (statement of Sen. Tribble).

97. 1985 *Computer Hearing*, *supra* note 41, at 29 (statement of Jack D. Smith, General Counsel, Federal Communications Comm.) (unclear whether privacy protection applies to computer users).

98. *Id.* at 68-70 (statement of Thomas S. Warrick, President, Washington Apple Pi, Ltd.).

governmental roles.<sup>99</sup>

One of the most desirable features of the computerized mail, conferencing, bulletin boards, and interactive forums is the ability to limit the participants so that communication can be carried on in private. Such services are valued by pedophiles, child pornographers, and other subscribers precisely because they allow these individuals to conduct private communication in relative anonymity. If CCBs are forced to monitor these services, the privacy value of the services will be destroyed.<sup>100</sup> Such monitoring will also be extremely costly and time consuming because CCBs would be forced to hire additional workers to do the monitoring. Finally, such monitoring would force CCBs to assume police-like duties, rendering them a civilian extension of law enforcement.

Even if a CCB were willing and able to monitor its transmissions, it lacks the requisite knowledge and expertise to referee in the area of freedom of expression. In *Blunt v. Rizzi*, the Supreme Court rejected the Postmaster General's congressionally granted power to rule on obscenity, finding that only the judiciary has "the necessary sensitivity to freedom of expression."<sup>101</sup> A CCB operator or monitor can be expected to be even less qualified than the Postmaster General. Forcing a CCB to referee its transmissions requires the CCB to perform quasi-judicial duties. Making such judgments would also be extremely costly and time-consuming. While the same workers could be employed to monitor and judge, the final decisions about questionable material are likely to require an executive decision. Such a procedure could result in the delay of legitimate transmissions, thus subjecting the CCB to potential civil liability. Alternatively, if the CCB were to give notice of the potential for delay, the speed value of computer transmissions would be destroyed, and the subscribers may choose to take their business elsewhere.

### III. IMPACT OF PROPOSED LEGISLATION

#### A. THE COMPUTER PORNOGRAPHY AND CHILD EXPLOITATION ACT OF 1985

Congress has responded to the growing concern over computer-assisted child sexual exploitation and pornography by entertaining legisla-

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99. *Id.* at 52 (statement of George M. Minot, Senior Vice President, CompuServe, Inc.).

100. Some monitoring of bulletin boards and forums is already provided by CCBs. CCBs investigate complaints from users by contacting the senders of offensive and undesirable messages and attempting to discourage the action. *Id.* at 50-51. "If the situation persists, we take appropriate corrective action." *Id.* at 51.

101. 400 U.S. 410, 418 (1971).

tion to criminalize these activities. S. 1305, the Computer Pornography and Child Exploitation Prevention Act of 1985, was introduced by Senator Tribble on June 17, 1985.<sup>102</sup> S. 1305 would "establish criminal penalties for the transmission by computer of obscene matter, or by computer or by other means, of matter pertaining to the sexual exploitation of children, and for other purposes."<sup>103</sup> S. 1305 would amend 18 U.S.C. § 1462 by adding "any obscene, lewd, lascivious, or filthy writing, description, picture, or other matter entered, stored, or transmitted by or in a computer"<sup>104</sup> to those items whose carriage in foreign or interstate commerce is forbidden.<sup>105</sup> Knowingly permitting computer services to be used for such transmission would also be made criminal. In addition, definitions of "computer," "computer program," "computer service," and "computer system" are provided.<sup>106</sup>

S. 1305 would next amend 18 U.S.C., § 2251<sup>107</sup> to prohibit knowing entry or transmission by a computer, or making, printing, publishing, or reproducing by any other means:

(1) any notice, statement or advertisement; or

(2) any minors' name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any minor, or the visual depiction of such conduct, shall be punished . . . , if such person knows or has reason to know that such [items 1 and 2] will be transported in interstate or foreign commerce or mailed, or if such information has actually been transported in interstate or foreign commerce or mailed.<sup>108</sup>

Knowingly permitting or causing computer services to be used for such entry and transmission would also be made criminal.<sup>109</sup>

S. 1305 would also amend 18 U.S.C. § 2252<sup>110</sup> by prohibiting knowing entry into or transmission by a computer, or making, printing, publishing, or reproducing by other means of a notice, statement, or advertisement to buy, sell, receive, exchange, or disseminate any visual depiction that is a result of the use of a minor in sexually explicit conduct, if the perpetrator knows or has reason to know that this material will be transported in interstate or foreign commerce.<sup>111</sup> Knowingly permitting or causing computer services to be used for such entry and

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102. S.1305, *supra* note 1, 131 CONG. REC. at S 8244.

103. *Id.* at S8239.

104. S. 1305, *supra* note 1, 131 CONG. REC. at S8244, § 2.

105. 18 U.S.C. 1462 (Supp. II 1985).

106. *Id.*

107. Supp. II 1985.

108. S. 1305, *supra* note 1, 131 CONG. REC. at S8244, § 3.

109. *Id.*

110. Supp. II 1985.

111. S. 1305, *supra* note 1, 131 CONG. REC. at S8244, § 4.

transmission would also be made criminal.<sup>112</sup>

Finally, S. 1305 would amend 18 U.S.C. § 2255<sup>113</sup> by providing a definition of "computer."<sup>114</sup>

#### B. CRITIQUE OF S. 1305

At the senate hearing which followed the proposal of S. 1305, reactions to the bill ranged from advocacy of its passage with minor modifications to concern over the potential liability accruing to computer communication businesses to advocacy of its total rejection on freedom of expression grounds.<sup>115</sup> The proposed amendments to sections 1462, 2251, and 2252 of Title 18 are designed to impose criminal penalties on individuals who use computers and computer services, programs and systems to further the sexual exploitation of children and the production and dissemination of child pornography.<sup>116</sup>

S. 1305 would impose criminal liability for transmitting, printing, publishing, reproducing, and distributing in foreign and interstate commerce information concerning the purchase, sale, exchange, solicitation, distribution, and production of child pornography, and for the solicitation or offer of sexually explicit conduct of or with a child.<sup>117</sup> Such provisions extend the protection provided by the Child Protection Act of 1984.<sup>118</sup> Such penalties are needed to deter child sexual exploitation by decreasing the demand for the products of such exploitation (*i.e.*, child pornography), and thereby the production, and by destroying the network of distribution.

S. 1305 also contains language that could create criminal liability in CCBs. The amendments create liability for "[w]hoever knowingly owns, offers, provides, or operates any computer program or service having reasonable cause to believe . . .,"<sup>119</sup> and for anyone who "knowingly causes or allows to be entered into or transmitted . . .,"<sup>120</sup> and for any person who "knows or has reason to know . . ."<sup>121</sup> that the statutorily prohibited material is moving in foreign or interstate commerce.

A CCB may be aware that statutorily prohibited material is being transmitted by its subscribers. For example, a CCB could receive a complaint from one of its users regarding the presence of some prohib-

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112. *Id.*

113. Supp. II 1985.

114. S. 1305, *supra* note 1, 131 CONG. REC. at S8244, § 5.

115. 1985 Computer Hearing, *supra* note 41.

116. S. 1305, *supra* note 1, 131 CONG. REC. at S8244.

117. *Id.* §§ 2-4.

118. 1984 Act, *supra* note 37.

119. S. 1305, *supra* note 1, 131 CONG. REC. at S8244, § 2.

120. *Id.* §§ 3, 4.

121. *Id.*

ited materials. If the complaint is specific, the CCB can track down the offender and remedy the situation, *e.g.*, convince the offender to cease the behavior or revoke access to CCB services. If the complaint is somewhat vague or widespread, the CCB has several choices. It can do nothing. If the government brings criminal prosecution, the CCB can attempt to show that it did not have sufficient knowledge to incur liability. At the other extreme the CCB could shut down its services and effectively go out of business. Alternatively, a prudent CCB may be forced to police its users in an effort to identify the offender(s). Such policing raises questions about the subscribers' expectations of privacy, and whether such monitoring could constitute an invasion of privacy.<sup>122</sup> Once the offenders are located, the CCB would be required to judge the content of the material transmitted. As discussed above, this is a costly and time consuming process which forces the CCB into a role it is untrained to perform. It could result in the delay in transmission of suspect but innocent messages and, thereby, lead to possible civil liability for the delay.<sup>123</sup> Such actions force CCBs to perform quasi-police and quasi-judicial functions, an unwanted and undesirable role for a private business.

S. 1305 should be redrafted to eliminate any language which would impose criminal liability on legitimate CCBs (as well as other common carriers, transportation and transmission mediums). These CCBs have no intention of promoting or furthering child pornography or sexual exploitation of children, but their services may be used to do so by any person accessing the services. The provision could be narrowed in several ways. A legislative definition could be incorporated into the bill which would explicitly exclude such companies from liability. The bill could include language requiring that the person know or have reason to know *and* intend that the computer be used for the prohibited purposes. Such language would insure that those CCBs who actually intend to transmit such information would be penalized and those who have no such intent would incur no criminal liability. In either case, any modifications should be accompanied by a statement of legislative intent to help clarify who is to be punished.

Alternatively, Congress could create a reporting requirement. A CCB would be required to report any transmissions that fell within certain specifically delineated guidelines, *e.g.*, images of children engaged in sexually explicit acts or advertisements for child pornography. Such a requirement is similar to the photo lab reporting laws, currently in effect in some states, which require a photo lab to report the existence of any suspicious images, *e.g.*, nude children, or children engaged in sexu-

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122. See *supra* notes 97-100 and accompanying text.

123. See *supra* note 100 and accompanying text.

ally explicit conduct, to its local police department.<sup>124</sup> To facilitate CCB reporting, Congress could establish a federal hotline to field complaints and channel investigations. The hotline could serve as a central clearinghouse for investigation and prosecution. A reporting requirement is a more reasonable and desirable method of curbing the abuse of CCBs by pedophiles because it returns the policing and judicial functions to the appropriate government authorities.

S. 1305 contains language that would create criminal liability for entering the prohibited materials into a computer.<sup>125</sup> Imposition of liability for merely entering information does not appear to be justified, even when qualified by the requirement that it be "for the purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any minor, or the visual depiction of such conduct"<sup>126</sup> or "to buy, sell, receive, exchange, or disseminate any visual depiction."<sup>127</sup> If either (1) the computer into which the information is entered is not linked to any other computer, or (2) the computer is linked to other computers, but the information is entered solely to create a personal record, then the information is not transmitted in foreign or interstate commerce. Entering information for storage into a personal computer is similar to keeping a diary, scrapbook, or file card system. If a copy of the stored information is transported in foreign or interstate commerce, *i.e.*, stored on software and transported, then the proposed amendment to 18 U.S.C. § 1462 will cover the transaction.<sup>128</sup>

Unless Congress intends to make criminal the possession of the prohibited materials, the proposed penalties for merely entering the material into a computer may represent an invasion of the computer user's privacy. The Court could decide this issue in two ways. On the one hand, the *Stanley v. Georgia* ruling might prohibit the imposition of criminal sanctions for mere possession.<sup>129</sup> The statute in *Stanley* was enacted to protect the individual's mind from the effects of obscenity, an interest that the Court found to be inconsistent with the first amendment.<sup>130</sup> The *Stanley* Court held that individuals have the right to read or view obscene materials in the privacy of their homes.<sup>131</sup> The Court also found that the evidence problem created in prosecution of distribu-

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124. *See, e.g.*, CAL. PENAL CODE § 11166 4(c) (West Supp. 1986); OKLA. STAT. ANN. tit. 21, § 1021.4 (West Supp. 1985).

125. S. 1305, *supra* note 1, 131 CONG. REC. at S8244, §§ 2-4.

126. *Id.* § 3.

127. *Id.* § 4.

128. *Id.* § 2.

129. 394 U.S. 557 (1969).

130. *Id.* at 565.

131. *Id.* *See supra* text accompanying notes 85-86.

tion of obscene materials cases was not a sufficient justification for infringement of these rights.

We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restrictions may not be justified by the need to ease the administration of otherwise valid criminal laws.<sup>132</sup>

Thus, the fundamental right of individual liberty would seem to require that the possession of child pornography would receive similar protection.

On the other hand, the Court in *New York v. Ferber* found a compelling state interest in the protection of children from sexual exploitation.<sup>133</sup> The Court attached liability to a distributor of child pornography based on the nexus between the sexual exploitation of children and the distribution of the product. The Court found that distribution offenses further the sexual exploitation of children and that offenders distribute products that are the result of such exploitation.<sup>134</sup> This reasoning could be extended to prohibit the possession of child pornography based on the nexus between sexual exploitation of children and purchase/exchange/possession of child pornography. Possession furthers the sexual exploitation of children by providing a market for products that are the result of such exploitation. Currently, seven states have laws making possession of child pornography a crime.<sup>135</sup> These laws should be evaluated to determine their effect on child sexual exploitation and pornography. A significant decrease in the occurrence of these activities would argue strongly for the passage of a federal possession statute. In any case, Congress should clarify its position with respect to possession of child pornography and related materials. Unless these acts are made criminal, the mere entry of these materials should not be a crime either.

The language of S. 1305 creates criminal penalties for "encouraging" sexual conduct of or with a minor or the visual depiction of such acts.<sup>136</sup> This language may raise a constitutional question, depending upon how the word "encouraging" is construed. In *Brandenburg v. Ohio*, the Supreme Court extended first amendment protection to

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132. 394 U.S. at 567-68.

133. 458 U.S. 747 (1982).

134. *Id.* at 758-60. See *supra* text accompanying notes 52-58.

135. ALA. CODE § 13A-12-192(b) (Michie Supp. 1985); MINN. STAT. ANN. § 617.247 (West Supp. 1985); NEV. REV. STAT. § 200.730 (1983); OHIO REV. CODE ANN. § 2907.321(A)(5) (Page Supp. 1984); OKLA. STAT. ANN. tit. 21 § 1021.2 (West Supp. 1985); TEX. PENAL CODE ANN. § 43.26 (Vernon Supp. 1986); WASH. REV. CODE ANN. § 9.68A.070 (West Supp. 1986).

136. S. 1305, *supra* note 1, 131 CONG. REC. at S8244 § 3.

speech constituting "mere advocacy" but excluded from protection speech constituting "incitement to imminent action."<sup>137</sup> "Encouraging" could be defined as advocating the prohibited conduct. While society in general may find such advocacy repugnant, it would appear to fall within the ambit of first amendment protection. If "encouraging" is defined to mean incitement to imminent lawless action, then such a provision would be constitutionally acceptable. Additional language should be added to clarify this intent. Whether such a provision would be necessary, however, is unclear. Pedophiles, who generally operate through a long seduction process, are not likely to act in a manner that would be characterized as incitement to imminent lawless action.<sup>138</sup> Child pornographers, who seek victims and persons to exchange materials with, are more likely to solicit, offer or facilitate rather than encourage imminent lawless action, and are covered under those provisions of S. 1305.<sup>139</sup>

S. 1305 contains a provision which establishes criminal penalties for the entry and transmission of "any minors' name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexually explicit conduct of or with any minor, or the visual depiction of such conduct. . . ."<sup>140</sup> This provision was drafted in response to the concern that pedophiles were using computers to store and transmit this information.<sup>141</sup> While such information provides an ugly record of real or imagined sexual exploitation of children, it is just that—a record.

When a pedophile enters and transmits such information, however, the receiver could be spurred into imminent lawless action: contacting and having sex with the identified child and/or producing visual depictions of such conduct. Under these conditions the provision is constitutionally acceptable under *Brandenberg*.<sup>142</sup> On the other hand, if the pedophile is merely exchanging information, (while perhaps fantasizing or bragging about such sexual conquests), and the receipt of such information does not lead to imminent lawless action, then such a provision would be constitutionally defective.<sup>143</sup> The receipt of such information may not create a nexus with child sexual abuse and pornography. As previously discussed, pedophiles may use such information solely to

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137. 395 U.S. 444 (1969).

138. See *supra* note 6 and accompanying text.

139. S. 1305, *supra* note 1, 131 CONG. REC. at S8244 § 3.

140. *Id.*

141. *Id.* at S8242.

142. 395 U.S. 444 (1969).

143. *Id.*



make contact and begin the long seduction process.<sup>144</sup> Child pornographers may also use the information, but only to solicit, offer, or facilitate child sexual exploitation and pornography—acts covered by the amendment to section 2251.<sup>145</sup>

A narrowly drafted provision, however, could deter the entry and transmission of the identifying information of the child victims and the resulting conduct of its recipients. Such a provision would need to clearly specify that criminal penalties would apply only when the entry and transmission of the identifying information led to imminent lawless action. This provision, however, raises a concern that law enforcement investigations could result in harassment of computer users and invasion of their privacy. The provision could be drafted to prevent such abuse. For example, law enforcement agents could be required to obtain a search warrant to gain entry into the suspect's home and seize the suspect's computer.<sup>146</sup>

The entry and transmission of minors' identifying information could also create liability for minors who are operating hotlines and dating services. A teenager dating service may provide the prohibited identifying information in an effort to match clients. Operators of such a service may know or have reason to know that their clients may engage in sexual conduct. If the clients use computer services to get to know each other, discussion about sex, which could be viewed as offers or solicitations of sex, could occur.<sup>147</sup> S. 1305 should be redrafted to eliminate criminal liability for legitimate teenage dating services and information hotlines. Requiring a person to know or have reason to know, and to intend that the computer be used for the prohibited purpose of child sexual exploitation and pornography would prevent the legislation from reaching legitimate users and services. While there is a possibility that adults will try to use the "cover" of a teenage dating service to disguise their true purposes, existing investigative procedures are adequate to deal with this problem. Again, Congress could issue a statement of legislative intent to clarify its desire not to restrict unduly the freedom of expression of the country's youth.

Finally, the law should be amended to include all methods of computer transmissions currently available. The law should also anticipate any possible methods of computer communication through both common carriers and private means, using existing and potential technolo-

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144. See *supra* note 6 and accompanying text.

145. S. 1305, *supra* note 1, 131 CONG. REC. at S8244 § 3.

146. Interview with William Dworin, *supra* note 46.

147. See generally *1985 Computer Hearing*, *supra* note 41, at 70-71 (statement of Thomas S. Warrick, President, Washington Apple Pi, Ltd.); *id.* at 78 (statement of Barry W. Lynn, Legislative Counsel, American Civil Liberties Union).

gies such as wire, radio, laser, and fiber optics.<sup>148</sup>

#### IV. CONCLUSION

The growing problem of computer-assisted child sexual exploitation and pornography demands legislative intervention to protect the nation's children from the resulting physiological, psychological, and emotional harms. The proposed legislation establishes criminal penalties for the use of computers in child sexual exploitation and pornography. With appropriate modifications, the bill can respond to the diverse interests of the government, computer user, and computer communication business.

*Patricia N. Chock*

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148. *Id.* at 29 (statement of Jack D. Smith, General Counsel, Federal Communications Comm.).

