Arguing an Attempted Rape Charge Within the Complex World of Pedophiles and Internet Chat Rooms

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ABSTRACT

As much as the Internet has advanced society in positive directions, it has also created complex issues for courts to try and unravel. The requirements for establishing attempted rape, specifically in cases dealing with minors, vary in different courts depending on statutes. The varying requirements make it difficult for prosecutors to charge defendants with attempted rape when cases involve solicitation over the Internet. Such a controversial topic involves many factors, including: the psychological state of the offender, the set-up arranged by law enforcement (if any), and the physical evidence involved. Psychology should be considered when drafting statutes relating to determining acts that constitute attempted rape of a minor when there has been previous solicitation. The standard that the Massachusetts Supreme Judicial Court (SJC) sets for a conviction of attempted rape of a minor is too high for the Commonwealth to prove, especially in the most common situation of solicitation of minors in today's society via the Internet. An adult traveling to meet a minor with condoms or to meet the mother of a four-year-old to discuss the fee for having sex with a child should be enough for a prosecutor to bring an attempted rape charge. How close does the SJC need the adult to be to committing the crime before a conviction

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of attempt is allowed? Do officers need to find someone on the force to pose as a minor and see how far the defendant will go? The SJC appears to require that the defendant get close to conviction for rape instead of attempt before they will allow the attempt charge when an undercover operation is involved.

I. INTRODUCTION

No one would say that inventing the Internet was a bad idea, but it did have unintended consequences in the realm of criminal activity.[1] Lately, the news has been filled with stories about identity fraud and hacking of personal information via the Internet.[2] Even before this latest surge of crimes relating to identity theft, a constant stream of information existed about the solicitation of minors over Internet chat rooms and police efforts to catch offenders.[3] These efforts were wildly publicized through the show *To Catch A Predator*.[4] The Association for the Treatment of Sexual Abusers (ATSA) is an organization dedicated to preventing sexual abuse and has

1. *See generally* Billy Henson et al., *Internet Crime*, *in* KEY ISSUES IN CRIME AND PUNISHMENT: CRIME AND CRIMINAL BEHAVIOR 155–68 (W. Chambliss ed., 2011), http://www.sagepub.com/haganintrocrim8e/study/chapter/handbooks/42347_10.2.pdf.

2. Ryan C.W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, MAYO CLINIC PROC., Apr. 2007, at 457, http://www.abusewatch.net/pedophiles.pdf ("Pedophilia has become a topic of increased interest, awareness, and concern for both the medical community and the public at large. Increased media exposure, new sexual offender disclosure laws, Web sites that list the names and addresses of convicted sexual offenders, politicians taking a 'get tough' stance on sexual offenders, and increased investigations of sexual acts with children have increased public awareness about pedophilia."); *see, e.g.*, Deirdre Fernandes, *Mass. Suspends Refunds over Fraud, ID Theft*, BOS. GLOBE (Feb. 6, 2015), http://www.bostonglobe.com/business/2015/02/06/turbotax-stops-processing-state-tax-returns-fraud-reports/dvPJbZC9G4tpzJx9ORsZcJ/story.html; *Jeb Bush's Emails Reportedly Expose 12,000 to Identify Theft*, MOHAVE VALLEY DAILY NEWS (Feb. 13, 2015, 1:14 AM), http://www.mohavedailynews.com/news/jeb-bush-s-emails-reportedly-expose-to-identity-theft/article_60f8f6e0-b358-11e4-bde9-8b50d62f1067.html; Ted Johnson, *President Obama Cites Sony Hack in Push for Cybersecurity Measures*, VARIETY (Feb. 13, 2015, 1:52 PM), http://variety.com/2015/biz/news/president-obama-cites-sony-hack-in-push-for-cybersecurity-measures-1201433677/.

3. *See Internet-Facilitated Sexual Offending*, ASS'N FOR TREATMENT OF SEXUAL ABUSERS (Sept. 7, 2010), http://www.atsa.com/internet-facilitated-sexual-offending. *See generally* U.S. DEP'T OF JUSTICE, THE NAT'L STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION (2010), http://www.justice.gov/psc/docs/natstrategyreport.pdf (discussing the threat child pornography poses to society and possible strategies for punishment and prevention).

4. *To Catch a Predator* (Dateline NBC) (using hidden cameras to catch sexual predators who thought they were meeting minors they had solicited over the internet).

defined the various types of sexual abuse that occurs via the Internet:

> Internet-related sexual offending includes different crimes: the largest number involve viewing, trading, or producing child pornography to be traded or posted on-line. Other offenders use the Internet to make contact with a child, adolescent or other vulnerable persons for sexual chat (electronic correspondence), exploitation such as convincing a child to view or produce pornographic images (e.g., having the child take and email a nude picture of him/herself), or to arrange face-to-face meetings to commit sexual offenses (sometimes referred to as "luring" or "traveler" offending). Both criminal justice and clinical data suggest there have been steady increases in the number of cases prosecuted and, subsequently, the number of clinical referrals for these behaviors.[5]

According to the ATSA, determining the risk internet-related sexual offenders may pose for direct contact offenses with victim(s) is a vital concern.[6]

With the introduction of this new avenue for sexual predators to find their victims, law enforcement and mental health professionals have had to develop a way to classify and prioritize offenders.[7] A variety of ways exist for law enforcement to conduct undercover investigations via the Internet,[8] and mental health professionals have done extensive research about how sex offenders operate.[9] According to the ATSA, more research is needed in order to better classify offenders and develop "effective treatment programs."[10] The Internet Crimes Against Children (ICAC) Task Force Pro-

5. *Internet-Facilitated Sexual Offending*, *supra* note 3.

6. *Id.*

7. *Id.*

8. Kimberly J. Mitchell et al., *Police Posing as Juveniles Online to Catch Sex Offenders: Is It Working?*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 241, 242 (2005), http://www.unh.edu/ccrc/pdf/jvq/CV82.pdf ("[I]nvestigations . . . include having investigators pose online as minors . . . as mothers of young children who are seeking men to 'teach' their children about sex . . . and when police find out youth have been solicited by adults. . . . Finally, investigators also pose online as child pornography traders or sellers.").

9. Janis Wolak et al., *Online "Predators" and Their Victims: Myths, Realities, and Implications for Prevention and Treatment*, 63 AM. PSYCHOLOGIST 111, 112 (2008), http://www.apa.org/pubs/journals/releases/amp-632111.pdf ("Most Internet-initiated sex crimes involve adult men who use the Internet to meet and seduce underage adolescents into sexual encounters. The offenders use Internet communications such as instant messages, e-mail, and chatrooms to meet and develop intimate relationships with victims.").

10. *Internet-Facilitated Sexual Offending*, *supra* note 3 ("Studies that have compared Internet-facilitated sex offenders to contact sex offenders have found consistent differences. These studies suggest Internet-facilitated sex offenders are less antisocial and are; therefore, less of a risk to commit a new offense or a probation violation. . . . These studies also suggest Internet-facilitated sex offenders are similar to or score lower than contact sex offenders on measures of clinical needs including offense-supportive attitudes and beliefs,

gram was created to "help state and local law enforcement agencies develop an effective response to cyber-enticement and child pornography cases."[11] Forty-nine states participate in the program.[12] Data from 2009, collected by the ICAC, reported 34,829 complaints, which resulted in 12,248 investigations.[13] Outside of this data are the undercover investigations set up by law enforcement.[14] One study showed that undercover investigations set up by law enforcement led to more arrests than those made of offenders who were actually soliciting minors.[15] Other differences were also found between the offenders including socio-economic status and prior criminal history.[16] This type of information and research should be included when drafting the law around what is required to convict an offender of attempted rape of a minor when Internet solicitation is involved, specifically with law enforcement posing as the victim. Having adequate knowledge of the psychology behind pedophilia in relation to Internet solicitation is important to ensure that adequate punishments are given to those offenders with the actual intent to commit the crime instead of allowing them to avoid the charge completely because they did not take a particular step towards the crime, which may be completely arbitrary.[17]

Part II of this Note discusses how the state and federal justice systems have evolved in order to prosecute Internet crimes against minors. Part III of this Note gives a brief history of proving attempt in the state of Massachusetts followed by Part IV, which provides the history in a few chosen states. Part V discusses the view that the laws in Massachusetts are too narrow and therefore allow for conduct that is unacceptable. Part VI suggests a reconstruction of attempt laws when specifically dealing with Internet crimes against minors. This Note concludes in Part VII.

intimacy deficits, and emotional problems.").

11. Mitchell et al., *supra* note 8, at 243.

12. *Id.*

13. U.S. DEP'T OF JUSTICE, *supra* note 3, at 17.

14. Wolak et al., *supra* note 9, at 119.

15. *Id.*

16. *Id.* at 119, 124–25 ("Those who solicited undercover investigators were somewhat older and more middle class in income and employment compared with those who solicited actual youths. They were also somewhat less likely to have prior arrests for sexual offenses against minors or for nonsexual offenses or to have histories of violence or deviant sexual behavior. However, both groups had equally high rates of child pornography possession (about 40%). . . . Moreover, one in eight offenders arrested in undercover operations had also committed crimes against actual youth victims, which were discovered as a result of the undercover operation.").

17. *See generally Internet-Facilitated Sexual Offending*, *supra* note 3 (discussing differences between internet facilitated sex offenders and contact sex offenders).

II. EVOLUTION OF THE JUSTICE SYSTEM TO HANDLE CHARGES STEMMING FROM SOLICITATION OF MINORS VIA THE INTERNET

A. Legislative History

Both criminal and civil sanctions may be imposed on persons convicted of Internet crimes against children.[18] As of 2009, the federal government, as well as California, Connecticut, Florida, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, and Pennsylvania, adopted major legislation.[19] The legislation in each of these states punishes varying actions associated with Internet solicitation including, but not limited to, traveling to meet the minor, sending sexually explicit images, and asking for/receiving sexually explicit images.[20]

Congress passed the Telecommunications Act of 1996 which punished "Online" Enticement.[21] Two years later Congress amended the Act due to the Child Protection and Sexual Predator Punishment Act of 1998, which

18. PATRICK MILLER & ALICE R. BUCHALTER, LIBRARY OF CONGRESS, INTERNET CRIMES AGAINST CHILDREN: A MATRIX OF FEDERAL AND SELECT STATE LAWS i (2009).

19. *See generally* CAL. PENAL CODE § 272(b) (West 2015) (punishing the use of a telephone or the Internet to lure a child younger than fourteen when the stranger is twenty-one or older); CONN. GEN. STAT. §§ 53(a)-90(a) (West 2014) (punishing the use of an "interactive computer service" to lure a minor for sexual activity); Computer Pornography and Child Exploitation Prevention Act, FLA. STAT. § 847.0135 (West 2014); MICH. COMP. LAWS § 750.145d (West 2014) (punishing use of the internet or a computer to lure a minor, or someone who the offender believes to be a minor, for sexual intercourse or an "immoral act"); MO. REV. STAT. § 566.151 (West 2015) (punishing the use, by someone twenty-one or older, of the Internet or any electronic communication to attempt to lure a minor under the age of fifteen for sexual conduct); N.H. REV. STAT. ANN. § 649-B:4 (West 2014) (punishing the use of a computer on-line service, or Internet service to "seduce or solicit, or to attempt to seduce or solicit, a child or a person believed to be a child for sexual assault or sexual contact"); N.J. STAT. ANN. § 2C:13-6 (West 2015) (using the internet or other electronic communication devices to lure a child into a motor vehicle, secluded area, or building is a crime of the second degree); N.Y. PENAL LAW § 235.22 (West 2014) (utilizing computer communication system to invite or induce a minor for sexual contact or conduct is a first degree class D felony); N.C. GEN. STAT. § 14-202.3 (West 2014) (punishing defendant if at least three years older than victim who is sixteen or younger by solicitation, enticement, or coercion by computer); 18 PA. CONS. STAT. § 6318 B6 (West 2014) (utilizing a computer to contact either a minor or a law enforcement officer posing as a minor in order to engage in sexual abuse or exploitation is a third degree felony); MILLER & BUCHALTER, *supra* note 18.

20. MILLER & BUCHALTER, *supra* note 18, at 6–12.

21. Jonathan Jeffress, *Winning Strategies Seminar, Enticers and Travelers Law and Strategy in "Child Sex" Cases*, DEFENDER SERVICES OFF. 3 (Jan. 30, 2014), http://www.fd.org/docs/select-topics/common-offenses/child-porn/enticers-and-travelers-law-and-strategy-in-child-sex-cases.pdf?sfvrsn=7.

was a bill that responded to "assaults facilitated by computers."[22] The first draft of the Act contained a provision that offenders were forbidden from contacting or attempting to contact minors when the purpose of the communication was to participate in any sexual activity.[23] Both the House and Senate rejected this provision for being too broad.[24] Therefore, the federal legislative history shows Congress' intent to punish "direct solicitation of minors online" and not merely contact.[25] With the movement towards updating federal and state laws to punish internet criminals, a need for more law enforcement task forces and agencies arose to ensure those laws were followed.[26]

B. History of Law Enforcement Task Forces Created to Protect Children from Internet Sex Crimes

The protection of children against sexual exploitation is something federal, state, local agencies, and non-government organizations sustained for many years.[27] The Department of Justice (DOJ) alone has several divisions that dedicate resources to "preventing, investigating, and prosecuting child exploitation."[28] For example, the FBI effected important programs like the Innocent Images National Initiative (IINI), the Innocence Lost National Initiative (ILNI), and the Child Abduction Rapid Deployment (CARD) teams.[29]

The ICAC Task Force Program was formed by the Office of Juvenile Justice and Delinquency Prevention in 1998 (the same year Congress passed the Child Protection and Sexual Predator Punishment Act) with the goal of helping state and local law enforcement agencies advance effective responses to solicitation and child pornography cases that include: "investigative components, training and technical assistance, victim services, and community education."[30] Data from 2009 shows that the ICAC consists of a national network of sixty-one task forces which represent over 2000 fed-

22. *Id.*

23. *Id.* at 4.

24. *Id.* at 5.

25. *Id.* at 6.

26. *See generally* MILLER & BUCHALTER, *supra* note 18 (discussing the interplay between federal and state laws relating to internet crimes).

27. U.S. DEP'T OF JUSTICE, *supra* note 3, at 41.

28. *Id.* ("These components include: the Office of the Deputy Attorney General (ODAG), the FBI, the U.S. Marshals Service, the U.S. Attorneys Offices, the Criminal Division's Child Exploitation and Obscenity Section (CEOS) and the Office of International Affairs (OIA), the Office of Justice Programs (OJP), and the Office of Legal Policy (OLP).").

29. *Id.*

30. Mitchell et al., *supra* note 8.

eral, state, local, and tribal law enforcement and prosecutorial agencies.[31] From 1998 to 2008, the ICAC Task Forces have evaluated over 180,000 complaints, which have resulted in the arrest of close to 17,000 individuals.[32] The training component of the program has also been successful in training close to "100,000 law enforcement officers, prosecutors, and other professionals . . . throughout the United States and in 17 countries around the world on techniques to investigat[e] and effectively prosecute ICAC related cases."[33] The Massachusetts State Police Department is one of the task forces of the ICAC.[34] Therefore, in investigations organized by the Massachusetts State Police, one can assume the officers are trained on how to orchestrate the capture of an offender who has been talking online with an officer posing as a minor.

III. HISTORY OF ATTEMPT CHARGES IN MASSACHUSETTS

A. Cases and the General Laws of Massachusetts

1. *Commonwealth v. Kennedy*

One of the earliest cases discussing how near a defendant must be to committing a crime for an attempt charge to be allowed was *Commonwealth v. Kennedy*.[35] The case involved a defendant who placed rat poison in a man's teacup.[36] The question, as the Court saw it, was "how nearly the overt acts alleged approached to the achievement of the substantive crime attempted."[37] Acts that, on the part of the defendant, are expected to bring about a certain outcome, are enough for an attempt charge.[38] The Court's analysis focused on the intent of the criminal and the circumstances surrounding the act.[39] The Court used various analogies to demonstrate its point: shooting at a wooden post that is thought to be a man is not enough for attempt, but shooting at a man and missing due to bad aim is enough.[40] The evidence showed that the habits of the intended victim and other cir-

31. U.S. DEP'T OF JUSTICE, *supra* note 3, at 58.

32. *Id.* at 59.

33. *Id.*

34. *Id.* at 62.

35. Commonwealth v. Kennedy, 48 N.E. 770, 770 (Mass. 1897).

36. *Id.* at 771–72.

37. *Id.* at 770.

38. *Id.*

39. *Id.* at 771 ("Intent imports contemplation, and more or less expectation, of the intended end as the result of the act alleged.").

40. *Id.* at 770.

cumstances were enough to show the defendant's expectation that the intended victim would use the cup and swallow the poison.[41] Therefore, the Court concluded that "there could be no doubt that the defendant's acts were near enough to the intended swallowing of the poison, and, if the dose was large enough to kill, that they were near enough to the accomplishment of the murder."[42] This case still remains good law over one hundred years later, and the same analysis can be seen in *Commonwealth v. Ortiz*.[43]

2. *Commonwealth v. Ortiz*

The SJC decided the *Ortiz* case in 1990 and involved a defendant challenging the sufficiency of evidence against him for an attempt charge.[44] The SJC stated that in order for an attempt charge to stand the defendant must have the intent to commit the underlying offense as well as commit an overt act toward the underlying offense.[45] The Court admitted that there was "very little" case law in construing the actual statute.[46] The requirement of committing an overt act was predominantly discussed as the factor that can vary the most depending on the circumstances.[47] The SJC ultimately reversed the attempt charges even though sufficient evidence existed of intent and preparation for assault and battery with a dangerous weapon, as insufficient evidence of an overt act by the defendant existed.[48] Interestingly, the SJC noted that its decision would be incorrect in following the laws of other states and the Model Penal Code (MPC), but since the Legislature in the Commonwealth had not enacted a different statute, it must follow the trend of the very few cases before *Ortiz*.[49]

41. *Id.* at 771.

42. *Id.*

43. Commonwealth v. Ortiz, 560 N.E.2d 698, 703–04 (Mass. 1990).

44. *Id.* at 702.

45. *Id.*

46. *Id.*; *see* MASS. GEN. LAWS ch. 274 § 6 (1988) ("Whoever attempts to commit a crime by doing any act towards its commission, but fails in its perpetration, or is intercepted or prevented in its perpetration, shall, except as otherwise provided, be punished. . . .").

47. *Ortiz*, 560 N.E.2d at 703.

48. *Id.*

49. *Id.* at 704 (mentioning Model Penal Code § 5.01(2) and its statement that "'lying in wait, searching for or following the contemplated victim of the crime,' if such conduct is 'strongly corroborative of the actor's criminal purpose,' 'shall not be held insufficient [to constitute an attempt] as a matter of law'").

3. *Commonwealth v. Hamel*

In a case involving undercover officers and a murder plot, the SJC reversed the attempted murder charges against the defendant due to the lack of an overt act on the part of the defendant.[50] The defendant was in prison and wanted to arrange a hit on a man who had raped his wife.[51] He organized payment and possible location of multiple murders including his parents and brother so that he could access their money to pay for all the hits.[52] The hitman was an undercover police officer, and he received written instructions from the defendant including a bill of sale as part of an "up front" payment for the murders.[53] The case centered on the requirement of a physical act toward consummation of the crime.[54] The SJC discussed the difference between the MPC's definition of criminal attempt and the definition found in the General Laws of Massachusetts.[55] The Legislature in the Commonwealth, as noted by the SJC, had not acted to adopt the broad definition of attempt found in the MPC—and to this day still has not.[56] Since the physical action requirement was not met, the attempt charges failed as a matter of law.[57] The SJC did make the point of mentioning that under the same circumstances an attempt charge would be valid under the MPC.[58]

4. *Commonwealth v. Fortier*

In a case following very closely behind *Hamel*, the SJC elaborated on the physicality requirement for a finding of an overt act that constitutes attempt.[59] The *Fortier* case involved the violation of a protective order by the

50. Commonwealth v. Hamel, 752 N.E.2d 808, 809–10 (Mass. App. Ct. 2001).

51. *Id.* at 811.

52. *Id.* at 810–13.

53. *Id.* at 811.

54. *Id.* at 813 ("There was much conversation, but, except insofar as an 'accident' was spoken of, and the parents' house might possibly serve as a locus for killings, there was no scheme, and surely no scheme in any detail, for carrying out the multiple murders contemplated. There were no acts, on the part either of the defendant or of the officers, that came close to or formed part of any physical perpetration of any murders.").

55. *Id.* at 814–15 ("The Code thus tends to broaden the base of criminal attempt, to make convictions easier to reach.").

56. *Id.* at 815.

57. *Id.* at 815–16 (explaining that the SJC wanted more than the mailing of the letter and detailed conversations).

58. *Id.* at 816 ("It is hardly necessary to say there was nothing in the conduct of the defendant or the officers synopsized above that could be found to reach the level of overt act. . . . Contrast with the Model Penal Code is again instructive.").

59. Commonwealth v. Fortier, 775 N.E.2d 785, 787 (Mass. App. Ct. 2002).

defendant, which fell under an abuse prevention statute.[60] For a violation of the statute to occur, one of the requirements was an "attempt to cause . . . physical harm."[61] The Commonwealth argued that the defendant's threat to kill his sister was an overt act, but the SJC quickly tossed this argument aside as invalid.[62] The SJC stated:

> An overt act, however, requires some external, objective manifestation of an action in furtherance of commission of the underlying substantive offense. By and large, an overt act requires an undertaking, not merely talk. Words alone generally will not suffice, unless the words, in the manner of verbal acts, activate for imminent execution actions which are reasonably certain to effect within close proximity the commission of the substantive crime.[63]

Since the defendant had merely used his words to threaten his sister instead of some physical act, the criteria for an attempt charge were not met under these circumstances.[64] Now that a sufficient background on criminal attempt in Massachusetts has been outlined, the foregoing cases discuss attempted rape of a minor.

5. *Commonwealth v. Bell*

The *Bell* case involved a sting operation involving a defendant looking to have sex with a young female child.[65] An undercover officer posing as a woman offering up her five-year-old foster child for prostitution talked with the defendant over the phone and arranged for a meeting.[66] The defendant was upset that the officer had not brought along the child with her, and after asking about the child's sexual history, he agreed to pay $200 to have intercourse with the girl and was told her location.[67] Once the defendant got into his car and drove in the direction of where he was told the child would be, he was arrested.[68] He had $211 on him at the time of his arrest.[69] After his convictions, the defendant appealed arguing that there was insufficient evidence of an overt act for the attempted rape charge.[70] Once

60. *Id.* at 786–87.
61. *Id.*
62. *Id.* at 790–91.
63. *Id.* at 791.
64. *Id.*
65. Commonwealth v. Bell, 917 N.E.2d 740, 744 (Mass. 2009).
66. *Id.* at 745.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*

again, the court noted that the Massachusetts Legislature had not adopted the MPC version of attempt and therefore they must adhere to the law dating back to Justice Holmes and the *Kennedy* case in 1897.[71] The SJC pointed out that in Massachusetts the defendant must have the occasion to commit the substantive crime.[72] The SJC began to split hairs when it reviewed the evidence pointing out that even though the defendant was only one mile away from the park where the undercover officer told him the child was located, he had yet to see the child.[73] They stated that he would also have to be shown the *exact* location of the child in the park area by the undercover officer.[74] The SJC focused on the fact that the defendant could have changed his mind on the way to meeting the child, and no evidence existed as to his plan of how he would carry out the crime.[75] This extremely narrow view of attempt in relation to attempted rape of a minor also exists in cases involving solicitation over the Internet.

6. *Commonwealth v. Buswell*

The defendant in the *Buswell* case was convicted of enticement of a child under age sixteen, attempted rape, and attempted indecent assault and battery of a child under age fourteen.[76] He appealed, and the appellate court affirmed the convictions.[77] Unfortunately, an appeal to the SJC led to a reversal of those convictions.[78] The defendant had initiated an online conversation with an undercover officer claiming to be thirteen years of age.[79] Multiple online conversations discussed sexual acts and meeting up to have sexual intercourse.[80] A meeting place was arranged at a video game

71. *Id.* at 746–48 ("We note that many States have adopted the Model Penal Code's formulation for attempt — a less stringent formulation focusing on the actions taken by the defendant toward attaining the substantive offense rather than what the defendant had left to do before reaching the substantive crime. This formulation makes convictions easier to reach. Of course, 'the creation of crimes is not for this court to determine, but for the Legislature. Our function is merely that of discovering the meaning of the words that the Legislature has used, bearing in mind that under the American system of law a citizen is not to be punished criminally unless his deed falls plainly within the words of the statutory prohibition, construed naturally.'" (quoting Commonwealth v. Corbett, 29 N.E.2d 151, 152 (Mass. 1940))).

72. *Id.* at 747.

73. *Id.* at 748.

74. *Id.*

75. *Id.* at 749.

76. Commonwealth v. Buswell, 9 N.E.3d 276, 279 (Mass. 2014).

77. *Id.*

78. *Id.* at 288.

79. *Id.* at 279–81.

80. *Id.*

store, and the defendant arrived with handwritten directions and one unopened condom where he was arrested.[81] Here again, due to the lack of specificity in the statute and the fact that it had not been updated in over fifteen years, the SJC relied on previous case law, which requires a large amount of discretion by the judge as the overt act requirement is circumstance dependent.[82] The appeals court found the circumstances and the acts by the defendant were enough for an attempt charge, but the SJC did not feel the same way.[83] The SJC wanted more than the defendant arriving to the agreed location with a condom after multiple discussions about having sexual intercourse upon meeting with the minor.[84] The SJC felt that a large gap still existed between the defendant's conduct and an attempt charge. The SJC reasoned that due to the fact that he was not arrested at the minor's home (where the sexual intercourse was to happen) and that even if he met up with the minor he would have to "engage in additional efforts to persuade [the minor] to have sex with him."[85] Therefore, it seems that the SJC would require the defendant to be in the act of persuading a minor to have sex with him in her room in order to be convicted of attempt.[86] The overall lack of clarity in the statute, combined with the heavy reliance on judges, and their view of the circumstances of each case call for change to the statute.

B. Proposed Legislation

Senator Michael O'Moore of the Second Worcester District in Massachusetts proposed an Act in 2015 to update the definition of attempt in criminal cases.[87] O'Moore is a former law enforcement officer[88] who has

81. *Id.* at 281.

82. *Id.*

83. *Id.* at 288.

84. *Id.*

85. *Id.* at 282–83.

86. *See id.* at 283 (discussing how the record did not "reflect that the defendant previously had engaged in intercourse with a child under sixteen; upon meeting an actual thirteen year old, he might have decided not to act on his earlier intentions"). The discussion here is absurd as a defendant's lack of past history having sex with minors should have no bearing on the decision made by the Court. It is just as likely that a previous offender would no longer commit crimes as someone with no criminal history would begin to commit them. *See generally* Deborah F. Buckman, *Construction and Application of United States Sentencing Guideline § 4A1.3(b)(1), Providing Downward Departure Where Defendant's Criminal History Category Substantially Overrepresents Seriousness of Defendant's Criminal History or Likelihood That Defendant Will Commit Other Crimes*, 29 AM. L. REP. FED. 2d 359 (2008) (discussing criminal history and career offender status in federal cases).

87. S. 884, 189th Gen. Court (Mass. 2015),

the background knowledge of what occurs in an attempt case, and therefore knows how officers need to conduct investigations in order to have attempt charges hold up in court.[89] His proposal clearly defined attempt and listed situations that were exceptions to the overt act requirement.[90] The Bill was not successful in the 2013 legislature.[91] The wording was identical to the MPC which was mentioned by the SJC in the *Ortiz* case discussed in Part III(A)(1) of this Note.[92] The MPC approach is helpful as it clarifies what constitutes substantial steps and takes away a majority of the judge's discretion when reviewing factual circumstances.[93]

https://malegislature.gov/Bills/189/Senate/S884.

88. *Michael O'Moore*, *Biography*, COMMONWEALTH OF MASS., https://malegislature.gov/People/Profile/MOM0 (last visited Feb. 16, 2015).

89. *Id.*

90. Mass. S. 884. The proposal recommends the removal of the words "by doing any act toward its commission, but fails in its perpetration, or is intercepted or prevented in its perpetration" and replacing them with the following with regard to the substantial step requirement:

> Section 6A(b) Conduct shall not be held to constitute a substantial step under Subsection (a)(3) unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) lying in wait, searching for or following the contemplated victim of the crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.

Mass. S. 884.

91. S. 772, 188th Gen. Ct. (Mass. 2013), https://malegislature.gov/Bills/188/Senate/S772.

92. MODEL PENAL CODE § 5.01(2) (AM. L. INST. 1981).

93. Matthew C. Campbell, Note, *Crossing The Rubicon: An Argument for Adopting the Model Penal Code Formulation of Criminal Attempt in Massachusetts*, 47 NEW ENG. L. REV. 949, 974 (2013).

IV. HISTORY OF ATTEMPT CHARGES IN OTHER STATES

A. Substantial Step Requirement

The criminal attempt statute in the state of Washington does not follow the MPC.[94] The Washington code is similar to that in Massachusetts—requiring intent and a substantial step towards commission—but goes on to further clarify conduct.[95] The conduct definition merely states that "[i]f the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission."[96] More recently, *State v. Wilson* dealt with the issue of attempted rape of a minor and the Internet.[97] The defendant appealed, arguing that there was insufficient evidence of a substantial step towards the commission of attempted rape of a minor as required by the statute.[98] The facts of the case were as follows: law enforcement posted an ad on Craigslist for a "Mother/Daughter Combo" stating the daughter was "much much younger"; the defendant responded to the post and agreed to pay $300 for sex with the thirteen year old daughter; the defendant was arrested in a parking lot as he was waiting to hear back from the mother about the final location for the sex acts to occur; he had $330 on him and admitted to having the intent to have sex with a thirteen year old.[99] Under the attempt law, preparation to commit a crime is not considered a substantial step and actions that "strongly corroborate" the offender's intent to commit the crime are necessary.[100] The Court ultimately found that there was enough evidence to convict the defendant of attempted rape.[101] If this case was tried in Massachusetts, the outcome most likely would have been the opposite if following the *Buswell* decision precedent discussed in Part III(A)(6).[102] This is surprising since the substantial step and overt act requirements are similarly worded. This shows that even though the legislatures in Washington and Massachusetts chose to have a narrower definition than the MPC of criminal attempt, the wording

94. WASH. REV. CODE § 9A.28.020 (West 2015).

95. *Id.*

96. *Id.*

97. State v. Wilson, 242 P.3d 19, 20 (Wash. Ct. App. 2010).

98. *Id.* at 20–21.

99. *Id.* at 21–22.

100. *Id.* at 25–26 ("Mere preparation to commit a crime is not a substantial step.") (quoting State v. Townsend, 57 P.3d 255, 262 (Wash. 2002)).

101. *Id.* at 27 (contrasting facts with previous cases where the evidence was sufficient to establish substantial step).

102. *See supra* Part III.A.6.

and application vary greatly between the two States.[103] Arkansas and Tennessee also follow the substantial step wording in their criminal attempt statutes and do not follow the MPC.[104] Again, similar to Washington, the use of the wording substantial step rather than overt act—although both involving the conduct of a defendant without conduct being specifically identified—leads to more convictions of attempted rape when dealing with internet solicitation.[105]

B. Overt Act Requirement

Similar to Massachusetts, the State of Florida also follows the overt act requirement of a criminal attempt charge and allows this requirement to negatively affect attempted rape of minor charges involving internet solicitation.[106] Fortunately, Florida courts have begun to find ways around the overt act requirement by distinguishing factual circumstances in order to avoid previous jurisprudence, therefore not coming into conflict with the legislature.[107] One such case where this occurred is *State v. Duke*, a case involving internet solicitation of a minor in Florida.[108] The defendant in the case engaged in Internet chat conversations with an individual whom he believed to be a twelve year old girl but who was actually an undercover police officer.[109] A meeting was arranged after multiple explicit conversa-

103. *Compare Wilson*, 242 P.3d at 27, *with* Commonwealth v. Buswell, 9 N.E.3d 276, 276 (Mass. 2014).

104. *See* ARK. CODE ANN. § 5-3-201 (West 2014); TENN. CODE ANN. § 39-12-101 (West 2014).

105. *See, e.g.*, Kirwan v. State, 96 S.W.3d 724 (Ark. 2003); People v. Patterson, 734 N.E.2d 462 (Ill. 2000); People v. Scott, 740 N.E.2d 1201 (Ill. App. 2000); State v. Fowler, 3 S.W.3d 910 (Tenn. 1999); Chen v. State, 42 S.W.3d 926 (Tex. Crim. App. 2001); State v. Townsend, 57 P.3d 255 (Wash. 2002).

106. FLA. STAT. § 777.04 (West 2014) ("A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt. . . . Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.").

107. *See* Wiggins v. State, 816 So. 2d 745 (Fla. App. 2002). *Compare* State v. Duke, 709 So. 2d 580, 582 (Fla. App. 1998) ("He discussed sexual acts with 'Niki' he intended to commit them with Niki, he planned an occasion where he would carry out those acts, and he arrived at a prearranged meeting point."), *with* Bist v. State, 35 So. 3d 936 (Fla. App. 2010) ("Not only did Bist travel a substantial distance in pursuit of his criminal intent, but he also brought with him items to facilitate his criminal intent and physically entered the decoy home.").

108. *Duke*, 709 So. 2d at 581.

109. *Id.*

tions.[110] The defendant was arrested once he arrived at the parking lot of the arranged meeting place.[111] Based on this standard, the Appeals Court determined that an overt act was lacking.[112] In order for an overt act to be found it must "reach far enough towards accomplishing the attempted crime as to amount to commencement of consummation of the crime . . . [and] go beyond preparation and planning."[113] Following closely behind this case was *Bist v. State*, which also involved solicitation over the internet of a minor and *Wiggins v. State*, which involved the handing of a note to a minor asking her to come over so he could pay her to let him perform a sexual act on her.[114] Both cases distinguished themselves from *Duke* by finding an overt act.[115] The *Bist* case involved a neighborhood watch group that was attempting to expose pedophiles via a television show similar *To Catch a Predator*.[116] The defendant was involved in multiple inappropriate conversations with whom he thought was a minor child and agreed to a meeting place.[117] The defendant drove two-hundred miles and arrived with chocolate and flowers to the home.[118] After he was arrested, lubricant and condoms were found in his car.[119] These facts are very similar to those in *Buswell*, except for the distance driven and the lack of flowers and chocolate on the part of the defendant.[120] Although both states have the overt act requirement, the *Bist* case allowed the attempt charge and *Buswell* did not.[121] Even with the same overt act requirement, the fact that Florida courts find attempt charges when dealing with online predators arranging meetings with minors is further proof that the law in Massachusetts needs to be changed to ensure sexual predators are punished properly under these circumstances.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* Bist v. State, 35 So. 3d 936, 938 (Fla. Dist. Ct. App. 2010); Wiggins v. State, 816 So. 2d 745, 746 (Fla. Dist. Ct. App. 2002).

115. *Bist*, 35 So. 3d at 941; *Wiggins*, 816 So. 2d at 747–48.

116. *Bist*, 35 So. 3d at 938–39.

117. *Id.*

118. *Id*. at 939.

119. *Id.*

120. Commonwealth v. Buswell, 9 N.E.3d 276, 282–83 (Mass. 2014).

121. *Bist*, 35 So. 3d at 939; *see Buswell*, 9 N.E.3d at 282–83.

V. LAWS IN MASSACHUSETTS ARE TOO NARROW

A. Looking at an Offender's Psychological Profile

To better understand defendants in these cases, it is important to contemplate their mental state, especially since intent is one of the requirements of an attempt charge.[122] Pedophilia is a clinical diagnosis that should be made by a psychologist or a psychiatrist.[123] Those who participate in computer-based pedophilia are usually placed into five categories, two of which are important for this discussion: "the stalkers, who try to gain physical access to children . . . [and] the cruisers, who use the Internet for direct reciprocated sexual pleasure without physical contact (e.g., chat rooms)."[124] The attempted rape of a minor charge should therefore only apply to the type of pedophiles who desire contact with children and not merely those who discuss sexually explicit material via chat rooms.[125] This confirms the current law's purpose not to punish merely words with an attempt charge.[126] Some states have made it a crime to have sexually explicit computer conversations with minors, therefore ensuring that pedophiles are punished regardless of whether they try and have physical contact with a minor.[127]

122. *See generally* Hall & Hall, *supra* note 2 (arguing the importance of understanding the mental health of those convicted of pedophilia).

123. *Id.* ("By diagnostic criteria of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, a pedophile is an individual who fantasizes about, is sexually aroused by, or experiences sexual urges toward prepubescent children (generally <13 years) for a period of at least 6 months. . . . Generally, the individual must be at least 16 years of age and at least 5 years older than the juvenile of interest to meet criteria for pedophilia.").

124. *Id.*

125. *Id.* at 460 ("Pedophiles are also classified as to whether child pornography and/or a computer was used to engage the child in sexual activity. Individuals engaging in computer based pedophilia are generally classified into 5 categories.").

126. Commonwealth v. Fortier, 775 N.E.2d 785, 791 (Mass. App. Ct. 2002) ("By and large, an overt act requires an undertaking, not merely talk. Words alone generally will not suffice.").

127. *See generally* CAL. PENAL CODE § 272(b) (West 2015) (punishing the use of a telephone or the Internet to lure a child younger than fourteen when the stranger is twenty-one or older); CONN. GEN. STAT. §§ 53(a)-90(a) (West 2014) (punishing the use of an "interactive computer service" to lure a minor for sexual activity); Computer Pornography and Child Exploitation Prevention Act, FLA. STAT. § 847.0135 (West 2014); MICH. COMP. LAWS § 750.145d (West 2014) (punishing use of the internet or a computer to lure a minor, or someone who the offender believes to be a minor, for sexual intercourse or an "immoral act"); MO. REV. STAT. § 566.151 (West 2015) (punishing the use, by someone twenty-one or older, of the Internet or any electronic communication to attempt to lure a minor under the age of fifteen for sexual conduct); N.H. REV. STAT. ANN. § 649-B:4 (West 2014) (punishing the use of a computer on-line service, or Internet service to "seduce or solicit, or to attempt

The stalker category is further subdivided into the "trust-based seductive approach" and the "direct approach."[128] The direct approach would involve a defendant who discusses sexually explicit themes from the start of the communication.[129] In general, the worry that the supposed anonymity of the Internet allows pedophiles to "engage in acts they would not otherwise consider" has always existed.[130] Studies and case reports have been conducted which reveal that thirty to eighty percent of pedophiles who viewed child pornography and seventy-six percent of those who were arrested for Internet child pornography had molested a child; however, the number of people that progress from the computer to physical acts and the number that would have progressed to physical acts without the computer is still unclear.[131] Interestingly, recent studies noticed a decrease in Internet-related child pornography possibly due to the increased presence of Internet "watchdog" groups and police presence on the Internet.[132] Eventually, one can hope that the Internet will be completely void of pedophiles, but until then it is important that they are punished accordingly.[133]

Understanding the mindset of a criminal is important in the determination of an attempt charge.[134] According to the categories discussed above detailed by the Mayo Clinic, if a pedophile takes steps to meet a minor they have the intent to have physical contact with that minor, taking the crime outside the realm of merely words and fantasy.[135] The SJC also focused on the fact that the defendants still had a chance to change their mind and turn

to seduce or solicit, a child or a person believed to be a child for sexual assault or sexual contact"); N.J. STAT. ANN. § 2C:13-6 (West 2015) (using the internet or other electronic communication devices to lure a child into a motor vehicle, secluded area, or building is a crime of the second degree); N.Y. PENAL LAW § 235.22 (West 2014) (utilizing computer communication system to invite or induce a minor for sexual contact or conduct is a first degree class D felony); N.C. GEN. STAT. § 14-202.3 (West 2014) (punishing defendant if at least three years older than victim who is sixteen or younger by solicitation, enticement, or coercion by computer); 18 PA. CONS. STAT. § 6318 B6 (West 2014) (utilizing a computer to contact either a minor or a law enforcement officer posing as a minor in order to engage in sexual abuse or exploitation is a third degree felony); MILLER & BUCHALTER, *supra* note 18.

128. Hall & Hall, *supra* note 2, at 460.

129. *Id.* at 457.

130. *Id.* at 460.

131. *Id.*

132. *Id.*

133. *See* Dara L. Schottenfeld, Comment, *Witches and Communists and Internet Sex Offenders, Oh My: Why It Is Time to Call Off the Hunt*, 20 ST. THOMAS L. REV. 359, 373 (2007).

134. MODEL PENAL CODE § 2.02 (AM. L. INST. 2015) (describing the general requirements of culpability); Hall & Hall, *supra* note 2, at 462 (detailing studies about why one is a pedophile).

135. Hall & Hall, *supra* note 2, at 460.

around or not go through with the crime once they see the child in person.[136] This is too speculative and the law should remain black and white. If the medical community has enough data and reports showing the mental state of pedophiles who desire to meet minors in person which show intent, then travelling to a meeting location should be enough for an attempted rape of a minor charge.[137] Under the circumstances of Internet solicitations, traveling alone should be enough of an overt act to commit the crime after sexually explicit conversations detailing what is going to occur during the future meeting.[138] It is unnecessary and dangerous to require that a defendant do more. The majority of cases discussed previously detailed accounts where the minor was fictitious, but this should not be taken into consideration when requiring overt acts because the defendant believes that a child is present.[139] Putting these offenders in jail and/or forcing them to obtain professional help is extremely important considering the fact that "few pedophiles voluntarily seek treatment."[140] Consistently allowing these charges to be dismissed, reversed, or dropped leads to lesser punishments for defendants that would commit the crime discussed in their messages if given the chance.[141]

VI. HOW ATTEMPT LAWS SHOULD BE RECONSTRUCTED

A. Model Penal Code

The MPC presents a quick way to improve the definition of criminal attempt in Massachusetts.[142] The MPC lists out scenarios that constitute a substantial step, getting rid of the current overt act requirement and its various interpretations.[143] Two of the listed scenarios in the MPC would re-

136. *See, e.g.*, Commonwealth v. Buswell, 9 N.E.3d 276, 282–83 (Mass. 2014); Commonwealth v. Bell, 917 N.E.2d 740, 746–48 (Mass. 2009).

137. *See, e.g.*, FLA. STAT. ANN. § 847.0135 (West 2009) (criminalizing the act of traveling to meet a minor for sexual activity).

138. *Id.*

139. *See generally* Hall & Hall, *supra* note 2 (discussing cases involving the use of undercover police officers to catch pedophiles).

140. *Id.* at 460.

141. *See, e.g.*, *Buswell*, 9 N.E.3d at 288 (holding that suspect's overt act of traveling did not constitute an attempt to engage in pedophelia).

142. MODEL PENAL CODE § 5.01 (AM. L. INST. 2015).

143. *Id.* ("Conduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose. . . . [T]he following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law: (a) lying in wait, searching for or following the contemplated victim of the crime; (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated

verse all of the cases discussed above in Massachusetts.[144] According to the MPC, enticement and possession of materials to be used in commission of the crime "that can serve no lawful purpose of the actor under the circumstances" are substantial steps if committed with the requisite intent.[145] In most circumstances, the predators discuss sexually explicit material with a minor in order to get them to agree to meet up.[146] In the scenario where a very young minor is being offered for sex, the predator will have condoms, money, and/or lubricant with them when going to the arranged meeting location.[147] Under the MPC, the defendants would all be found guilty of an attempted rape charge if these were the substantial steps being proven by the prosecution.[148] In many of the cases cited throughout this Note, the courts reversing the attempt charges have mentioned the fact that the MPC definition of criminal attempt has not been adopted in Massachusetts.[149] They continue further by stating that it is up to the legislature to make a change, and they cannot go against the laws as they are currently written.[150] It would appear from these cases that the courts are hinting that the law requires an update to match the current state of society.[151] The law as it stands now comes from 1897 and the world has significantly changed since then, and many new ways to commit crimes not even imaginable to the legislature in 1897 exist today.[152]

Although the MPC does present a better situation than currently available in Massachusetts, a separate criminal statute should exist that discusses

for its commission; (c) reconnoitering the place contemplated for the commission of the crime; (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances; (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.").

144. *See id.*

145. *Id.*

146. *See* Kirwan v. State, 96 S.W.3d 724, 725–26 (Ark. 2003); *Buswell*, 9 N.E.3d at 288; Commonwealth v. Bell, 917 N.E.2d 740, 745 (Mass. 2009); State v. Wilson, 242 P.3d 19, 21–22 (Wash. Ct. App. 2010).

147. *See Buswell*, 9 N.E.3d at 288; *Bell*, 917 N.E.2d at 745; *Wilson*, 242 P.3d at 21–22.

148. MODEL PENAL CODE § 5.01 (AM. L. INST. 2015).

149. *See, e.g.*, *Buswell*, 9 N.E.3d at 284; *Bell*, 917 N.E.2d at 748 ("Any reformation of the statutory crime of attempt is a matter for the Legislature. See art. 30 of the Massachusetts Declaration of Rights.").

150. *See, e.g.*, *Buswell*, 9 N.E.3d at 284; *Bell*, 917 N.E.2d at 747–48.

151. *See Buswell*, 9 N.E.3d at 284; *Bell*, 917 N.E.2d at 747–48.

152. *Bell*, 917 N.E.2d at 747.

a specific charge of attempted rape of a minor via internet solicitation.[153] Currently, separate charges of attempted rape of a minor and internet solicitation exist,[154] but one solution is that they be combined after review of the medical community's view on the mental disorder of pedophilia and the fact that the condition can only be managed through proper psychological treatment, but never cured.[155] An offender who has sexual conversations with a young child via the Internet and desires to act out those behaviors should not be allowed to continue living out their fantasies.[156] The majority of cases deal with undercover police officers, but what about all those instances where it was not an undercover officer involved that will never come to light? This should be kept in mind when determining sentencing and requirements for an attempt charge. If the pedophile is not receiving treatment and/or being held in jail, then they will continue their illegal behavior until they are caught.[157] They may even continue after being caught, but at least the justice system functioned enough to get all available charges filed against the offender.[158]

B. Suggestion for New Criminal Charge

Due to the fact that no cure for pedophilia exists and the seriousness of the offense, a separate charge should be created to allow prosecutors to charge criminals who solicit minors via the Internet and take steps to meet with them after multiple sexually explicit conversations and/or sending of explicit material (e.g., photographs). When a pedophile is arranging a meeting with a minor, they have the intent to commit all or some of the acts discussed in the sexually explicit conversations.[159] This mental disorder does

153. *See* MODEL PENAL CODE § 5.01 (AM. L. INST. 2015). *See generally* M. Megan McCune, Comment, *Virtual Lollipops and Lost Puppies: How Far Can States Go to Protect Minors Through the Use of Internet Luring Laws*, 14 COMMLAW CONSPECTUS 503 (2006) (describing the legal measures some states have taken against internet solicitation of minors).

154. *See* MASS. GEN. LAWS ch. 265 §§ 23, 26C (2015).

155. *Pessimism About Pedophilia*, HARV. HEALTH PUBL'N (July 1, 2010), http://www.health.harvard.edu/newsletter_article/pessimism-about-pedophilia ("The goal of treatment, therefore, is to prevent someone from acting on pedophile urges—either by decreasing sexual arousal around children or increasing the ability to manage that arousal. But neither is as effective for reducing harm as preventing access to children, or providing close supervision.").

156. *To Catch a Predator*, *supra* note 4.

157. *See* Schottenfeld, *supra* note 133, at 371; Margaret Harding, *Scott Day Care Center Worker 'Surrounded Himself with Kids,'* TRIBLIVE (Sept. 21, 2011), http://triblive.com/x/pittsburghtrib/news/s_757834.html.

158. Hall & Hall, *supra* note 2, at 467.

159. *Id.* at 460.

not have a grey area; the offender is either satisfied by inappropriate materials alone or is compelled to act on his urges.[160] The fact that solicitation via the Internet is decreasing is proof that all of the programs put into place are working and this should not be inhibited by bad law in any state.[161] Offenders should not be allowed leniency on an attempted rape charge due only to their location or where they go to meet up with a minor. The improvements in Internet safety for minors should be furthered in Massachusetts by ensuring that pedophiles are punished appropriately across the board and are not only charged with solicitation when the goal of the solicitation was to commit rape or any type of sexual assault on a minor.

This Note proposes a new law that would follow the same format as MPC § 5.01, having a section that defines what conduct is necessary to prove attempted rape of a minor after solicitation over the internet.[162] For illustration purposes, the conduct that shall not be held insufficient as a matter of law would be: (i) lying in wait, (ii) enticing or seeking to entice the contemplated victim to go to the place contemplated for its commission, (iii) possession of materials to be employed in the commission of the crime, or (iv) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission.[163] Outside of the necessary conduct would be the provisions that define rape, minor, and solicitation, which could be references to other parts of the General Laws already in existence. The new law would also include a section defining what would need to be found in the Internet conversations in order to reach the level necessary for attempted rape. Any reference to performing sexual acts on one another would satisfy the requirement. The bar would be a low one since there would be the additional requirement that the offender travel to a pre-arranged location where the acts discussed were to occur. Any mention of sexual conduct on the child would be enough, as long as it is accompanied by the travel requirement. The time it takes for the defendant to get to a location or the number of miles travelled would not be a consideration of the requirement as any effort to get to a location on the part of the defendant would be enough for the charge. The underlying point is that any adult who, after having multiple sexually explicit conversations with someone he or she believes to be a minor, travels to a location in order to meet this child has the intent to play out some if not all of the acts discussed. The focus has mainly been on the travel element thus far, but if a law like this is formed there would most

160. *Id.*

161. *Id.*

162. MODEL PENAL CODE § 5.01 (AM. L. INST. 2015).

163. *See id.*

likely be plenty of issues with what materials would be considered "to be employed in the commission of the crime."[164]

In order to clarify this, a definitional section would be created to try and clear up any confusion or ambiguity. The goal is to punish offenders, not allow them to get off on technicalities like they are allowed to do now with the current attempt laws in Massachusetts. If a specific item was mentioned in the conversations (amount of money, gift, certain brand of condoms, etc.) and the item(s) were then found on the defendant when he was arrested, then those materials would fit under the definition and meet the level of conduct necessary. Certain materials that are more obvious (e.g., condoms and/or lubricant) could be listed out in the statute. Here again as with the travel time/distance, the amount of the items, whether small or large, would not affect the severity of the charge or allow it to be dropped as a matter of law. Once the charge goes to trial, it would be up to the jury to determine the degree of the crime based upon all of the aforementioned requirements. Each degree would have a different level of punishment if found guilty. With this arrangement, the jury may decide if one condom plus an item specifically mentioned in the Internet conversations should be punished at the same level as a box of condoms. The way the current law is written requires a very circumstantial, fact-specific analysis that always seems to come out the wrong way in Massachusetts when it comes to the attempted rape of a minor charge after internet solicitation. By making attempted rape of a minor following internet solicitation an individual charge with specific requirements, the goal would be to prevent further decisions by the courts that do not allow for justice to be done.

VII. CONCLUSION

The standard that the SJC sets for a conviction of attempted rape of a minor is too high for the Commonwealth to prove, specifically when dealing with the situation of solicitation of minors via the Internet. The SJC appears to require that the defendant get close to conviction for rape instead of attempt before they will allow the attempt charge when an undercover operation is involved.[165] The substantial step analysis followed by other states does not provide much more structure as it has been shown to come out opposite ways under similar factual circumstances.[166] By having a specific statute relating to attempted rape in relation to solicitation of a minor via the Internet, this inconsistency can be avoided. The substantial

164. *Id.*

165. *See* Commonwealth v. Buswell, 9 N.E.3d 276, 282–83 (Mass. 2014).

166. *See* FLA. STAT. ANN. § 847.0135 (West 2009); State v. Wilson, 242 P.3d 19, 21–22 (Wash. Ct. App. 2010); *supra* Part IV.A.6.

step/overt act analysis works for other types of crime, but not solicitation via the Internet of a minor leading up to attempted rape. These should have separate analyses in order to ensure that child predators are not allowed to get off the hook just because they were only one small step away from committing rape otherwise this presents a dangerousness requirement that is unrealistic and unnecessary when dealing with Internet solicitation of a minor is actually an undercover officer. If the offender was willing to make a trip to any location agreed upon by the parties involved in order to commit any type of illegal act with a minor, they should be charged with attempt and suffer the consequences of their actions.