

## *Veritas: On-line Deception, Pedophilia and the Fantasy Defense*

### I. Introduction

The problem of pedophilia existed in ancient times, and pedophilia continues to persist today. Pedophilia, sexual relations with a minor, modern Western society considers as one of the most culpable acts a member of society can perform. The relatively recent advent of the internet as a mass method of communication and source of information enables pedophiles, via the internet, to penetrate homes to an extent previously unknown.<sup>1</sup> In response, the government combats pedophilia by creating sting online operations.<sup>2</sup> The reaction by pedophiles resulted in a new breed of legal defense. One of the most novel, and to date most successful pedophile defenses is known as the fantasy defense.<sup>3</sup> In internet pedophile cases, such as those involving chat rooms, the fantasy defense does not preclude proof of intent or absolve the defendant from criminal negligence, and is not a legitimate defense.

In this paper, the current culture of the internet, chat rooms, and the accompanying psychology of the internet will be discussed. In addition, a brief history of pedophilia will be given, to put the current situation in a historical context. The current federal legislation will be discussed, and brief suggestions made to strengthen it. Then

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<sup>1</sup> CHRISTA M. BOOK, COMMENT, DO YOU REALLY KNOW WHO IS ON THE OTHER SIDE OF YOUR COMPUTER SCREEN? STOPPING INTERNET CRIMES AGAINST CHILDREN, 14 ALB. L.J. SCI. & TECH. 749 (2004).

<sup>2</sup> ID. AT 751.

<sup>3</sup> DONALD S. YAMAGAMI, COMMENT, PROSECUTING CYBER-PEDOPHILES: HOW CAN INTENT BE SHOWN IN A VIRTUAL WORLD IN LIGHT OF THE FANTASY DEFENSE?, 41 SANTA CLARA L. REV. 547 (2001).

cases involving pertinent elements of pedophilia will be analyzed, and the evolution of the case law will be covered. Lastly, the fantasy defense will be shown to be insufficient to absolve the culpability of the user.

## II. The Internet Chat Room Psychology

Since the advent of the world wide web in 1991, the internet has become a community in a way previously unknown to man.<sup>4</sup> Chat rooms were first created in 1996, and have since become extremely popular as a source of community where common interests ranging from politics to hobbies are discussed. Personal computer use has risen to 51% as of 2000, and projections indicate by the year 2010 usage doubling to 1.3 billion computers.<sup>5</sup> The online community continues to experience explosive growth, as does chat room usage. In a chat room, a user creates a profile online, complete with a username chosen by them.<sup>6</sup> The username traditionally chosen differs from the name of the person considerably, containing numbers or a mnemonic unique to that person. An example of a username would be “j3st3r13”. More modern chat rooms use avatars, a thumbnail picture beside the username, to aid identification of a user. Again, most avatars represent a particular aspect of the user’s life, such as a sports team, video game character, or political affiliation.

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<sup>4</sup> ROBERT H. ZAKON, HOBBS’ INTERNET TIMELINE, [WWW.ZAKON.ORG/ROBERT/INTERNET/TIMELINE/](http://WWW.ZAKON.ORG/ROBERT/INTERNET/TIMELINE/), (LAST VISITED NOV. 30, 2008).

<sup>5</sup> BBC NEWS, PC OWNERSHIP TO DOUBLE BY 2010, [WWW.NEWS.BBC.CO.UK/2/HI/TECHNOLOGY/4095737.STM](http://WWW.NEWS.BBC.CO.UK/2/HI/TECHNOLOGY/4095737.STM), (2004).

<sup>6</sup> B. CORNWELL, D.C. LUNDGREN, COMPUTERS IN HUMAN BEHAVIOR, 198 (OHIO STATE UNIV. 2001).

Many chat rooms employ a mediator system, whereby certain guidelines can be enforced. Prohibition of obscene, racist or violent remarks commonly occurs. However, some chat rooms lack mediators, or allow remarks to remain uncensored. Often, chat rooms will allow users to form a private conversation by leaving the group discussion and communicating similar to instant messaging.

One of the key features of chat rooms lies in their anonymity.<sup>7</sup> The anonymity afforded by chat rooms creates a unique interpersonal situation.<sup>8</sup> Under ordinary social situations, an individual faces consequences for any behavior manifested to other individuals. Distain and similar negative consequences result from individuals removing themselves from socially acceptable norms. In contrast, proper behavior garners admiration and respect. Children learn this paradigm early on, with educational institutions and society in general reinforcing the concept. The internet provides a unique opportunity for individuals to remove themselves from that paradigm and insert oneself into a new one.<sup>9</sup> In one sense, the new paradigm offers absolute freedom, but also the opportunity for absolute deception.<sup>10</sup>

Ultimately, chat rooms give the user the opportunity to create an entire persona online. Many times the persona differs significantly from the actual user.<sup>11</sup> The distance

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<sup>7</sup> YAMAGAMI, SUPRA, AT 553.

<sup>8</sup> ID. AT 553.

<sup>9</sup> KIMBERLY S. YOUNG, WHAT MAKES THE INTERNET ADDICTIVE: POTENTIAL EXPLANATIONS FOR PATHOLOGICAL INTERNET USE, 105<sup>TH</sup> AM. PSYCHOL. ASS'N. 6.

<sup>10</sup> CORNWELL, SUPRA AT 198.

<sup>11</sup> YAMAGAMI, SUPRA AT 553.

in cyberspace allows misrepresentation of attributes such as age and physical appearance.<sup>12</sup> The inability of other users to verify information otherwise apparent in face-to-face encounters seems to encourage misrepresentation. Additionally, chat rooms do not require users to verify information relating to their identity in any way, most require only a valid e-mail address to create a profile.<sup>13</sup>

Studies show many users unlock repressed characteristics of their persona.<sup>14</sup> Shy individuals transform into charismatic, gregarious people.<sup>15</sup> Normally calm, peaceful individuals now manifest the raging anger pent-up.<sup>16</sup> Sexual tendencies previously repressed now manifest themselves freely. Once repressed personalities become unlocked, many individuals eventually express difficulty in repressing them again once offline.<sup>17</sup> The dichotomy created between online and offline eventually resolves itself by the repressed characteristics spilling over into real life.<sup>18</sup> In relation to pedophiles, the chat rooms allow the repressed characteristic of pedophilia opportunity to manifest itself with limited opportunity for reprisal.<sup>19</sup> Ultimately, the anonymity provides insulation from repercussions due to the users behavior.

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<sup>12</sup> YOUNG, SUPRA AT 7.

<sup>13</sup> CORNWELL, SUPRA AT 200.

<sup>14</sup> YOUNG, SUPRA AT 8.

<sup>15</sup> ID AT 7.

<sup>16</sup> ID AT 9.

<sup>17</sup> ID AT 12.

<sup>18</sup> ID AT 8.

<sup>19</sup> ID AT 6.

Pedophiles use chat rooms many times to initiate contact with the child selected as a victim. A technique employed by pedophiles consists of pulling a child off to a private chat, preventing anyone other than the two from viewing the contents of the conversation, thus allowing the pedophile to prevent users from reporting the conversation or warning the child.<sup>20</sup> In the physical world, most pedophiles molest children who already know them and have a certain amount of trust established.<sup>21</sup> The anonymity of the chat room allows the pedophile to develop the child's trust without the alarm caused by an approaching adult.<sup>22</sup> Additionally, the chat room allows the pedophile to conduct the seduction more effectively because it eliminates the need for the child to be absent from supervision for any length of time. Children have relatively concrete itineraries throughout the day, and deviation from them is often noticed. The chat room circumvents this problem.

One of the methods of combating pedophilia, and in particular internet pedophilia lies in the control of the internet itself. Chat rooms could be made less anonymous. A verification of the users true identity before allowing use would be sufficient to determine the age of the user. The necessary security measures exist to avoid identity theft, the internet is rife with websites for purchasing products online. To require identity of some kind is analogous to being carded at a bar or grocery store. Lastly, the penalties for internet pedophiles should be much greater. Pedophiles should

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<sup>20</sup> CHRISTA M. BOOK, COMMENT, DO YOU REALLY KNOW WHO IS ON THE OTHER SIDE OF YOUR COMPUTER SCREEN? ATOPPING INTERNET CRIMES AGAINST CHILDREN, 14 ALB. L. J. SCI. & TECH. 749, 750 (2004).

<sup>21</sup> YOUNG SUPRA AT 9.

<sup>22</sup> ID. AT 749.

face banishment from the online community. At the least, the possibility of several months to years of severely restricted internet use would help curb repeat offenders.

### III. The Evolution of Pedophilia in Western Culture

The scope and exact amount of pedophiles using the internet to seduce children remains unknown. Since the advent of widespread use of computers in the early 1990's, chat rooms allowed pedophiles to approach seduction in a novel manner. Quite literally pedophiles now intrude into homes via the internet and communicate with children.

Pedophilia existed as far back as ancient Athens, where brothels existed for children to sell themselves.<sup>23</sup> In imperial Rome castration occurred during infancy for some children so as to be used in brothels.<sup>24</sup> In 13<sup>th</sup> century England, church law prohibited girls under the age of twelve from marrying or participating in sexual relations of any kind.<sup>25</sup> However, English common law prior to the 18<sup>th</sup> century indicates sexual crimes hinged upon consent, not age.<sup>26</sup> Thus, English common law granted children and adults the same freedom and conversely, the same responsibility. Children discovered performing incest or homosexual relations received punishment identical to the adult party.<sup>27</sup> The increased importance of childhood development in 19<sup>th</sup> century England by Victorian culture contributed to the societal stigma associated with

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<sup>23</sup> ANDREW LEECH, SALAMIS, TARTS, PAEDOPHILIA, AND PORNIKOTELOS, [www.helleniccomserve.com/salpedof.html](http://www.helleniccomserve.com/salpedof.html), (last visited Nov. 30, 2008).

<sup>24</sup> ID.

<sup>25</sup> DENNIS HOWITT, PAEDOPHILES AND SEXUAL OFFENCES AGAINST CHILDREN, 234 (1995).

<sup>26</sup> ID. AT 235.

<sup>27</sup> ID. AT 235.

pedophilia. “Once sexuality had been defined as of central importance to mental and physical health the sexual habits of the population at large became socially significant. With childhood defined as critical to the development of healthy sexuality anything which threatened children's purity was a threat to the future of society.”<sup>28</sup> The view continues today, particularly in the United States, as attested to by existing case law and extensive efforts of the FBI and state authorities to prevent pedophilia.

The current case law and statutes in the United States represent a dramatic reinterpretation of the nature of sex-related crimes. Modern Western society established the age of consent holding to the theory that children develop judgment and discernment as they grow older. Thus, laws prevent self-destructive behavior to individuals under an established age, and limit the accountability of minors. As such, when sexual relations occur between adults and children today, the majority of culpability falls upon the adult. The advent of the internet during the late 20<sup>th</sup> century provided a vector for pedophiles to contact and seduce children unknown to previous cultures. As a reaction to the increase in pedophilia via online contact through chat rooms, the United States government passed the Child Pornography Prevention Act of 1996(CPPA).<sup>29</sup> The statute outlaws the distribution, creation and possession of child pornography, including computer-generated images.

The FBI began conducting sting operations in 1995, to catch possible pedophiles.<sup>30</sup> An agent poses in a chat room as a young girl or boy, usually under

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<sup>28</sup> ID. AT 236.

<sup>29</sup> CHILD PORNOGRAPHY PREVENTION ACT, PUB. L. NO. 104-208, 110 STAT. 3009 (1996).

<sup>30</sup> YAMAGAMI, SUPRA AT 548.

thirteen.<sup>31</sup> Once solicited the agent verifies the adult knows the age of the alleged child. The adult many times sends explicit pictures of themselves or minors and adults engaged in sex or obscene behavior.<sup>32</sup> Additionally, the pedophile many times will encourage the child to masturbate or describe the acts the pedophile will perform on the child.<sup>33</sup> The adult violates the CPPA with such behavior. The pedophile then suggests a meeting place, to which the agent agrees.<sup>34</sup> Often the pedophile brings items such as sex toys, alcohol, or drugs to lower the inhibitions of the child, and asks the child to wear an identifying piece of clothing or a certain type or color of bag. The agents then arrest the adult once they appear at the meeting place. The effort to travel to the meeting place has been established by case law to show *mens rea*.<sup>35</sup>

Recent developments in the arena of pedophilia include an increase in organizations with pro-pedophile agenda's and the increase in the difficulty of performing effective sting operations. Organizations such as the North American Man-Boy Love Association (NAMBLA) and the Pedophile Alert Network (PAN) promote pedophilia throughout the world.<sup>36</sup> NAMBLA and PAN provide advice and legal resources to pedophiles, as well as tips and advice to increase the effectiveness in

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<sup>31</sup> BOOK, SUPRA AT 750,751.

<sup>32</sup> ID. AT 752

<sup>33</sup> NEW YORK V. FOLEY, 257 A.D. 2D 248 (N.Y. APP. DIV. 1999).

<sup>34</sup> BOOK, SUPRA AT 752.

<sup>35</sup> UNITED STATES V. GAMACHE, 156 F. 3D 1 (4<sup>TH</sup> CIR. 1998).

<sup>36</sup> MICHAEL ALHONTE, THE POLITICS OF AEGISM, [WWW.NAMBLA.ORG/ALHONTE.HTM](http://WWW.NAMBLA.ORG/ALHONTE.HTM) (2003).



seducing children.<sup>37</sup> NAMBLA demonstrated considerable knowledge about police stings as well, identifying ten sting in five states correctly in one publication alone.<sup>38</sup> An increasing awareness of case law and exact legal guidelines seems to be the hallmark of pedophiles in recent times.

#### IV. The Case History of Internet Pedophilia

*New York v. Foley* demonstrated the Constitution left obscene and offensive material unprotected by the First Amendment. The defendant, Thomas Foley, contacted an officer posing in the chat room “KidsofFamilySex”<sup>39</sup>. The trooper served the New York Computer Crime Unit, and logged in under the username “Aimee”.<sup>40</sup> Foley proceeded to chat with “Aimee” about sex, even after “Aimee” identified herself multiple times as a fifteen-year old girl.<sup>41</sup> For a total of eight hours over four different days Foley discussed sex with “Aimee.”<sup>42</sup> The officer indicated during every conversation the fact “Aimee” was fifteen.<sup>43</sup> Foley sent “Aimee” several explicit pictures of adults engaged in

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<sup>37</sup> KENNETH WOODEN, A PROFILE OF THE CHILD MOLESTER, [WWW.PARENTING.VILLAGE.COM/GS/GSSAFETY/O,QVVI,OO.HTML](http://WWW.PARENTING.VILLAGE.COM/GS/GSSAFETY/O,QVVI,OO.HTML) (LAST ACCESSED NOV. 30 2008).

<sup>38</sup> ID.

<sup>39</sup> FOLEY, 156 F. 3D. AT 247.

<sup>40</sup> ID.

<sup>41</sup> ID.

<sup>42</sup> ID. THE CHATS WERE FOUR DIFFERENT CONVERSATIONS OVER EIGHT DAYS, AND EACH CONVERSATION WAS APPROXIMATELY TWO HOURS.

<sup>43</sup> ID.

sex with pre-teen girls. The police obtained a search warrant to the house of Foley, and searched the house, finding Foley typing at a computer.<sup>44</sup> Foley admitted to chatting with “Aimee” and to the knowledge she was fifteen.<sup>45</sup>

Foley contended the NY Penal Law overstepped the constitutional boundaries and infringed on First Amendment rights.<sup>46</sup> The court found the statute constitutional and not overbroad for two distinct reasons. First, state statutes presume constitutionality.<sup>47</sup> Traditionally, individuals cannot attack the constitutionality of a statute unless the statute violates the constitutional rights of the individual in the circumstances before the court.<sup>48</sup> The argument that the statute violates the Constitution in another set of circumstances is invalid.<sup>49</sup> However, statutes concerning the First Amendment constitute an exception.<sup>50</sup>

The NY Penal Law sets forth two elements required for prosecution under the statute.<sup>51</sup> The first prohibits the distribution of “graphic images” of explicit acts deemed “harmful to minors.”<sup>52</sup> The statute then describes the definition of “harmful to minors”

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<sup>44</sup> FOLEY, 156 F. 3D AT 248.

<sup>45</sup> ID.

<sup>46</sup> ID.

<sup>47</sup> ID.

<sup>48</sup> ID.

<sup>49</sup> ID.

<sup>50</sup> ID.

<sup>51</sup> N.Y. PENAL LAW 235.22 (2008).

<sup>52</sup> ID.

in great detail.<sup>53</sup> The second element of the statute prohibits the luring or persuading of a minor to participate in sexual activity.<sup>54</sup> The statute explicitly demarcates the situation in which it limits the First Amendment.<sup>55</sup> The judge therefore ruled the statute not overbroad, and constitutional.<sup>56</sup> The rationale for content-based regulation of free-speech lies in the fact that the state's interest compels the restriction.<sup>57</sup> The state considers "safeguarding the physical and psychological well-being of a minor...compelling."<sup>58</sup> The judge ruled the statute met the specific desire of the legislature to protect children from predators and the objections to the statute can be managed on a case-by-case basis.<sup>59</sup> *New York v. Foley* demonstrated the viability of state statutes restricting content online, but still remaining within the bounds of constitutionality.

*United States v. Alkhabaz* represents a significant development in the history of the "fantasy defense." Abraham Alkhabaz, a student at the University of Michigan, wrote

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<sup>53</sup> ID. "...IN WORD OR IMAGES ACTUAL OR SIMULATED NUDITY, SEXUAL CONDUCT, OR SADO-MASOCHISTIC ABUSE..."

<sup>54</sup> ID. "...IMPORTUNES, INVITES OR INDUCES A MINOR TO ENGAGE IN SEXUAL INTERCOURSE, ORAL SEXUAL CONDUCT, OR ANAL SEXUAL CONDUCT, OR SEXUAL CONTACT WITH HIM, OR TO ENGAGE IN A SEXUAL PERFORMANCE, OBSCENE SEXUAL PERFORMANCE, OR SEXUAL CONDUCT FOR HIS BENEFIT."

<sup>55</sup> ID.

<sup>56</sup> FOLEY, 156 F. 3D AT 248.

<sup>57</sup> ID.

<sup>58</sup> ID. AT 250.

<sup>59</sup> ID.

several stories distributed on Usenet.<sup>60</sup> The stories consisted of rape, torture and the eventual murder of women in a variety of ways.<sup>61</sup> Alkhabaz wrote several stories, all in the same vein of rape, torture and murder.<sup>62</sup> One such story contained the name of a classmate, and the story portrayed the classmate being tortured, then raped and killed.<sup>63</sup> The woman filed suit against Alkhabaz for threatening her. The initial trial determined Alkhabaz to be guilty of U.S.C. 875 (c), prohibiting interstate communication threatening murder or kidnap to another person.<sup>64</sup>

The defendant appealed to the Sixth Circuit Court that the ruling violated the First Amendment rights of Alkhabaz, and the essays did not constitute a threat.<sup>65</sup> The Circuit Court found the District Court erred in the classification of Alkhabaz's story as a threat to the safety of his classmate.<sup>66</sup> The essay's purported intent of "shared sexual fantasies" rendered it protected under the First Amendment.<sup>67</sup> The test for determining what constitutes a threat is whether or not a reasonable individual would find the communication intimidating in the factual context in which it is couched. The logic used by the majority of the Circuit Court lies in the intended recipient of the stories.<sup>68</sup> The

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<sup>60</sup> UNITED STATES V. ALKHABAZ, 104 F. 3D 1492 (6<sup>TH</sup> CIR. 1997).

<sup>61</sup> ID. AT 1498.

<sup>62</sup> ID. AT 1497.

<sup>63</sup> ID AT 1498.

<sup>64</sup> UNITED STATES V. BAKER, 890 F. SUPP. 1375 (D. MI. 1995).

<sup>65</sup> ALKHABAZ, 104 F. 3D AT 1492.

<sup>66</sup> ID. AT 1496.

<sup>67</sup> ID AT 1492.

<sup>68</sup> ID.

audience for the stories was not the woman in the story, but others who shared in Alkhabaz's fantasies.<sup>69</sup> Thus, the intimidation factor of the story lies at practically zero<sup>70</sup>. The defense avoids *mens rea* by claiming no foreknowledge, and therefore unforeseeable by a reasonable person. Consequently, the story falls under First Amendment protection.

The court's acknowledgement of the "shared sexual fantasy" claim laid the foundation for similar internet-related cases involving the First Amendment. The reduction of responsibility for communication through the internet increases the scope of the First Amendment. In the dissenting opinion, Judge Krupansky indicates the folly of assuming the recipient excuses the effect of the stories.<sup>71</sup> The classmate had access to the story and ,in fact, read the story.<sup>72</sup> The trauma caused by the story resulted in psychological trauma to the individual, prompting a suggestion for counseling.<sup>73</sup> The defense used failed to address the issue of the actual consequences of Alkhabaz's actions, but instead focused simply on the intent. Thus, intent became more legally pertinent than the reality of the actions.

In *United States v. Gamache* the court ruled that intent to have sexual relations with a minor can be shown by traveling to the proposed meeting site. The New Hampshire Police Department placed an advertisement in the Tri-State Swingers

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<sup>69</sup> ID.

<sup>70</sup> ID.

<sup>71</sup> ID AT 1503.

<sup>72</sup> ID AT 1498.

<sup>73</sup> ID.

magazine.<sup>74</sup> The advertisement was for a male mentor for her children, under the name Francis.<sup>75</sup> The defendant, Gamache, replied to the advertisement, expressing interest.<sup>76</sup> In further communication the NH police stated clearly that by mentor they were referring to someone engaging in sexual acts with children of the ages twelve, ten, and eight.<sup>77</sup> The correspondence continued between Gamache and the NH police for several months. Gamache readily agreed to perform sexual acts on the children, and agreed to meet Francis.<sup>78</sup> Gamache traveled from Maine to New Hampshire, and the New Hampshire Police arrested him at the meeting place.<sup>79</sup> The police found alcohol, condoms, lubricant, and food in the truck driven by Gamache.<sup>80</sup>

The importance of the Gamache case lies in the legal precedent set for future cases relating to pedophilia. The District Court of New Hampshire found Gamache guilty for attempting to engage in illegal sex with a minor.<sup>81</sup> The court found the effort required to travel to the meeting place to constitute intent in this case.<sup>82</sup> As illustrated by the *United States v. Alkhabaz* the mere statement of something does not constitute the intent to perform an action.

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<sup>74</sup> GAMACHE, 156 F. 3D AT 4.

<sup>75</sup> ID.

<sup>76</sup> ID.

<sup>77</sup> ID AT 6.

<sup>78</sup> ID AT 7.

<sup>79</sup> ID.

<sup>80</sup> ID.

<sup>81</sup> ID AT 9.

<sup>82</sup> ID.

Gamache appealed to the First Circuit Court on the grounds U.S.C. 2423 (b) was unconstitutional, and the jury had not been instructed on entrapment. Gamache claimed the statute “criminalizes mere thought,” and thus is unconstitutional.<sup>83</sup> The First Circuit Court responded to the claim the statute is unconstitutional by pointing out the fact that crossing a state line does not constitute “mere thought.”<sup>84</sup> The action of crossing a state line, or in general traveling constitutes action, and thus avoids violation of the First Amendment.<sup>85</sup> The relation the Circuit Court made to action and intent in relation to travel figures directly into pedophile cases, particularly those involving the internet. The action of going to a specific place to meet a child is sufficient to indicate *actus rea*, an element difficult to prove in written communication.

One of the landmark cases in the case law concerning pedophilia is Jacobson v. United States. Jacobson v. United States illustrates the nuances of the law when determining the existence of *mens rea*. Jacobson ordered two magazines containing photographs of children nude, before the Child Protection Act made it illegal in 1984.<sup>86</sup> The government placed Johnson on their mailing list, and attempted to solicit an order for child pornography from him for the next 2 1/2 years.<sup>87</sup> Jacobson responded to one of the catalogues sent to him, and ordered two magazines. The order constituted a

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<sup>83</sup> ID AT 8.

<sup>84</sup> ID.

<sup>85</sup> ID.

<sup>86</sup> JACOBSON V. UNITED STATES, 503 U.S. 540, 544 (1992).

<sup>87</sup> ID.

violation of the Child Protection Act, and Jacobson was arrested.<sup>88</sup> The police failed to find any other material in Jacobson's house relating to child pornography, with the exception of the two magazines he had ordered earlier.<sup>89</sup> Jacobson was convicted by the District Court, and the Appellate Court affirmed the decision. However, the Supreme Court overruled the decision.

The rationale the Supreme Court used in overturning the Jacobson case hinges on the doctrine of entrapment. The Supreme Court found the government had not met the burden of proof in demonstrating Jacobson had a predisposition to violate the Child Protection Act.<sup>90</sup> The Supreme Court reasoned the lack of any other illegal material in Jacobson's house supported the belief the appellant was entrapped.<sup>91</sup> Furthermore, the length of time required for Jacobson to commit a crime, nearly 30 months, also supported the claim of entrapment.<sup>92</sup> Lastly, the Court reasoned the effort and amount of publications sent to Jacobson indicated his reticence to violate the Child Protection Act.<sup>93</sup> Therefore, the Supreme Court overturned the conviction, and declared Jacobson entrapped by the government. The Court postulated that aside from government interference Jacobson would have never committed a crime.

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<sup>88</sup> ID.

<sup>89</sup> ID AT 548.

<sup>90</sup> ID AT 549.

<sup>91</sup> ID.

<sup>92</sup> ID AT 550.

<sup>93</sup> ID.



The precedent the *Jacobson* case set for future pedophiles lies in the broadening of the definition of entrapment.<sup>94</sup> The Court broadened the definition of entrapment from coercion and threats to mere repeated opportunity.<sup>95</sup> Thus, the entrapment defense lends itself readily to the defense of internet pedophilia, by the rationale that the police entrapped the pedophile. Chatting between the officer posing as the child and a pedophile many times occurs several times before the pedophile suggests a meeting. Thus, the *Jacobson* case establishes the possibility of entrapment in nearly every internet-related pedophile case.

## V. The Fantasy Defense

One of the most novel defenses today for internet-related pedophilia cases is a derivation of the “shared sexual fantasy” concept used in *United States v. Alkhabaz*.<sup>96</sup> The defense consists of a denial of *mensa rea*, because of the prevalent culture in chat rooms today.<sup>97</sup> The defendant claims to have communicated under the pretense that the recipient was an adult.<sup>98</sup> The entire span of communication purportedly was all a sexual fantasy.<sup>99</sup> The defendant believed the individual was

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<sup>94</sup> ID AT 551.

<sup>95</sup> ID AT 552.

<sup>96</sup> ALKHABAZ, 104 F. 3D AT 1492.

<sup>97</sup> BOOK, SUPRA AT 556.

<sup>98</sup> ID.

<sup>99</sup> ID AT 547.

playing along with the fantasy as well.<sup>100</sup> Incorporating elements of the Alkhabaz case, the statements made can be intended for an entirely different user than the actual age and even sex of the user.<sup>101</sup> The fantasy defense states the pedophile did not believe the child or officer posing as a child when the subject of age was broached.<sup>102</sup> For instance, should a user claim to be thirteen, it is entirely reasonable to question the veracity of that claim. Therefore, the pedophile can claim ignorance of the true age of the user. Indeed, many times the persona portrayed in chat rooms is indeed false, or misrepresentative.<sup>103</sup> The fantasy defense uses the psychology and community of internet chat rooms as an integral part of disproving *mens rea*.<sup>104</sup>

The first case in which the fantasy defense was used was the case of Patrick Naughton.<sup>105</sup> Naughton began chatting online in a chat room entitled dads&daughterssex with a user named KrisLA.<sup>106</sup> KrisLA in reality was a member of the California Cybercrime Unit.<sup>107</sup> Naughton sent explicit pictures of himself, and after several chats Naughton agreed to meet KrisLA on a Santa Monica pier.<sup>108</sup> Nuaghton

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<sup>100</sup> ID AT 556.

<sup>101</sup> ALKHABAZ, 104 F. 3D AT 1492.

<sup>102</sup> BOOK, SUPRA AT 755.

<sup>103</sup> ID AT 756.

<sup>104</sup> ID AT 755.

<sup>105</sup> YAMAGAMI, SUPRA AT 547.

<sup>106</sup> ID.

<sup>107</sup> ID.

<sup>108</sup> ID.

contended he thought KrisLA was an adult, citing her mature writing style.<sup>109</sup> Naughton also claimed he thought KrisLA has lied about her age online, that the chats were all “fantasy.”<sup>110</sup> The fantasy defense alleged the trip to Santa Monica only indicated the intent to meet an adult, not a minor.<sup>111</sup> The Naughton jury split down gender, with six male jurors filed a verdict for Naughton, and six female jurors indicated a verdict against.<sup>112</sup> Thus, in the inaugural trial, the fantasy defense proved successful.

The fantasy defense hinges on two overlapping spheres of ignorance. The first sphere lies in the psychology of the chat room. The users must take one another’s word for any facts given about other users than themselves. Unless a third party or outside source is able to verify a fact, the veracity of any statement made is not known. For instance, mistaken age and gender are not uncommon in chat rooms, either by deception or misassumption.<sup>113</sup> Physical traits such as these users are unable to conclusively verify online. Consequently studies have shown that physical attributes are the most frequent type misrepresented.<sup>114</sup>

The second sphere of ignorance is the anonymity of the chat room. The anonymity can be distinguished from the deception in relation to users, and the method

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<sup>109</sup> BOOK, SUPRA AT 756.

<sup>110</sup> ID.

<sup>111</sup> YAMAGAMI, SUPRA AT 547.

<sup>112</sup> ID ; BOOK, SUPRA AT 756.

<sup>113</sup> YAMAGAMI, SUPRA AT 556.

<sup>114</sup> CORNWELL, SUPRA AT 208.

of obtaining access to a chat room.<sup>115</sup> Chat rooms do not require an individual verify their identity or use anything linking to the true identity of the person. Anonymity further isolates the sources of information between chat room users. The user now has the ability not only to deceive other users, but also do so without repercussions. Thus, a significant incentive to be honest is removed. The anonymity overlaps with the ignorance, in that there is no third party an individual can appeal to for a verifiable answer, specifically in relation to a users age.

Several other factors contribute to the success of the fantasy defense. One of them was the type of chat room the pedophile was chatting in. Naughton was in an adult-oriented chat room, and therefore the location led credence to his overall defense.<sup>116</sup> Another was the location of the meeting place, a pier in Santa Monica.<sup>117</sup> Should the meeting place been somewhere more probative of the intent of Naughton, the defense would be rendered less effective. Thus, the fantasy defense depends somewhat on the facts of the case, and cannot be made to fit every pedophile defense.

## VI. Argument Against the Fantasy Defense

The fantasy defense lies directly in opposition to the majority of the body of case law. Throughout English common law and the body of case law in the United States, personal responsibility has been a key theme. In modern times, those who behave irresponsibly may be held liable for damages. Negligence is defined as “ failure to

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<sup>115</sup> ID.

<sup>116</sup> YAMAGAMI, SUPRA AT 556.

<sup>117</sup> BOOK, SUPRA AT 756.

exercise the care toward others which a reasonable or prudent person would do in the circumstances.”<sup>118</sup> The fantasy defense constitutes negligence at best. The duty as a citizen of the United States is to be aware of the law and remain within its limits. The pedophile whether through ignorance or intent breaches that duty when he solicits sex from a minor. The standard of care a reasonable person would use online rises far above that of soliciting sex from an anonymous user when reasonable doubt exists concerning the possibility of the user being a minor. The causation of the breach of duty again lies with the pedophile. No coercion was involved in the chatting or the desire to meet with the minor. The pedophile through personal volition attempts to contact the minor. The denial of culpability because of the fantasy defense is analogous to driving recklessly because of a failure to inform one of basic rules of the road. The pedophile is responsible for the damages that occur to the child, and to society as a whole. Thus, the “fantasy defense” is an affirmative defense for criminal negligence.

## VII. Conclusion

Children are a vital part of our society. The protection of children is one of the foremost goals of parents and is crucial to the continued development of a society. The courts recognize children as not fully developed mentally, emotionally, and physically, evidenced by the limited liability of minors. Pedophilia feeds on the most mentally, physically, and emotionally vulnerable individuals in society, and is perhaps the single most destructive crime to children. The results of pedophilia echo far beyond the current

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<sup>118</sup> THE LAW DICTIONARY 273 (AMY BRANN ED., ANDERSON PUBLISHING COMPANY 1997) (1888).

generation into the next generation and the generation after that. The pedophile damages not just a child, but a future spouse and parent. Consequently, the utmost attention should be focused on eliminating the threat of pedophilia.