

**REFORMING ATTEMPT LIABILITY UNDER
18 U.S.C. § 2422(B): AN INSUBSTANTIAL STEP
BACK FROM *UNITED STATES V.
ROTHENBERG***

KOREY J. CHRISTENSEN[†]

ABSTRACT

The statute under which Internet sex predators are prosecuted for illicit online communications prohibits attempts to “knowingly persuade[], induce[], entice[], or coerce[]” minors to engage in “any sexual activity for which any person” can be criminally charged. This broad language has allowed courts to gradually expand the statute’s reach by reducing the level of conduct considered sufficient to constitute a substantial step toward commission of the crime. The Eleventh Circuit’s decision in United States v. Rothenberg is especially illustrative of this problematic expansion, as the court held that a conversation between consenting adults, without more, was sufficient to support a conviction. This Note critiques Rothenberg for its flawed analysis of precedent; its inconsistency with the statute’s legislative history and principles of federal attempt jurisprudence; and its potential to yield absurd results, whereby criminal liability attaches to behavior many would consider relatively innocuous. A suggested reform—imposing a higher conduct requirement when defendants have communicated solely with adults and implementing a defense for proximity of age—would have the narrow impact of rectifying these problems while not diminishing law enforcement’s ability to protect children from online predators.

Copyright © 2011 by Korey J. Christensen.

[†] Duke University School of Law, J.D. expected 2012; Creighton University, B.S.B.A. 2009. I would like to thank Professor Sara Sun Beale for her invaluable assistance throughout the Note-writing process. I am similarly grateful to Sarah Eichenberger and the rest of the editors of the *Duke Law Journal*. Their tireless efforts have had a tremendous impact on this Note. If any errors remain, they are solely my own. Most importantly, I want to thank my father, Jim; my mother, Kim; and my sister, Jaime Joy. Your love, support, patience, and inspiration have made all the difference in my life; I would not be where I am without the three of you.

INTRODUCTION

Imagine the following scenario: A forty-seven-year-old man named John is logged into an Internet chat room entitled “I Love Older Men.”¹ There he comes across the profile of a user named “Jenny30043,” who describes herself as a single female student.² John contacts Jenny, who tells him that she is thirteen years old. John “[tells] Jenny that she [is] ‘at the age [she] need[s] to learn some things’ such as ‘how to have pleasure’ and ‘experiment with [her] body on what makes it feel good.’”³ The conversation then turns explicitly sexual and John proceeds to describe “masturbation, ejaculation, [and] orgasms” to thirteen-year-old Jenny.⁴ John explains in detailed, exceptionally vulgar language his desire to engage in certain sex acts with Jenny and he tells her that he will drive from his home in North Carolina to Georgia to meet her “if [she] will f— [him].”⁵ Jenny suggests meeting that Friday and John agrees.⁶ When the arranged day arrives, John travels from North Carolina to Georgia, to the specific mall and store where Jenny had proposed to meet him.⁷

Now consider a second scenario: It is the night before the high-school prom, and Jack, an eighteen-year-old senior, is excited to take his seventeen-year-old girlfriend, Jane, to the big event. Jack is especially eager for the evening to arrive in part because Jane has indicated to him that, after two years of dating exclusively, she wants to lose her virginity on prom night. Jack, also a virgin, agrees that the time is right, but he is secretly feeling unsure of himself and insecure about his inexperience. Jack gets on the Internet to check his Gmail account and receives a chat message from Tim, a teammate on the football team, who is aware of the nature of Jack and Jane’s physical relationship through the often-unavoidable high-school phenomenon of locker-room gossip. Unsolicited, Tim, also an eighteen-year-old senior, offers his opinion that Jack should indeed have sex with Jane

1. *United States v. Root*, 296 F.3d 1222, 1224 (11th Cir. 2002), *superseded by* U.S. SENTENCING GUIDELINES MANUAL supp. app. C, amend. 732 (2009), *as recognized in* *United States v. Jerchow*, 631 F.3d 1181 (11th Cir. 2011).

2. *Id.*

3. *Id.*

4. *Id.* at 1225.

5. *Id.* (internal quotation marks omitted).

6. *Id.*

7. *Id.* at 1226.

on prom night and encourages Jack not to feel insecure. Tim, who has had several sexual partners, provides Jack with detailed advice on exactly how best to carry out the act.

The second scenario described is purely hypothetical. The first set of facts, however, is borrowed from *United States v. Root*,⁸ an Eleventh Circuit case that upheld the conviction of an Internet sex predator.⁹ In reality, thirteen-year-old “Jenny” was Agent Waylon Howell, an investigator assigned to the Innocent Images Task Force of the Federal Bureau of Investigation,¹⁰ and John was arrested upon arriving at the meeting place he had agreed upon with Jenny.¹¹

Regardless of variations in individuals’ moral beliefs or knowledge of the applicable law, few would argue with the notion that forty-seven-year-old John’s communications with thirteen-year-old Jenny—culminating in his travel to meet her so they could engage in sexual intercourse—should be punished by our legal system. Conversely, eighteen-year-old Tim’s communications with eighteen-year-old Jack simply do not elicit the same intuitive, emotional condemnation. Under the Eleventh Circuit’s interpretation of 18 U.S.C. § 2422(b)¹² in *United States v. Rothenberg*,¹³ however, both John, the Internet sex predator, and Tim, the eighteen-year-old encouraging his friend to engage in consensual sex with his minor girlfriend, can be convicted of a crime that carries a mandatory minimum sentence of ten years in prison.¹⁴ This seemingly absurd

8. *United States v. Root*, 296 F.3d 1222 (11th Cir. 2002), *superseded by* U.S. SENTENCING GUIDELINES MANUAL *supp. app. C, amend. 732* (2009), *as recognized in* *United States v. Jerchow*, 631 F.3d 1181 (11th Cir. 2011).

9. *Id.* at 1236. It is perhaps easy to imagine the second hypothetical scenario occurring fairly frequently. The type of facts described in *Root*, however, may unfortunately be similarly common:

Internet sexual offenses are a relatively new and burgeoning area of offending, and as such it is extremely difficult to estimate the number of individuals who fall victim to predators on the Internet. . . . The Texas Office of the Attorney General suggests that sexual solicitation has happened to one in five young people online, though this is only an estimate.

LAURA J. ZILNEY & LISA ANNE ZILNEY, *PERVERTS AND PREDATORS: THE MAKING OF SEXUAL OFFENDING LAWS* 106 (2009) (citation omitted) (citing *Cybercrimes*, 8 CRIM. L. UPDATE (Office of the Attorney Gen. of Tex., Austin, Tex.), no. 3, 2001, at 4, 4).

10. *Root*, 296 F.3d at 1224.

11. *Id.* at 1226.

12. 18 U.S.C. § 2422(b) (2006).

13. *United States v. Rothenberg*, 610 F.3d 621 (11th Cir. 2010).

14. *See* 18 U.S.C. § 2422(b) (requiring that those who are convicted “shall be fined under this title and imprisoned not less than 10 years or for life”). Note that Tim can be punished under § 2422(b) in states, such as California, that have a statutory rape law with an age of

outcome is based on the *Rothenberg* court's holding that communications occurring entirely between consenting adults can constitute § 2422(b) attempt, even if the defendant takes no further action to facilitate the occurrence of an illegal sex act.¹⁵

Protecting minors from sexual predators lurking on the Internet should remain an important goal for law enforcement and policymakers alike. The language of § 2422(b), however, has allowed courts to interpret what conduct is sufficient to constitute an attempt broadly,¹⁶ as the statute merely requires that the defendant attempt to “persuade[], induce[], entice[], or coerce[]” a minor to “engage in . . . any sexual activity for which any person can be charged with a criminal offense.”¹⁷ This language does not, on its face, make any distinction between consensual sex that amounts to statutory rape and offenses that are more intuitively sinister, such as child molestation. Although some people may be offended by the notion of teenagers' freely discussing premarital sex, Tim's hypothetical conduct does not inspire the same level of condemnation as John's direct solicitation of Jenny for sexual intercourse.¹⁸ Thus, this Note contends that § 2422(b) should be reformed in two distinct ways to shield individuals like Tim from liability. First, a defense for proximity of age should be added to the statute; this addition would distinguish defendants like Tim from Internet predators whose underlying sexual offense is not merely consensual statutory rape. Second, in circumstances in which a defendant engaged in communication entirely with another *adult*—rather than with a minor—§ 2422(b) should be amended to require a substantial step toward facilitation of an illegal sex act, thereby foreclosing prosecutions that are based solely on the content of a conversation

consent of eighteen and no defense for proximity of age. See CAL. PENAL CODE § 261.5(a) (West 2008) (prohibiting intercourse with a person under eighteen years old who is not the defendant's spouse).

15. See *Rothenberg*, 610 F.3d at 627 (upholding a § 2422(b) attempt conviction when the defendant had engaged in explicit Internet chats with other adults but had taken no further action to ensure that the illegal sexual activity he had suggested ever took place).

16. See *infra* Part I.B–D.

17. 18 U.S.C. § 2422(b) (emphasis added).

18. Cf. CAROLYN COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 137–38 (2004) (“Statutory rape laws, their meanings constructed and reconstructed to reflect contemporary economic, political, social, and cultural anxieties, help some and harm others. They can be used to safeguard those who require protection, and they can be used to punish marginalized populations whose behavior has been labeled ‘deviant’—those who fall outside the constructed boundaries of the ‘traditional’ married, heterosexual, middle-class American.”).

between consenting adults. This two-faceted reform would narrow the scope of § 2422(b) and would enable law-enforcement officials to continue prosecuting predators like John without also criminalizing Tim's conduct as an attempt.

Part I of this Note offers a brief primer on the tension inherent in attempt liability as legislators seek to encourage preventative law enforcement without punishing mere thoughts. It also explains how the current problem in § 2422(b) interpretation arose, examining the evolution of case-law interpretations of § 2422(b) that led to the outcome in *Rothenberg*. These case-law examples are drawn in large part from the Eleventh Circuit, as that circuit's precedent is especially illustrative of the problems with § 2422(b). Part II explains why the *Rothenberg* interpretation of § 2422(b) attempt liability is problematic, describing that case's flawed analysis of precedent; its inconsistency with the statute's legislative history and federal attempt jurisprudence; and its potential to yield absurd results, such as the sentencing of Tim to a mandatory minimum sentence of ten years in prison. Finally, Part III introduces this author's proposed two-faceted reform to § 2422(b), addressing potential counterarguments and applying the reform to various examples to demonstrate its ultimately narrow effect.¹⁹

I. INTERNET SEX PREDATORS AND THE EVER-EXPANDING INTERPRETATION OF 18 U.S.C. § 2422(B) ATTEMPT

Both John and Tim, as well as other offenders in the category commonly referred to as Internet sex predators, can be found subject to criminal liability for their online communications under 18 U.S.C. § 2422(b), which reads as follows:

Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.²⁰

19. See *infra* Part III.B.

20. 18 U.S.C. § 2422(b).

As the Internet has changed the way in which sex predators are able to interact with their potential victims, courts have been faced with new and varied fact patterns under which they must interpret whether an attempt to “persuade[], induce[], entice[], or coerce[]” has actually occurred. The statute’s broad wording, coupled with the especially troubling nature of the underlying offense, has led courts to expand the statute’s reach.²¹ This Note does not contend that § 2422(b) should be rewritten or reinterpreted in an excessively narrow fashion. The series of small extensions that has occurred, however, culminating in the Eleventh Circuit’s June 2010 decision in *Rothenberg*, has led to an overbroad interpretation of § 2422(b) that fails to acknowledge the importance of the substantial-step requirement in American criminal jurisprudence.

A. *Attempt Law’s Inherent Balancing Act: Enabling Preventative Law Enforcement Without Punishing Thoughts*

As a threshold matter, the dangers of an overbroad interpretation of the substantial-step requirement must be briefly acknowledged. An attempt conviction requires evidence: “(1) that the defendant acted with the kind of culpability required for the commission of the crime and (2) that the defendant engaged in conduct which constituted a substantial step toward commission of the crime.”²² A step toward commission is considered sufficiently substantial if “the defendant’s objective acts mark the defendant’s conduct as criminal so that the defendant’s acts as a whole strongly corroborate the required culpability.”²³ The Supreme Court has summarized this rule by observing that “the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by *significant* conduct.”²⁴

One commentator accurately describes the purpose of attempt liability as “provid[ing] a basis of punishment for actors who, by mere fortuity, have not completed a crime, but who are indistinguishable in

21. Cf. 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, 359–61 (2008) (attributing the shift “from punitive to preventative measures” in Internet-sex-offense legislation to a “[w]idespread fear that an evil faction of society will infect the masses,” which has turned the issue into a national “witch hunt,” analogous to the Salem witch trials or McCarthy-era accusations of communism).

22. *United States v. Forbrich*, 758 F.2d 555, 557 (11th Cir. 1985).

23. *Id.*

24. *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007) (emphasis added).

blameworthiness from those who succeed.”²⁵ Because the underlying crime has not been completed, however, “less certainty exists as to an individual’s blameworthiness,” and the danger arises that those defendants who are not blameworthy might also be punished.²⁶ Such punishment would violate the long-held, and seemingly unchallenged, principle that “no one is punishable for his thoughts.”²⁷ Thus, the substantial-step requirement, endorsed by the Model Penal Code²⁸ and employed by federal courts in § 2422(b) attempt cases,²⁹ functions as an essential sorting mechanism because it “serves to distinguish people who pose real threats from those who are all hot air.”³⁰ Overbroad judicial interpretation, however, has the potential to dilute the substantial-step requirement’s efficacy, thereby increasing the danger that those defendants who are insufficiently blameworthy might indeed be punished.³¹

B. Communication with a Purported Minor Is Not Required for a § 2422(b) Attempt Conviction

Initially, the § 2422(b) cases facing courts generally followed the same pattern. The defendant would contact his potential victim in an online chat room; the victim would identify himself or herself as a minor; and an explicit conversation would ensue, typically with some arrangement being made for the pair to meet and consummate the subject of their discussions.³² Although the facts of the case could vary

25. Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. RICH. L. REV. 477, 479 (2004).

26. *Id.* at 480–81.

27. *United States v. Muzii*, 676 F.2d 919, 920 (2d Cir. 1982); *see also, e.g., Proctor v. State*, 176 P. 771, 773 (Okla. Crim. App. 1918) (“Guilty intention, unconnected with an overt act or outward manifestation, cannot be the subject of punishment under statute.” (quoting *Ex parte Smith*, 36 S.W. 628, 629 (Mo. 1896)) (internal quotation marks omitted)).

28. MODEL PENAL CODE § 5.01(1) (1962) (“A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely does or omits to do anything that . . . is an act or omission constituting a *substantial step* in a course of conduct planned to culminate in his commission of the crime.” (emphasis added)).

29. *E.g., United States v. Rothenberg*, 610 F.3d 621, 626 (11th Cir. 2010).

30. *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

31. *See id.* (“Treating speech (even obscene speech) as the ‘substantial step’ would abolish any requirement of a substantial step.”); Schottenfeld, *supra* note 21, at 383 (“By permitting the act of chatting online to satisfy the substantial step requirement of internet luring laws, current legislation is criminalizing bad thoughts.”).

32. *See, e.g., United States v. Panfil*, 338 F.3d 1299, 1300 (11th Cir. 2003) (describing a defendant’s unsuccessful constitutional challenge to § 2422(b) when he had engaged in an

in several ways—including whether the defendant was arrested before or after embarking on the travel necessary to meet the victim and whether the victim was an undercover investigator or a real minor—until 2004, every case involved a defendant’s direct communication with a party he believed to be a minor.³³

In 2004, the Eleventh Circuit became the first federal appellate court to review a § 2422(b) conviction based wholly upon a defendant’s interaction with a party he subjectively believed was an adult.³⁴ Although previous prosecutions had often been based on conversations that had in fact taken place between two adults, *United States v. Murrell*³⁵ required an appellate court to consider, for the first time, a fact pattern in which the undercover investigator had never claimed to be a minor. The case challenged Anthony Murrell’s conviction under § 2422(b) for having “ma[de] an online deal with a purported adult father to have sex with the father’s minor daughter.”³⁶

On two separate occasions in September 2002, Murrell made contact in America Online chat rooms with an undercover detective posing as the parent of an underage child.³⁷ In the initial instance, Murrell corresponded with a person whom he believed to be the mother of a thirteen-year-old daughter in “the ‘family love’ chat room.”³⁸ He “expressed an interest in meeting the mother and daughter for a ‘discreet sexual relationship,’” and he later emailed the

Internet chat with a party he believed was a thirteen-year-old girl, asked her “to meet him to engage in sexual activity,” and “offered to furnish oral sex” before being arrested at the prearranged meeting place); *United States v. Root*, 296 F.3d 1222, 1223–26 (11th Cir. 2002) (upholding a conviction based on the first set of facts described in this Note’s Introduction), *superseded by* U.S. SENTENCING GUIDELINES MANUAL supp. app. C, amend. 732 (2009), *as recognized in* *United States v. Jerchow*, 631 F.3d 1181 (11th Cir. 2011); *see also* Elizabeth D. Tempio, Casenote, *A/S/L? 45/John Doe Offender/Federal Prison—The Third Circuit Takes a Hard Line Against Child Predators in United States v. Tykarsky*, 52 VILL. L. REV. 1071, 1071–73 (2007) (describing the common fact pattern under which Internet-predator stings occur); Christopher P. Winters, Comment, *Cultivating a Relationship That Works: Cyber-Vigilantism and the Public Versus Private Inquiry of Cyber-Predator Stings*, 57 U. KAN. L. REV. 427, 433–35 (2009) (summarizing a typical sting operation and the involvement of private groups such as Perverted Justice).

33. *See United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) (observing that the case of “a defendant who arranges to have sex with a minor through communications with an adult intermediary” was “a matter of first impression in the federal circuit courts”).

34. *Id.*

35. *United States v. Murrell*, 368 F.3d 1283 (11th Cir. 2004).

36. *Id.* at 1284.

37. *Id.*

38. *Id.*

decoy mother to reiterate his desire “to get intimate” with both her and her underage daughter.³⁹

The second instance occurred only a few days later, when Murrell contacted someone he believed to be the father of an underage daughter within a chat room titled “Rent F Vry Yng.”⁴⁰ Murrell chatted with the decoy father about “renting” his daughter, and he expressed a desire to have sex with her.⁴¹ During subsequent conversations “[o]ver the next few days,” Murrell arranged to meet the purported father at a Holiday Inn, where Murrell would pay him \$300 to have sex with the daughter.⁴² Murrell arrived at the agreed-upon location with \$300, a box of condoms, and a teddy bear.⁴³ The police arrested Murrell “as he walked toward a hotel room in which he believed the minor was waiting.”⁴⁴

On appeal, Murrell contended that § 2422(b) did not prohibit his conduct because he had communicated exclusively with parties he had believed to be adults.⁴⁵ Noting that this issue was “a matter of first impression in the federal circuit courts,”⁴⁶ the court proceeded to analyze the two elements of an attempt conviction: “(1) that the defendant had the specific intent to engage in the criminal conduct for which he [was] charged and (2) that he took a substantial step toward commission of the offense.”⁴⁷

Following the analysis set forth in *United States v. Bailey*,⁴⁸ a § 2422(b) case in which the defendant believed he had communicated directly with minors,⁴⁹ the *Murrell* court recognized that an attempt conviction does not require specific intent to engage in sexual activity with the victim, but merely requires “intent to persuade, induce,

39. *Id.*

40. *Id.* (internal quotation marks omitted).

41. *Id.* at 1284–85.

42. *Id.* at 1285.

43. *Id.*

44. *Id.*

45. *Id.* at 1286. Murrell also challenged the lower court’s application of sentencing enhancements on appeal, *id.* at 1285, but that challenge falls outside the scope of this Note.

46. *Id.* at 1286.

47. *Id.*

48. *United States v. Bailey*, 228 F.3d 637 (6th Cir. 2000); *see also id.* at 639 (“While it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly *separate and different intents* and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, *not* the performance of the sexual acts themselves.” (emphasis added)).

49. *Id.* at 639.

entice, or coerce a minor to engage in unlawful sexual activity.”⁵⁰ The court concluded that Murrell’s actions revealed an intent to induce, which it defined as “[t]o stimulate the occurrence of; cause.”⁵¹ “By negotiating with the purported father of a minor,” the court explained, “Murrell [had] attempted to stimulate or cause the minor to engage in sexual activity with him,” thus satisfying the specific-intent requirement of § 2422(b).⁵²

Having explained that § 2422(b) punishes “persuasion, inducement, enticement, or coercion of the minor rather than the sex act itself,”⁵³ the court proceeded to analyze whether a substantial step had been taken toward this end, citing circuit precedent for the proposition that finding a substantial step requires “that the defendant’s objective acts mark his conduct as criminal such that his acts as a whole strongly corroborate the required culpability.”⁵⁴ Because Murrell’s objective acts included communication with an undercover police officer posing as separate parents; travel to the arranged meeting location; and possession of condom, a stuffed animal, and cash in the agreed-upon “rental” amount when he arrived at this location, the panel determined that a substantial step had been taken, asserting that “[Murrell’s] actions, taken as a whole, demonstrate unequivocally that he intended to influence a young girl into engaging in unlawful sexual activity and that his conduct was therefore criminal.”⁵⁵

C. Travel To Meet the Victim Is Not Required for a § 2422(b) Attempt Conviction

A pair of cases in the Eleventh Circuit signaled a subtle shift in the § 2422(b) analysis and provided opportunities for the circuit to clarify that although travel to an agreed-upon meeting place could corroborate intent and constitute evidence that a substantial step had occurred, travel to a meeting place is not required for a conviction. In

50. *Murrell*, 368 F.3d at 1287.

51. *Id.* (alteration in original) (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 671 (new college ed. 1981)) (internal quotation marks omitted). A second definition of “induce” from the same dictionary was rejected by the court because it was determined to be “essentially synonymous with the word ‘persuade.’” *Id.*

52. *Id.*

53. *Id.* at 1286.

54. *Id.* at 1288 (citing *United States v. Forbrich*, 758 F.2d 555, 557 (11th Cir. 1985)).

55. *Id.*

United States v. Yost,⁵⁶ the Eleventh Circuit upheld the defendant's § 2422(b) attempt conviction when the defendant had arranged to meet a purported minor at a specific place and time but then had failed to show up.⁵⁷ The defendant in *Yost* had engaged in sexually explicit Internet chats with, and also telephoned, an undercover Secret Service agent he believed to be a thirteen-year-old named "Lynn."⁵⁸ Additionally, he had posted a picture of his genitalia online that he instructed Lynn to view and had made arrangements to meet Lynn to consummate the subject of their chats.⁵⁹ Ultimately, the panel reasoned that "[d]espite a lack of evidence of travel, the *totality* of Yost's actions convinces us that a reasonable jury could have found Yost committed a substantial step."⁶⁰

*United States v. Lee*⁶¹ took the analysis in *Yost* a step further when it upheld the conviction of a defendant who had communicated exclusively with a postal inspector posing as "Candi," the mother of two minor daughters.⁶² The defendant in *Lee* had engaged in several graphic chats with Candi in which he had expressed his desire to have sex with her daughters.⁶³ He also had sent Candi a picture of his penis that he had encouraged her to share with her daughters,⁶⁴ and had offered to send gifts to the daughters.⁶⁵ Throughout the interactions, Lee had affirmed that his intent was to engage in sex with the underage daughters rather than with the decoy mother herself.⁶⁶ Additionally, he had requested that Candi "send him a revealing photograph of her and her daughters."⁶⁷ When Candi had offered to

56. *United States v. Yost*, 479 F.3d 815 (11th Cir. 2007).

57. *Id.* at 820.

58. *See id.* at 816–17.

59. *Id.* at 820.

60. *Id.* (emphasis added). Yost was eventually apprehended when he traveled to meet a second minor—"Candi"—who in fact was the same undercover Secret Service agent involved in the previous encounter. *Id.* at 816–18. At trial, he faced three counts of § 2422(b) attempt, including one count related to a third minor alias of the agent whom he had contacted—"Mandy." *Id.* at 816. Yost was eventually acquitted regarding his contact with Mandy. *Id.* He was convicted, however, on the two remaining counts related to his communication with Lynn and Candi; both of these convictions were upheld on appeal. *Id.* at 820.

61. *United States v. Lee*, 603 F.3d 904 (11th Cir. 2010).

62. *Id.* at 908.

63. *See id.* at 908–11 (describing the defendant's correspondence with the decoy mother between September 2007 and his arrest on March 7, 2008).

64. *Id.* at 909.

65. *Id.* at 911.

66. *Id.* at 910–11.

67. *Id.* at 909.

take such photos because she did not currently have any, Lee had “provided detailed specifications” as to the sexually explicit poses he wanted the photographs to depict.⁶⁸ Like Yost, however, Lee never made more than very general arrangements to travel to meet Candi and her daughters⁶⁹ and he was ultimately arrested at his own home.⁷⁰

Lee initially argued that the plain language of § 2422(b) prohibits the “persuasion, inducement, enticement and coercion of a minor, not an adult who controls the behavior of the minor.”⁷¹ This contention was quickly rejected by the panel, which cited *Murrell*, among other cases, and noted that “one can persuade, entice, or coerce a minor to engage in sexual activity through an adult intermediary because ‘[s]exual predators can and do . . . attempt to persuade children to engage in sexual activity through the victim’s parents or guardians.’”⁷² In determining whether sufficient evidence of a substantial step had been presented to affirm the § 2422(b) attempt conviction, the panel cited both *Murrell* and *Yost* for the proposition that “the government must prove that the defendant took a substantial step *toward causing assent*, not toward causing actual sexual contact,”⁷³ specifically noting that “[t]he statute ‘criminalizes an intentional attempt to achieve a *mental state*—a minor’s assent.’”⁷⁴ In upholding *Murrell*’s view on the sufficiency of communication with adult intermediaries, the panel opined that it could think of no reason that “the burden of proof for the government should change when a defendant, like Lee, communicates only with an adult intermediary who can influence a minor.”⁷⁵

Although the communications in question had been entirely between Lee and Candi, and although the discussions regarding a meeting had been less than specific, the panel determined that Lee had taken a substantial step toward a § 2422(b) violation because he had essentially “requested assistance from the one woman who had

68. *Id.*

69. *See id.* at 919 (Martin, J., concurring in part and dissenting in part) (“It is undisputed that Mr. Lee never took any step, substantial or otherwise, to travel to California. He never bought a plane, bus or train ticket. He never set a date for a visit. He never left Georgia.”).

70. *Id.* at 911 (majority opinion).

71. Initial Brief of Appellant at 31, *Lee*, 603 F.3d 904 (No. 08-17077-A).

72. *Lee*, 603 F.3d at 913 (alteration and omission in original) (quoting *United States v. Nestor*, 574 F.3d 159, 162 n.4 (3d Cir. 2009)).

73. *Id.* at 914 (emphasis added) (citing *United States v. Yost*, 479 F.3d 815, 819–20 & n.3 (11th Cir. 2010); *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004)).

74. *Id.* (quoting *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007)).

75. *Id.*

‘influence and control over [the] daughters.’”⁷⁶ The court placed particular weight on the fact that Lee had made promises to buy gifts for the girls and had sent a graphic photo of himself to the girls, despite the fact that both actions had been directed through Candi and would have required her independent and unverifiable cooperation to achieve their desired effect.⁷⁷ These actions “toward causing Candi’s daughters to assent to sexual contact,” the court held, were sufficient to outweigh the lack of “firm plans to travel” and, thus, to uphold Lee’s conviction.⁷⁸

The substantial-step prong of the *Lee* panel’s analysis drew a partial dissent from Judge Beverly Martin, who apparently recognized the shift that was occurring. Judge Martin argued, in the face of well-established contrary precedent,⁷⁹ that the requisite substantial step must be “towards stimulating the occurrence of [the defendant’s] intended goal of having sex with a child,” rather than merely toward causing a state of mental assent within the child.⁸⁰ Acknowledging that travel is not required for an attempt conviction, Martin compared Lee’s actions to those of several other defendants whose convictions had been upheld, noting that Lee had taken less of a substantial step than had any defendant in any prior case.⁸¹ Having made her argument in favor of vacating Lee’s § 2422(b) attempt conviction, Martin felt it necessary to include a caveat, stating that she did not “intend to minimize the threat that sexual predators pose to children” and that “[f]urthering Mr. Lee’s argument . . . [was] not an easy task.”⁸²

76. *Id.* at 915 (alteration in original) (quoting *United States v. Spurlock*, 495 F.3d 1011, 1014 (8th Cir. 2007)).

77. *Id.*; *see also id.* (“Much of Lee’s conduct—especially his sending graphic photographs to the girls and promising gifts—also supports a finding that he groomed the girls in an effort to facilitate a future sexual encounter.”).

78. *Id.*

79. *See, e.g., United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004) (“Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.” (quoting *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000))).

80. *Lee*, 603 F.3d at 920 (Martin, J., concurring in part and dissenting in part).

81. *Id.* at 921.

82. *Id.* at 922; *see also id.* (“[Lee’s] interaction with Candi Kane is disturbing, and their conversations repugnant. I in no way intend to minimize the threat that sexual predators pose to children in our society or the life-shattering effects their actions have on their victims. Nevertheless, I write out of concern that the majority opinion does not clearly demarcate despicable but lawful talk from a criminal attempt punishable by up to thirty years in prison.”). This Note’s author shares Judge Martin’s sentiment.

D. United States v. Rothenberg Takes § 2422(b) Substantial-Step Analysis to a New Depth

A subsequent decision by the Eleventh Circuit further extended *Lee*'s analysis and unequivocally rejected the proposition that traveling to meet a victim, or even arranging such a meeting, is necessary to sustain a conviction under § 2422(b). In *United States v. Rothenberg*, the defendant communicated with a decoy parent on the Internet and expressed his desire to have sex with the parent's underage daughter.⁸³ The defendant arranged to meet with the decoy parent and was arrested when he arrived at the agreed-upon location.⁸⁴ He ultimately pled guilty to both knowingly attempting to induce a minor to engage in illegal sexual conduct and knowingly possessing child pornography.⁸⁵

At issue on appeal was the defendant's contention that the district court had improperly applied sentencing enhancements "resulting from the district court's finding of a pattern of prohibited sexual misconduct."⁸⁶ The district court had based its finding on records of chat-room conversations discovered when the defendant's home and computer were searched following his initial arrest.⁸⁷ These individual conversations had not formed the basis of the underlying conviction for which Rothenberg was sentenced. Their sufficiency as attempts to induce illegal sexual conduct by a minor was nevertheless the focal point of the court's analysis because the conversations were relied upon to support the "pattern of activity" sentencing enhancement.⁸⁸

On December 21, 2006, Rothenberg engaged in a chat-room conversation with a nineteen-year-old male.⁸⁹ The two were "discussing having sex" when the nineteen-year-old "disclosed that he

83. *United States v. Rothenberg*, 610 F.3d 621, 623 (11th Cir. 2010).

84. *Id.*

85. *Id.*

86. *Id.* at 623–24.

87. *Id.* at 624–25.

88. *See id.* at 625 n.5 ("[T]he term 'pattern of activity' . . . is defined to include any two or more occasions of *prohibited sexual conduct* whether or not such conduct occurred during the course of the instant offense and regardless of whether the conduct resulted in a conviction. Thus, either of the prior chats relied upon by the district court, *if either should be found to constitute an offense involving prohibited sexual conduct*, would be sufficient, when joined with the offense of conviction, to warrant the finding of a 'pattern' supporting the enhancements." (emphasis added) (citations omitted)).

89. *Id.* at 625.

had a ‘lil bro’” who was sixteen years old at the time.⁹⁰ Rothenberg replied by exclaiming “HOT” and proceeded to describe methods for manual and oral sexual stimulation that he encouraged the nineteen-year-old to perform on his younger brother.⁹¹ In a separate conversation on June 1, 2007, Rothenberg chatted “with a person who described himself as a 30 year old divorced male with custody of two young sons, ages 8 and 11.”⁹² Again, Rothenberg described methods that the father could use to engage in manual, oral, and anal sex with his sons, encouraging him to do so with repeated assertions that such contact “is so natural between dad and son.”⁹³ At no time during either conversation, however, did Rothenberg indicate any desire to engage in illegal sexual conduct himself, nor did he express any intent to meet either of the men with whom he was conversing or their minor relatives. He neither initiated subsequent communications with the men nor indicated any intent to ensure that these sex acts occurred.⁹⁴ Thus, the court was faced with the question of whether an Internet chat between two adults could, without further action by the defendant, “constitute a substantial step toward commission of an offense in violation of 18 U.S.C. § 2422(b) so as to complete the crime of attempt.”⁹⁵ The court answered that question in the affirmative,⁹⁶ lowering the bar for a substantial step under § 2422(b) to an unprecedented level. Furthermore, the court suggested that the bar may eventually be lowered even further when it quoted the *Lee* court’s explanation that “[n]ot surprisingly, none [of our precedent] guesses at or purports to have identified the minimum conduct that section 2422(b) proscribes.”⁹⁷

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 625–26.

94. *See id.* at 626 (“Rothenberg contends that neither of these ‘chats,’ *without more*, is legally sufficient to constitute an attempt to violate 18 U.S.C. § 2422(b)” (emphasis added)). Although the court did not reproduce a complete transcript of the conversations at issue, it also made no mention of any statements through which the defendant had demonstrated such an intent. Thus, if the defendant *had* made such statements—in some portion of the chat that was not provided by the court in its opinion—it is reasonable to assume that they had no bearing on the outcome of the case.

95. *Id.*

96. *Id.* at 627.

97. *Id.* (quoting *United States v. Lee*, 603 F.3d 904, 916 (11th Cir. 2010)).

II. *ROTHENBERG'S* OVERBROAD INTERPRETATION OF A SUBSTANTIAL STEP UNDER § 2422(B) IS PROBLEMATIC

Four problems exist with the *Rothenberg* court's interpretation of § 2422(b), and together, these problems illustrate the necessity of a statutory reform like the two-faceted proposal in Part III. The first problem is that the *Rothenberg* court mischaracterized precedent, inferring a broader rule than the facts of the cited cases actually support. The second problem is that the *Rothenberg* court's interpretation of § 2422(b) runs contrary to the statute's legislative history, and the third is that it offends foundational principles of criminal-attempt law. The fourth and final problem is that *Rothenberg's* rule leads to absurd outcomes, potentially extending criminal liability to defendants in relatively benign circumstances.

A. *Rothenberg Is Based upon Flawed Analysis of Precedent*

In reaching its conclusion, the *Rothenberg* panel reviewed the evolution of § 2422(b) case law in the Eleventh Circuit. The court cited *Murrell* for the proposition that “the essence of the crime is the attempted enticement of someone the defendant believes to be a minor, not actual engagement in sexual activity with a minor.”⁹⁸ To support its ultimate conclusion that “a sexually solicitous communication by means of interstate commerce, without more, can . . . constitute a substantial step toward” a § 2422(b) violation, the court cited *Yost* and *Lee*.⁹⁹ These cases, however, are factually distinguishable from the conduct at issue in *Rothenberg*.

Although a § 2422(b) attempt may conceivably arise under myriad circumstances, for the purposes of this analysis, four factual variables help to illustrate *Rothenberg's* departure from prior § 2422(b) attempt cases. These variables include (1) whether the defendant's sexually explicit communications were sent directly to someone he believed was a minor, or instead to an adult intermediary whose independent and potentially unverifiable cooperation would be required to complete the underlying crime of persuasion, inducement, enticement, or coercion of a minor;¹⁰⁰ (2) whether the

98. *Id.* at 626 (citing *United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004)).

99. *Id.*

100. *Compare* *United States v. Yost*, 479 F.3d 815, 817–18 (11th Cir. 2007) (describing the defendant's communications, which he believed were directly with minors), *with* *Lee*, 603 F.3d at 908–11 (summarizing the defendant's communications with “Candi Kane,” whom he believed to be the mother of minor children).

defendant made sufficiently firm plans to meet the other party to the Internet communication;¹⁰¹ (3) whether the defendant took any other overt acts toward persuading, inducing, enticing, or coercing a minor;¹⁰² and (4) whether the defendant intended to engage personally in illicit sexual activity.¹⁰³

Although the court in *Rothenberg* asserted that *Lee* and *Yost* “supplied an affirmative answer” to the question of “whether a sexually solicitous communication . . . *without more*[] can ever constitute a substantial step,”¹⁰⁴ this characterization is misleading. In *Yost*, the court listed the “objective acts” taken by the defendant toward the completion of a § 2422(b) violation, which included encouraging a minor to view a photo of his genitalia that he had posted online and making a firm plan to meet his potential victim.¹⁰⁵ *Yost* also communicated directly with someone he believed to be a minor rather than with an adult intermediary, and his plan to meet the purported minor unambiguously demonstrated his intent to engage in illegal sexual activity.¹⁰⁶ Similarly, although the defendant in *Lee* communicated with an adult intermediary and did not make firm plans to meet with the minor victims, the court put special emphasis on the fact that he had sent graphic photos to the minors, through their mother, as evidence “that he [had] groomed the girls in an effort to facilitate a future sexual encounter.”¹⁰⁷ Thus, it can hardly be said

101. Compare *Murrell*, 368 F.3d at 1285 (describing the defendant’s arrest, which occurred when the defendant arrived at the prearranged meeting location), with *Rothenberg*, 610 F.3d at 627 (explaining that the defendant’s conduct could be found to constitute a § 2422(b) attempt even though the defendant made no plans to meet the other party to the online communication).

102. See, e.g., *Lee*, 603 F.3d at 909 (explaining that the defendant had sent a picture of his penis to Candi Kane, whom he believed to be the mother of minor children, and had asked that she share the photograph with her daughters); *Yost*, 479 F.3d at 817 (“Yost asked [his chat partner, whom he believed to be a minor,] if she wanted to see how big he was and told her to go to his profile to see a picture of his genitalia.”); *Murrell*, 368 F.3d at 1288 (noting that the defendant “[was carrying] a teddy bear, \$300.00 in cash, and a box of condoms when he arrived at the meeting site”).

103. Compare *Rothenberg*, 610 F.3d at 625–26 (quoting the defendant’s chat messages, which did not include any mention of a desire to participate in illegal sexual activity), with *Yost*, 479 F.3d at 817 (quoting the defendant’s chat messages, which included descriptions of the sex acts he wanted the minor to perform on him).

104. *Rothenberg*, 610 F.3d at 626 (emphasis added).

105. *Yost*, 479 F.3d at 819–20.

106. *Id.* at 817 (describing Yost’s direct communication with Lynn, whom he believed to be thirteen years old, during which he set a time and place to meet her).

107. *Lee*, 603 F.3d at 915.

that Yost and Lee were convicted based upon “a sexually solicitous communication . . . *without more*.”

An examination of the four factual variables aids in understanding how a court, considering “the ‘totality’ of [the defendant’s] conduct,”¹⁰⁸ might ultimately arrive at *Rothenberg*’s outcome. By following a line of cases in which the absence of individual variables was outweighed by the presence of others, the *Rothenberg* panel ultimately ruled that the defendant’s conduct constituted a § 2422(b) attempt even though *none* of the variables present in the cited convictions—and none of the variables typically proven in most § 2422(b) prosecutions—were actually found in *Rothenberg*. *Rothenberg* spoke only with adult intermediaries; never made any plans to meet with his chat partners or with the relevant minors involved—nor did he even indicate any desire to do so—and took no overt actions beyond participating in the conversations themselves to persuade, induce, entice, or coerce a minor to engage in illegal sex acts.¹⁰⁹ Most notably, unlike the defendants in *Yost* and *Lee*, *Rothenberg* never expressed *any* desire to engage in illegal sexual activity himself.¹¹⁰ Thus, relying on what amounted to a patchwork quilt of precedents relating to different factual elements in the substantial-step analysis, the Eleventh Circuit indicated that a defendant can be convicted of attempting to persuade, induce, entice, or coerce a minor to engage in illegal sexual conduct based *entirely* upon the content of text transmitted to a consenting adult.

B. Congress Did Not Intend for § 2422(b) Attempt Liability To Be Construed So Broadly

This Note contends that the legislative history of § 2422(b) does not evidence an intent to punish solely on the basis of adult-to-adult communications; instead, it demonstrates Congress’s desire to avoid an outcome like the one in *Rothenberg*.¹¹¹ Subsection (b) was

108. *Id.* at 916 (quoting *Yost*, 479 F.3d at 820).

109. *See Rothenberg*, 610 F.3d at 625–26 (describing the chats in question).

110. *See id.* at 625 (quoting *Rothenberg*’s messages, which encouraged the other adult to engage in an illegal sexual encounter but did not demonstrate that *Rothenberg* had any desire to meet or participate in the encounter).

111. Conversely, although legislative history can provide a valuable tool for interpreting congressional intent, it can sometimes also be misleading. *See, e.g.*, *N. States Power Co. v. United States*, 73 F.3d 764, 766 (8th Cir. 1996) (“We think that when, as here, the statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative.” (citing *Davis v. Mich. Dep’t*

appended to the statute as part of the Telecommunications Act of 1996,¹¹² but the Third Circuit in *United States v. Tykarsky*¹¹³ noted that “[t]here is very little legislative history pertaining to the first version of § 2422(b).”¹¹⁴ Rather, as the *Tykarsky* court explained, “Because the [Protection of Children from Sexual Predators Act of 1998 (Protection Act)]¹¹⁵ rewrote § 2422(b) and made substantial changes to related laws, we find the Congressional findings related to [the 1998] act to be more relevant here.”¹¹⁶ Indeed, the portion of the statutory language analyzed by the Eleventh Circuit in 2010 has not been changed since the passage of the Protection Act.¹¹⁷

Two important points can be gleaned from a review of the Protection Act’s legislative history. First, the history describes Congress’s grave concern with “pedophiles who stalk children on the Internet” in an attempt to create direct relationships with them.¹¹⁸ For

of the Treasury, 489 U.S. 803, 808 n.3 (1989)). Additionally, the *Rothenberg* court’s interpretation of the statute’s plain language and, in particular, its current emphasis on the inducement of a mental state as the actus reus, are not altogether unreasonable. See *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) (“Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.”). Thus, to the extent that the legislative history appears to contradict the plain language of the statute, a legislative fix, rather than a shift in judicial interpretation, constitutes the most effective medium for the necessary change. For an example of such a legislative reform, see *infra* Part III.

112. Telecommunications Act of 1996, Pub. L. No. 104-104, § 508, 110 Stat. 56, 137 (codified as amended at 18 U.S.C. § 2422 (2006)). The initial version of the statutory language read as follows:

Whoever, using any facility or means of interstate or foreign commerce, including the mail, or within the special maritime and territorial jurisdiction of the United States, knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years to engage in prostitution or any sexual act for which any person may be criminally prosecuted, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.

Id.

113. *United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006).

114. *Id.* at 467 n.4.

115. Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

116. *Tykarsky*, 446 F.3d at 467 n.4.

117. The only changes to the 1998 language have been to the portion of the statute related to the punishment to be imposed. Compare Protection of Children from Sexual Predators Act of 1998 sec. 102, § 2422(b) (providing that those who are convicted “shall be fined under this title, imprisoned not more than 15 years, or both”), with 18 U.S.C. § 2422(b) (2006) (providing that those who are convicted “shall be fined under this title and imprisoned not less than 10 years or for life”).

118. H.R. REP. NO. 105-557, at 12 (1998), as reprinted in 1998 U.S.C.C.A.N. 678, 680.

instance, in describing the “Background and Need for the Legislation,” the House Judiciary Committee warned,

While parents strive to *warn their children* about the dangers outside of the home, they are often unaware of the dangers within—on the World Wide Web. “Cyber-predators” often “cruise” the Internet in search of *lonely, rebellious or trusting young people*. The anonymous nature of the on-line relationship allows users to misrepresent their age, gender, or interests. Perfect strangers can reach into the home and *befriend a child*.

Recent, highly publicized news accounts in which pedophiles have used the Internet to *seduce or persuade children* to meet them to engage in sexual activities have sparked vigorous debate about the wonders and perils of the information superhighway. *Youths* who have agreed to such meetings have been kidnapped, photographed for child pornography, raped, beaten, robbed, and worse.¹¹⁹

The committee went on to describe the bill as “a response to *requests of victim parents* and law enforcement to address public safety issues involving the most vulnerable members of our society, our children.”¹²⁰ The repeated use of child-centric language to describe the activity the committee hoped to criminalize suggests that the committee was focused on prohibiting direct communications between predators and minors without the knowledge, let alone the active participation and cooperation, of the minors’ parents. Although such language cannot, on its own, be construed to foreclose *Rothenberg*-type liability, at the very least it raises significant doubt as to whether Congress ever contemplated that the broad language of § 2422(b) could be used to incarcerate defendants who merely conversed *with parents or other adults* about illegal sexual activity but who took no other action.

The second relevant point evident from the legislative history comes from a provision that Congress ultimately failed to include in the final version of the Protection Act. On June 11, 1998, the House of Representatives passed a version of the Protection Act that would have appended a Subsection (c) onto § 2422.¹²¹ This ultimately

119. *Id.* at 11–12 (emphasis added).

120. *Id.* at 12 (emphasis added).

121. Child Protection and Sexual Predator Punishment Act of 1998, H.R. 3494, 105th Cong. § 101 (as passed by House of Representatives, June 11, 1998).

unenacted § 2422(c) would have punished any Internet user who “knowingly” contacted someone who was under the age of eighteen—or “who ha[d] been represented to the person making the contact as not having attained the age of 18 years”—if the contact was made “for the purposes of engaging in any sexual activity, with a person who ha[d] not attained the age of 18 years, for which any person may be criminally prosecuted.”¹²²

Like § 2422(b), the plain language of the proposed Subsection (c) also explicitly addressed attempt liability,¹²³ thus opening the door for convictions of individuals who never completed the underlying offense of contacting a child, but who merely took a substantial step toward doing so with the requisite intent. Unlike § 2422(b), however, the unenacted § 2422(c) passed by the House would have included a defense for those situations in which “the sexual activity [was] prosecutable only because of the age of the individual contacted, the individual contacted had attained the age of 12 years, and the defendant was not more than 4 years older than the individual contacted.”¹²⁴ The contemplated inclusion of this defense suggests that Congress explicitly intended to avoid a potentially absurd result in which an eighteen-year-old could be arrested and jailed for a sex crime for up to five years because he had used the Internet to arrange a consensual sexual encounter with his seventeen-year-old girlfriend.¹²⁵

At the time the bill passed the House, it was widely popular, and the § 2422(c) prohibition of mere contact with the purpose of engaging in illegal sexual activity was one of the bill’s more eye-catching provisions.¹²⁶ Ultimately, however, the § 2422(c) provision was removed from the legislation before the bill was passed by

122. *Id.*

123. *Id.*

124. *Id.*

125. *Cf.* CAL. PENAL CODE § 261.5 (West 2008) (prohibiting intercourse between a person of at least eighteen years of age and a person under eighteen years of age who is not the elder party’s spouse).

126. *See* Lizette Alvarez, *House Passes Bill To Crack Down on Pedophiles Exploiting Internet*, N.Y. TIMES, June 12, 1998, at A16 (“The bill passed 416 to 0, reflecting Congress’s growing concern with cyberspace . . . Embraced by all sides—Republicans, Democrats and the Clinton Administration—the bill would prohibit ‘contacting’ a minor through an on-line service, like the Internet, or engaging in sexual activity and would establish a three-year minimum sentence for using a computer to do so.”).

Congress.¹²⁷ In speaking to the Senate on the date it passed the Protection Act, Senator Patrick Leahy of Vermont explained the decision to omit the proposed § 2422(c) prohibition on contact:

As passed by the House, H.R. 3494 would make it a crime, punishable by up to 5 years' imprisonment, to do nothing more than "contact" a minor, or even just attempt to "contact" a minor, for the purpose of engaging in sexual activity. This provision, which would be extremely difficult to enforce and would invite court challenges, does not appear in the Hatch-Leahy-DeWine substitute. In criminal law terms, the act of making contact is not very far along the spectrum of an overt criminal act. Targeting "attempts" to make contact would be even more like prosecuting a thought crime. It is difficult to see how such a provision would be enforced without inviting significant litigation.¹²⁸

If one follows *Rothenberg's* analysis, these same concerns are also applicable to § 2422(b) prosecutions. The failed § 2422(c) would have prohibited direct communication between an Internet predator and a minor, but only if it were undertaken for the purpose of engaging in illegal sexual activity.¹²⁹ The Senate, however, refused to prohibit this type of conduct out of a concern that "the act of making contact is not very far along the spectrum of an overt criminal act," even if prosecutions were limited to situations in which the defendant had sought to engage in illegal sex.¹³⁰

That Congress rejected the provision based on this concern strongly suggests that it did not interpret § 2422(b) in the same broad manner as the *Rothenberg* court did.¹³¹ Under *Rothenberg*, a

127. See Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 102, 112 Stat. 2974, 2975 (codified as amended at 18 U.S.C. § 2422 (2006)) (excluding the proposed § 2422(c) contact provision that had appeared in the House bill).

128. 144 CONG. REC. 25,239 (1998) (statement of Sen. Patrick Leahy); see also *id.* at 25,761 (statement of Rep. Alcee Hastings) ("The original House bill was also too broad in that it made it a crime to contact or attempt to contact a minor. This was so broad that it would have covered a simple 'hello' in an Internet chat room. Targeting attempts to make contact is like prosecuting a thought crime.").

129. See H.R. 3494 § 101 (as passed by House of Representatives, June 11, 1998) (limiting the imposition of liability to those circumstances in which contact was made "for the purposes of engaging in any sexual activity, with a person who ha[d] not attained the age of 18 years, for which any person may be criminally prosecuted").

130. 144 CONG. REC. 25,239 (1998) (statement of Sen. Patrick Leahy).

131. But see Andriy Pazuniak, Comment, *A Better Way To Stop Online Predators: Encouraging a More Appealing Approach to § 2422(b)*, 40 SETON HALL L. REV. 691, 697 (2010) (suggesting that the inclusion of the ultimately unenacted § 2422(c) in the version of the

defendant could be convicted without having any intent to engage in illegal sexual activity.¹³² Likewise, to be convicted under *Rothenberg*'s conceptualization of § 2422(b) attempt, the defendant need not ever have communicated with someone he believed to be a child.¹³³ Although the communications in *Rothenberg* were repugnant and far more troublesome than a simple “Hello” chat message, the rejected § 2422(c) would have required more than mere contact; rather, its prohibition would have extended only to contact made with a purported minor for the purpose of engaging in illegal sex acts.¹³⁴ If Congress felt that direct communication with a minor for the purpose of engaging in illegal sexual activity was “not very far along the spectrum of an overt criminal act,”¹³⁵ then Congress would likely have viewed the prohibition of communications between consenting adults—even communications whose content was inherently disgusting and upsetting—as similarly problematic when those communications were unaccompanied by any level of intent to engage in illegal sexual activity.

C. A Diminished Substantial-Step Requirement Is Inconsistent with Federal Attempt Jurisprudence

Aside from raising concerns that the *Rothenberg* decision was based on flawed reasoning and that it applied the law in a way Congress never anticipated, this Note contends that the reasoning used in *Rothenberg* to extend § 2422(b) is inconsistent with federal attempt jurisprudence. One of the most well-argued criticisms of the expansion of § 2422(b) attempt liability found in the Eleventh Circuit's *Murrell-Yost-Lee-Rothenberg* line of cases comes from Judge Richard Posner. In his decision for the Seventh Circuit in *United States v. Gladish*¹³⁶ in 2008—before both *Lee* and *Rothenberg*—Judge Posner warned that, with regard to § 2422(b) attempt liability,

Protection Act passed by the House of Representatives served to “[f]urther demonstrat[e] Congress’s intent to criminalize the online interaction between sexual predators and minors”).

132. See *United States v. Rothenberg*, 610 F.3d 621, 625–26 (11th Cir. 2010) (quoting the defendant’s chat messages, which notably did not include any suggestion that the defendant intended to engage in illegal sexual activity).

133. See *id.* at 625 (noting that *Rothenberg*’s conversations were with a “19 year old male” and a “30 year old divorced male”).

134. H.R. 3494 § 101.

135. 144 CONG. REC. 25,239 (1998) (statement of Sen. Patrick Leahy).

136. *United States v. Gladish*, 536 F.3d 646 (7th Cir. 2008).

“[t]reating speech (even obscene speech) as the ‘substantial step’ would abolish any requirement of a substantial step.”¹³⁷

In *Gladish*, the panel was faced with a defendant who had been caught in a sting operation while communicating with a government agent who had claimed to be a fourteen-year-old girl.¹³⁸ During the course of the communications, Gladish “solicited ‘Abigail’ (as the agent called herself) to have sex with him.” Although “[s]he agreed to have sex with the defendant and in a subsequent chat he discussed the possibility of traveling to meet her in a couple of weeks,” ultimately “no arrangements were made.”¹³⁹ Additionally, during the course of the communications, the defendant sent Abigail “a video of himself masturbating,” which led to a conviction under 18 U.S.C. § 1470 for transferring obscene material to a minor.¹⁴⁰ Despite the fact that the defendant had engaged in direct, obscene communication with a purported minor during which he had demonstrated an intent to engage in illegal sexual activity,¹⁴¹ Judge Posner, writing for the unanimous panel, reversed Gladish’s § 2422(b) conviction.¹⁴²

The conversations described in these cases, including those in *Gladish*, are shocking, upsetting, and disgusting on a primal and intuitive level. As Judge Martin wrote in her partial dissent in *Lee*, advancing the arguments of these sexual predators “even to [a] limited extent . . . is not an easy task.”¹⁴³ To do so, one must keep in mind the importance of requiring a substantial step in federal attempt jurisprudence.¹⁴⁴ Judge Posner’s decision in *Gladish* summarized the fundamental role the substantial-step requirement plays in balancing competing societal interests—preventative law enforcement that keeps the public safe, and an individual’s personal interest in avoiding punishment for unexecuted crimes:

137. *Id.* at 650. For a discussion of the important role the substantial-step requirement plays in preventing the prosecution of mere thoughts, see *supra* Part I.A.

138. *Gladish*, 536 F.3d at 648.

139. *Id.*

140. *Id.* at 650. This conviction was not challenged on appeal. *Id.*

141. *See id.* (“[T]he defendant in the present case said to a stranger whom he thought a young girl things like ‘ill suck your titties’ and ‘ill kiss your inner thighs’ and ‘ill let ya suck me and learn about how to do that’ . . .”).

142. *Id.* at 651.

143. *United States v. Lee*, 603 F.3d 904, 922 (11th Cir. 2010) (Martin, J., concurring in part and dissenting in part).

144. *See supra* Part I.A.

The criminal law, because it aims at taking dangerous people out of circulation before they do harm, takes a different approach [from that of tort law]. A person who demonstrates by his conduct that he has the intention and capability of committing a crime is punishable even if his plan was thwarted. The “substantial step” toward completion is the demonstration of dangerousness, and has been usefully described as “some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime.” *You are not punished just for saying that you want or even intend to kill someone, because most such talk doesn’t lead to action.* You have to do something that makes it reasonably clear that had you not been interrupted or made a mistake—for example, the person you thought you were shooting was actually a clothier’s manikin—you would have completed the crime. That something marks you as genuinely dangerous¹⁴⁵

Judge Posner expressed “surprise[] that the government [had] prosecuted [Gladish] under section 2422(b),” observing that if obscene speech can constitute a substantial step in and of itself, then the substantial-step requirement has effectively been eliminated.¹⁴⁶ Such a holding, he reasoned,

would imply that if *X* says to *Y*, “I’m planning to rob a bank,” *X* has committed the crime of attempted bank robbery, even though *X* says such things often and never acts. The requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air¹⁴⁷

With regard to causing the ultimate harm of illegal sexual conduct, the defendant in *Rothenberg* represented even less of a “real threat” than Judge Posner’s innocent *X*. Rothenberg’s statements were instead more analogous to *X*’s telling *Y*, “You should rob a bank.”¹⁴⁸ Simply put, Rothenberg expressed no intent to engage

145. *Gladish*, 536 F.3d at 648 (emphasis added) (citations omitted) (quoting *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980)); see also *Rogers*, *supra* note 25, at 479–80 (“Attempt provides a basis of punishment for actors who, by mere fortuity, have not completed a crime, but who are indistinguishable in blameworthiness from those who succeed. Yet, failure, which is intrinsic to attempt liability, creates the oft-noted apprehension of improper punishment. Without the harmful result proscribed by the offense-in-chief, less certainty exists as to an individual’s blameworthiness.” (footnotes omitted)).

146. *Gladish*, 536 F.3d at 650.

147. *Id.*

148. See *United States v. Rothenberg*, 610 F.3d 621, 625 (11th Cir. 2010) (quoting the defendant’s chat messages, which used such phrases as “go slow and you can do it” and “let him

personally in illegal sexual conduct and he could cause such conduct to occur only by relying on the independent, unverifiable cooperation of another adult.¹⁴⁹ These distinctions suffice to make the facts of *Rothenberg* a notable departure from the example presented by Judge Posner's innocent *X*, who could have acted independently to consummate the criminal activity he had discussed.

The Eleventh Circuit judges in the *Rothenberg* majority would likely reply that Judge Posner's analysis misidentified the underlying crime, in effect requiring a substantial step toward the occurrence of illegal sexual contact and not toward the ultimate "persua[sion], induce[ment], entice[ment], or coerc[ion]" of a minor to engage in such illegal activity, which is the conduct actually prohibited by the statute.¹⁵⁰ Such a response, however, would not entirely address Judge Posner's concern that if speech alone can constitute a substantial step, actors who are not truly dangerous will be punished. This concern is further explored in the next Section.

D. *Rothenberg's Logic Leads to Absurd Outcomes*

In addition to resting on a flawed analysis of precedent, contradicting § 2422(b)'s legislative history, and running afoul of fundamental attempt-law principles, the rule that emerges from *Rothenberg* also leads to overbroad extensions of criminal liability. *Rothenberg's* analysis rested on the understanding that "the essence of the crime is the attempted enticement of someone the defendant believes to be a minor, not actual engagement in sexual activity with a minor."¹⁵¹ In other words, a defendant can be convicted of § 2422(b) attempt by taking a substantial step toward "achiev[ing] a *mental* state—a minor's assent,"¹⁵² without taking any such step toward ensuring that the illegal sex actually occurred. The *Rothenberg* court

sleep with u" to encourage the defendant's adult chat partners to engage in illegal sexual activity).

149. See *supra* note 94 and accompanying text.

150. 18 U.S.C. § 2422(b) (2006); see also Pazuniak, *supra* note 131, at 708 ("Although the factors the [Seventh Circuit] highlighted [in the post-*Gladish* case, *United States v. Zawada*, 552 F.3d 531 (7th Cir. 2008),] pertain to whether a predator intended to actually have sex with a minor, they do not necessarily indicate a defendant's attempt to persuade. . . . [Section] 2422(b) does not target a predator's attempt to have sex with a minor. Rather, § 2422(b) criminalizes a predator's attempt to convince a minor to have sex, which may be accomplished solely through online interaction and without any of the concrete steps that the Seventh Circuit listed.").

151. *Rothenberg*, 610 F.3d at 626.

152. *United States v. Lee*, 603 F.3d 904, 914 (11th Cir. 2010) (quoting *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007)) (internal quotation mark omitted).

noted that because this enticement would be sufficient to constitute the completed offense, a defendant could attempt “to entice a minor into sexual activity with the defendant *or some third person*” through the use of an “adult intermediary.”¹⁵³ In summary, a defendant can be convicted of § 2422(b) attempt when, through an adult intermediary, he takes a substantial step toward causing a minor to consent to illegal sexual activity with a third person.¹⁵⁴

Recall the high-school-prom hypothetical offered in this Note’s Introduction. Under the laws of several states, even consensual sexual intercourse between prom dates Jack and Jane, who could be just a few weeks or even mere days apart in age, would constitute an illegal sexual act commonly referred to as statutory rape.¹⁵⁵ And even more states have crafted statutes that penalize consensual sex if the defendant is sufficiently older than his minor victim.¹⁵⁶ For example, in Oregon, the consensual sex between Jack and Jane would be illegal if Jane were one day shy of her eighteenth birthday and Jack were three years and one day older than she was.¹⁵⁷

153. *Rothenberg*, 610 F.3d at 626 (emphasis added).

154. *Id.* (citing *Lee*, 603 F.3d at 913); *see also* *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000) (“Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.”).

155. *See, e.g.*, CAL. PENAL CODE § 261.5 (West 2008) (prohibiting intercourse between a person of at least eighteen years of age and a person under eighteen years of age who is not the elder party’s spouse); GA. CODE ANN. § 16-6-3(a) (2011) (“A person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the victim.”); MICH. COMP. LAWS ANN. § 750.520d (West 2004) (criminalizing sexual penetration with someone who is less than sixteen years old); WIS. STAT. ANN. § 948.02(2) (West 2005) (prohibiting “sexual contact or sexual intercourse with a person who has not attained the age of 16 years”); *id.* § 948.09 (criminalizing intercourse with a partner who is at least sixteen years old, but younger than eighteen years old if the partner is not the defendant’s spouse).

156. *See* COCCA, *supra* note 18, at 29–61 (examining why states implement so-called “age-span provisions,” why these provisions are so varied from state to state, and how their implementation has affected prosecution in those states that have adopted them).

157. *See* OR. REV. STAT. § 163.435(1)(a) (2009) (criminalizing intercourse between a male older than eighteen years old with a female younger than eighteen years old); *id.* § 163.345 (providing a defense to prosecutions under § 163.435 when “the actor was less than three years older than the victim at the time of the alleged offense”); *see also, e.g.*, IDAHO CODE ANN. § 18-6101 (Supp. 2011) (prohibiting “penetration, however slight, of the oral, anal or vaginal opening with the perpetrator’s penis . . . [w]here the female is under the age of sixteen (16) years and the perpetrator is eighteen (18) years of age or older” or “[w]here the female is sixteen (16) or seventeen (17) years of age and the perpetrator is three (3) years or more older than the female”).

These statutory rape laws are relevant because § 2422(b)'s broad language prohibits attempting to persuade, induce, entice, or coerce a minor to engage in "any sexual activity for which any person can be charged with a criminal offense."¹⁵⁸ Under *Rothenberg*, Jack's friend, Tim, has in all likelihood taken a substantial step toward enticing Jane to engage in sexual activity for which Jack can be charged with a crime. Like Rothenberg himself, Tim has "actively coached and encouraged" Jack as to how to engage in this illegal activity.¹⁵⁹ And like Rothenberg,¹⁶⁰ Tim has used an adult intermediary, Jack, who presumably has a tremendous ability to influence his long-term girlfriend's decision about whether to engage in sexual intercourse.¹⁶¹ Further, Tim's own lack of intent to engage in illegal sexual conduct will presumably not be a sufficient defense, just as it was not sufficient in *Rothenberg*,¹⁶² so long as Tim has the sufficient intent to persuade, induce, entice, or coerce Jane to engage in illegal sex.¹⁶³ Thus, Tim could be sentenced to ten years in prison for engaging in an Internet chat with a consenting adult, despite the fact that Tim had taken no other steps to ensure the fruition of the illegal sexual activity in which he had attempted to entice Jane to participate.¹⁶⁴ Notably, under § 2422(b), Tim has committed a crime as soon as the conversation occurs the night before the high-school prom, and he could still be convicted even if Jack decides not to have consensual sex with Jane.¹⁶⁵

158. 18 U.S.C. § 2422(b) (2006) (emphasis added).

159. See *Rothenberg*, 610 F.3d at 625 (describing chat conversations during which Rothenberg "actively coached and encouraged other adults in graphic detail about how to sexually abuse minors in their care or under their influence").

160. See *id.* at 624–25 ("In determining that Rothenberg merited the pattern of activity [sentencing] enhancements . . . the district court relied upon transcripts of two separate chat-room conversations Rothenberg had in the past *with other adults* . . ." (emphasis added)).

161. Cf. *United States v. Murrell*, 368 F.3d 1283, 1287 (11th Cir. 2004) (observing that the defendant had chosen an adult intermediary "who presumably exercised influence over" the victim of the illegal sexual conduct).

162. See *Rothenberg*, 610 F.3d at 625–26 (quoting the defendant's Internet communications, which never mentioned a desire to participate in any sexual activity).

163. See *id.* at 626 (explaining the requirement that "the defendant intend[] to commit the underlying criminal offense with the requisite mens rea," in addition to the requirement that he take a substantial step toward committing the underlying crime, to be convicted of attempt).

164. See *id.* at 627 (holding that the defendant's conduct was sufficient to constitute a § 2422(b) attempt when the defendant had engaged in explicit Internet chats with other adults but had taken no further action to ensure that the illegal sexual activity he had suggested was ever consummated).

165. See *id.* at 626 ("[T]he essence of the crime is the attempted enticement of someone the defendant believes to be a minor, not actual engagement in sexual activity with a minor." (citing *Murrell*, 368 F.3d at 1286)).

This outcome is, in itself, shocking. Although the illegal sexual activity that brought the chat in *Rothenberg* within the purview of § 2422(b) was considered much more serious than in the high-school-prom hypothetical—that is, child molestation as compared to statutory rape—it is not the underlying sexual conduct that is criminalized by § 2422(b). Rather, § 2422(b) punishes the persuasion, inducement, enticement, or coercion that precedes these illicit sexual activities. As the Sixth Circuit wrote in *United States v. Bailey*,

While it may be rare for there to be a separation between the intent to persuade and the follow-up intent to perform the act after persuasion, they are two clearly separate and different intents and the Congress has made a clear choice to criminalize persuasion and the attempt to persuade, not the performance of the sexual acts themselves.¹⁶⁶

Because the ultimate crime is the persuasion, inducement, enticement, or coercion rather than the sex act in which the minor is being persuaded to engage, the relevant question is how close the defendant has come to completing that persuasion, inducement, enticement, or coercion—not the reprehensibility of the illegal sex act.¹⁶⁷ Although the crimes Rothenberg encouraged his chat partners to commit would almost certainly be seen by most as more harmful than the crime Tim encouraged Jack to commit, both Rothenberg and Tim are equally culpable under § 2422(b).

Tim's potential conviction is problematic for two separate, conceptually distinct reasons. It may be intuitive that sentencing eighteen-year-old Tim to ten years in prison is a disproportionate response when the worst-case scenario is that Tim might succeed in his attempt to persuade Jack to have consensual intercourse with his slightly younger girlfriend. That the statute prohibits attempts to persuade a minor to “to engage in . . . any sexual activity [including statutory rape] for which any person can be charged with a criminal offense,”¹⁶⁸ however, is not § 2422(b)'s only shortcoming. Even if the offense Tim suggested that Jack commit were more sinister, Tim's only conduct would still be a mere conversation with Jack, another

166. *United States v. Bailey*, 228 F.3d 637, 639 (6th Cir. 2000).

167. *See id.* (clarifying the distinction between “persuasion and the attempt to persuade,” which are both criminalized by § 2422(b), and “the performance of the sexual acts themselves,” which proceeds from a “clearly separate and different intent[]” than that prohibited by § 2422(b)).

168. 18 U.S.C. § 2422(b) (2006) (emphasis added).

adult, who had consented to participating in the discussion. Interpreting § 2422(b) so that conversations alone are sufficient to constitute a substantial step toward the commission of this serious crime effectively “[t]reat[s] speech . . . as the ‘substantial step’ [and thus] abolish[es] any requirement of a substantial step.”¹⁶⁹ This interpretation ultimately punishes conversations that are unaccompanied by any other act.

III. A PROPOSED REFORM: A TWO-FACETED ATTEMPT STATUTE FOR INTERNET SEX PREDATORS

A. *An Overview of the Proposed Two-Faceted Reform*

Remedying *Rothenberg*'s overexpansion of § 2422(b) attempt liability will be a delicate balancing act. For the reasons discussed in Part II, mere adult-to-adult communication about an illegal sexual act should be regarded as insufficient to constitute a substantial step toward a § 2422(b) attempt, if unaccompanied by something more.¹⁷⁰ Furthermore, a proximity-of-age defense should be added to circumvent the broad plain language of § 2422(b) and to foreclose prosecutions when the only underlying offense is consensual sex between young people who are relatively close in age. Law enforcement, however, must retain the ability to act preventatively to stop sexual predators before they commit sex crimes.¹⁷¹

Thus, this Note proposes the creation of a statutory distinction: on the one hand would lie § 2422(b) persuasion, inducement, enticement, and coercion attempted through direct communication with a minor; and on the other hand would lie the same conduct attempted through communication with an adult intermediary. This Note also advocates the creation of a statutory defense for age proximity. A statute rewritten to accommodate these features (Reform § 2422) would read as follows:

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so

169. *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

170. *See supra* Part II.

171. *See supra* Part I.A.

through communication with a person thought to be a minor, shall be fined under this title and imprisoned not less than 10 years or for life.

(c) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense *and facilitates such prostitution or prosecutable sexual activity*, or attempts to do so *through communication with a person thought to have attained the age of 18 years*, shall be fined under this title and imprisoned not less than 10 years or for life.

(d) It is a defense to a prosecution for an offense under sections (b) and (c) that the sexual activity is prosecutable only because of the age of the individual sought to be persuaded, induced, enticed, or coerced; the individual sought to be persuaded, induced, enticed, or coerced had attained the age of 12 years; and any other participant in the prosecutable sexual activity was not more than 4 years older than the individual sought to be persuaded, induced, enticed, or coerced.¹⁷²

First, this reform would remedy the dilution of the substantial-step requirement noted by Judge Posner in *Gladish*.¹⁷³ Under this proposed reform, when a predator communicates directly with a party he believes to be a minor, the standard will remain unchanged and the defendant could be convicted on the basis of a conversation alone.¹⁷⁴ But when a predator communicates exclusively through

172. The proposed statutory language retains nearly all the existing § 2422(b) language, while creating the desired distinction between pedophile-to-minor and pedophile-to-adult communications. Additionally, it adds a defense based upon proximity of age, which utilizes the same age groupings as those found in the § 2422(c) contact provision that was passed by the House but ultimately omitted from the final version of the Protection Act. *See* 18 U.S.C. § 2422(b) (providing the language and structure upon which Reform § 2422(b) is based); Child Protection and Sexual Predator Punishment Act of 1998, H.R. 3494, 105th Cong. § 101 (as passed by House of Representatives, June 11, 1998) (providing the proximity-of-age defense that Reform § 2422(b) borrows).

173. *See supra* Part II.C.

174. *Cf.* United States v. Yost, 479 F.3d 815, 820 (11th Cir. 2007) (affirming the defendant's conviction under § 2422(b) despite his never having traveled to the prearranged meeting place, meaning that his overt actions toward the completion of a § 2422(b) offense were limited to Internet communications). Note that in *Yost*, the court was able to point to the fact that the defendant had "posted pictures of his genitalia online" and had encouraged his victim to view

someone he believes to be an adult intermediary, the reform will require a substantial step toward “facilitation”¹⁷⁵ of the occurrence of illegal sexual activity. This requirement would depart from the existing standard, which requires merely a substantial step toward achieving the mental assent of a minor with whom the defendant has never communicated.¹⁷⁶ Thus, Reform § 2422(c) redefines the underlying offense, requiring not only that the defendant “knowingly persuade[], induce[], entice[], or coerce[]” a minor, but also that he *facilitate* the criminal sexual act.

This Reform § 2422(c) standard would operate similarly to Judge Posner’s interpretation of the standard in *Gladish*. As Judge Posner reasoned in *Gladish*,

The substantial step can be making arrangements for meeting the girl, as by agreeing on a time and place for the meeting. It can be taking other preparatory steps, such as making a hotel reservation, purchasing a gift, or buying a bus or train ticket, especially one that is nonrefundable. “[T]he defendant’s initiation of sexual conversation, writing insistent messages, and attempting to make arrangements to meet” were described as a substantial step in *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). . . . We won’t try to give an exhaustive list of the possibilities.¹⁷⁷

them. *Id.* Under *Rothenberg*’s conception of what constitutes a substantial step, *see* *United States v. Rothenberg*, 610 F.3d 621, 626–27 (11th Cir. 2010), the defendant would almost certainly have been convicted of a § 2422(b) attempt even if he had not posted any photos, and this Note’s proposed reform would do nothing to upset that anticipated outcome.

175. “Facilitation” is defined by BLACK’S LAW DICTIONARY (9th ed. 2009) as “[t]he act or an instance of aiding or helping; esp., in criminal law, the act of making it easier for another person to commit a crime.” *Id.* at 668. Such a broad term would allow courts to interpret the substantial-step requirement broadly and would shift the focus from the mental state of the minor to the occurrence of illegal sex. This term would eliminate the possibility of unwarranted liability that existed after *Rothenberg*—when an adult could be liable for merely speaking with another adult about illegal sex acts—while retaining liability if the defendant could be found to have taken any step toward the actual occurrence of a sex act.

176. *See* *United States v. Dwinells*, 508 F.3d 63, 71 (1st Cir. 2007) (explaining that § 2422(b) “criminalizes an intentional attempt to achieve a *mental* state—a minor’s assent”); *cf.* Michael W. Sheetz, Comment, *CyberPredators: Police Internet Investigations Under Florida Statute 847.0135*, 54 U. MIAMI L. REV. 405, 446–47 (2000) (arguing, in the context of a state Internet-solicitation statute, that the statute as written “moves the point of criminal conduct well into the area of thoughts antecedent action” and instead should “mak[e] proof of the crime more removed from the planning stage, and more closely related to criminal conduct” by forcing the state to “await the defendant’s overt act,” such as “arriv[ing] at the predetermined meeting place or another ‘substantial step’ toward the commission of the crime”).

177. *United States v. Gladish*, 536 F.3d 646, 649 (7th Cir. 2008) (alteration in original) (citations omitted).

Judge Posner's interpretation of what constitutes a § 2422(b) substantial step is more stringent than the standards established in the Eleventh Circuit's *Murrell-Yost-Lee-Rothenberg* line of cases.¹⁷⁸ At least implicitly, Judge Posner's *Gladish* analysis required the substantial step to be toward the commission of illegal sexual activity rather than simply toward achieving a state of mental assent in the mind of a minor.¹⁷⁹ Reform § 2422(c) is intended to mirror this more stringent standard for violations based on communications between two adults.

Adopting this higher bar makes sense for several reasons. First, it would prevent the absurd extension of criminal liability to the high-school-prom hypothetical that *Rothenberg* otherwise would allow.¹⁸⁰ It also makes sense to require more of a substantial step when a defendant is speaking only with an adult intermediary because, in that situation, the defendant is wholly reliant on the intermediary's potentially unverifiable cooperation to gain the minor's mental assent.¹⁸¹ Furthermore, if an explicit or obscene conversation is truly all that has occurred, then it seems consistent with federal policy—particularly the statute restricting the “[t]ransfer of obscene material to minors”¹⁸²—to perceive the harms caused by the online communication differently depending on whether the party exposed to the explicit material is an adult or a minor.

Second, by including a defense based upon proximity of age, Reform § 2422(d) would avoid applying the statute to cases in which the only underlying offense is consensual statutory rape. This change borrows language and age groupings from the failed version of § 2422(c) that was passed by the House of Representatives but that

178. See *supra* Part II.C.

179. See *Gladish*, 536 F.3d at 648 (characterizing the issue on appeal as “whether the defendant is guilty of having *attempted* to get an underage girl to have sex with him,” rather than whether the defendant was guilty of having attempted to get an underage girl to *want* to have sex with him).

180. See *supra* Part II.D.

181. At least one commentator advocates an interpretation of § 2422(b) attempt whereby defendants would be considered to have committed a substantial step when they “encourage[] or invite[] a minor to engage in illegal sexual activity.” Pazuniak, *supra* note 131, at 712. Such an interpretation, it is argued, is logical because “[w]hen a predator encourages or invites a minor to engage in illegal sexual activity, he places the decision of whether to accept or reject the suggestion *squarely in the hands of the minor*.” *Id.* at 713 (emphasis added). This Note contends that a slightly higher standard is warranted when the decision is placed in the hands of an adult prior to any contact with a minor.

182. 18 U.S.C. § 1470 (2006).

was ultimately excluded from the final version of the Protection Act.¹⁸³ The defense provides further protection for potential defendants, such as Tim in the high-school-prom hypothetical, who could be convicted under the *Rothenberg* interpretation of the § 2422(b) language for attempting to persuade, induce, entice, or coerce a minor one day shy of her eighteenth birthday to engage in consensual sexual intercourse with her eighteen-year-old boyfriend.¹⁸⁴

Although under the facts described in this Note's opening pages, Tim would be excluded from liability under Reform § 2422(c) because he has taken no substantial step toward facilitating the occurrence of illegal sexual activity, it is easy to imagine seemingly benign circumstances under which he might take such action. For instance, suppose Jack has indicated to Tim that he planned to engage in unprotected sexual intercourse with Jane because he lacked access to condoms or other forms of protection and contraception. Under those circumstances, it would likely be in the best interests of all parties involved—most notably, Jane, the “victim” of this illegal sexual encounter—for Tim to procure condoms for Jack, even though such an action would correctly be considered a substantial step toward facilitation of illegal sexual activity under Reform § 2422(c). Thus, the proximity-of-age defense provided in Reform § 2422(d) would exclude Tim from prosecution entirely when the illegal sexual behavior he facilitated was statutory rape.

B. Addressing Counterarguments

Any proposed reform that appears to raise the standards prosecutors must meet to convict those perceived as sexual predators will likely face skepticism and resistance.¹⁸⁵ Based on this line of thought, one counterargument to Reform § 2422 could be that prosecutors must be given—or, in this case, allowed to retain—the broadest possible tools to combat the “pedophiles who stalk children on the Internet.”¹⁸⁶ Those making this counterargument would likely point to the judicious use of prosecutorial discretion as a sufficient

183. See *supra* note 172.

184. See *supra* Part II.D.

185. Cf. Pazuniak, *supra* note 131, at 719–20 (advocating a new standard for § 2422(b) attempt analysis, based in part on the fact that “[t]he current standard forces law enforcement to expend valuable time and resources devising elaborate sting operations . . . [which] take time to develop and allow predators to continue to chat online with children,” even though “[t]he quicker law enforcement may intervene, the safer vulnerable children will be”).

186. H.R. REP. NO. 105-557, at 12 (1998), reprinted in 1998 U.S.C.C.A.N. 678, 681.

remedy for any statutory or judicial overreaching in regard to § 2422(b) and would argue that even if Tim's behavior in the high-school-prom hypothetical were technically illegal under *Rothenberg*, it would be highly unlikely for a prosecutor to choose to pursue the case.

To address this counterargument, the role of prosecutorial discretion in the operation of § 2422(b) attempt liability must be briefly explored. Although prosecutors may indeed choose not to pursue some of the more benign cases that implicate § 2422(b) attempt liability, the statute's strict minimum penalty and its applicability to relatively innocent situations are too disconcerting to leave to the discretion of potentially overzealous prosecutors, especially given the stigma attached to such charges.¹⁸⁷

Additionally, the changes in Reform § 2422 would ultimately have a narrow scope. For instance, in the cases of the predator-to-child communications that Congress appeared to have in mind when amending § 2422(b) in 1998,¹⁸⁸ nothing about the current standard would change. The only change would occur when a defendant merely communicated with a person he believed to be another adult about engaging in an illegal sexual act. This change would thus alter the outcome of the sentencing in *Rothenberg*,¹⁸⁹ as well as the ultimate outcome of the high-school-prom hypothetical, because, in each of these cases, the only conduct toward a § 2422(b) attempt was consensual adult-to-adult communication.¹⁹⁰ It would not, however, change the outcome in *Murrell*, in which the defendant had made arrangements to meet the adult intermediary and his daughter; had traveled to the meeting location; and had arrived carrying condoms, a teddy bear, and enough cash to pay the agreed-upon price.¹⁹¹ Any of

187. See Schottenfeld, *supra* note 21, at 360–61 (“[C]itizens accused of being sexual predators are faced with a nation willing to overlook any presumption of innocence in order to protect its youth. . . . [Sexual-predator watchdog organizations] have made a public spectacle out of men who have not had their rightful day in court. . . . Before any charges are filed against them, they are tried in the court of public opinion without an impartial judge or jury.”).

188. See *supra* Part II.B.

189. Note that the proposed reform would affect only the applicability of the pattern-of-activity sentencing enhancements in *Rothenberg*, not the underlying conviction for which *Rothenberg* was sentenced. See *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir. 2010) (describing the facts surrounding *Rothenberg*'s underlying conviction); *supra* Part I.D.

190. See *Rothenberg*, 610 F.3d at 627 (noting that “*Rothenberg*'s chats were specific instructions to adults with influence over young children,” rather than communication directly with children).

191. *United States v. Murrell*, 368 F.3d 1283, 1285 (11th Cir. 2004).

these acts done separately, including the making of arrangements to meet, would have been sufficient to “facilitate” the occurrence of illegal sexual conduct and thus would allow Murrell to be convicted under Reform § 2422(c). Similarly, the conviction in *Lee* would also be upheld because the defendant sent the adult intermediary photographs of his penis and asked that she show them to her daughters because “[it was] only fair for them to see what they [would] be getting.”¹⁹² This transmission of sexually explicit photos would constitute conduct beyond a mere adult-to-adult conversation, that “ma[de] it easier” for illegal sexual activity to occur.¹⁹³ Thus, it would fit within the broad interpretation of Reform § 2422(c)’s facilitation requirement that this Note advocates.¹⁹⁴

Furthermore, the proposed change to § 2422(b) would not affect prosecutors’ ability to charge criminals with other, related crimes. For example, in the high-school-prom hypothetical, the prosecutor would still be able to charge Jack for his statutory rape of Jane, and in *Rothenberg*, the adult intermediaries would still be liable to the full extent if they made the independent decision to act on Rothenberg’s advice. Thus, the only defendants who would be spared liability under Reform § 2422 would be those who participated in conversations with individuals they believed to be adults and who played no role in whether or not any illegal sexual activity actually took place, as well as those who attempted to persuade, induce, entice, or coerce a minor to engage in sexual activity with a partner sufficiently close in age to qualify for the reform’s proximity-of-age defense.

CONCLUSION

In an effort to protect minors from “pedophiles who stalk children on the Internet,”¹⁹⁵ courts have gradually expanded their interpretation of the already-broad language of § 2422(b) to convict and incarcerate more Internet sex predators. From *Murrell* to *Yost* to *Lee*, the Eleventh Circuit has gradually lowered the bar for just how much of an overt act is required to constitute a substantial step toward a § 2422(b) attempt. With its decision in *Rothenberg*, the court articulated an even lower threshold for attempt liability, upholding a conviction on the basis of the content of a conversation between

192. *United States v. Lee*, 603 F.3d 904, 909 (11th Cir. 2010) (alteration in original).

193. *See supra* note 175.

194. *See supra* note 175.

195. H.R. REP. NO. 105-557, at 12 (1998), *reprinted in* 1998 U.S.C.C.A.N. 678, 681.

consenting adults and simultaneously warning that future § 2422(b) attempt convictions might be supported by even less overt conduct.¹⁹⁶

One might, at first, welcome any judicial interpretation that reduces the burden on prosecutors seeking § 2422(b) convictions. But the *Rothenberg* analysis of § 2422(b) attempt liability is concerning for several reasons. By relying on the holdings of *Murrell*, *Yost*, and *Lee*, each of which is factually distinguishable from *Rothenberg*, the court was able to hold that an Internet user need not communicate with a minor, intend to travel to meet a minor, take other lewd action toward a minor—such as sending explicit photographs—or even intend to participate in illegal sex with a minor to be convicted of attempt under § 2422(b).¹⁹⁷ Such an interpretation appears to be far broader than Congress ever anticipated, and it contradicts the congressional intent exhibited by the rejection of the proposed § 2422(c), which would have prohibited contacting a minor on the Internet for the purposes of engaging in illegal sexual activity. Furthermore, by “[t]reating speech (even obscene speech) as [a] ‘substantial step,’” the *Rothenberg* court essentially “abolish[ed] any requirement of a substantial step,” a requirement that plays an essential role in “distinguish[ing] people who pose real threats from those who are all hot air.”¹⁹⁸ The potential negative consequences of the *Rothenberg* interpretation are most easily demonstrated by the absurd outcomes that could result from its logic. Under *Rothenberg*, both Internet users introduced in this Note’s opening pages, Tim and John, could be convicted and face a mandatory minimum sentence of ten years’ imprisonment, despite the clear difference in the culpability of their actions.

By reforming § 2422(b) to introduce an proximity-of-age defense and to create a separate standard for cases in which the defendant’s efforts to persuade, induce, entice, or coerce are communicated entirely with an adult intermediary, policymakers can remedy the problems of the *Rothenberg* interpretation without affecting prosecutors’ ability to convict those who have committed more morally reprehensible and predatory crimes. This dual reform would leave the existing standard undisturbed in cases involving pedophile-

196. See *United States v. Rothenberg*, 610 F.3d 621, 627 (11th Cir. 2010) (“Not surprisingly, none [of our precedent] guesses at or purports to have identified the minimum conduct that section 2422(b) proscribes.” (quoting *Lee*, 603 F.3d at 916)).

197. *Id.* at 626–27.

198. *United States v. Gladish*, 536 F.3d 646, 650 (7th Cir. 2008).

to-child communications and, thus, would only affect those cases in which the defendant had never had *any* level of contact with a minor. In those cases, the proposed reform to § 2422(b) would require the defendant to have taken a substantial step toward “facilitation” of the underlying criminal sexual activity, rather than merely having taken substantial steps toward achieving a certain state of mind within a minor.¹⁹⁹

Ultimately, the effects of such a reform would be quite narrow in scope. Of the fact patterns discussed throughout this Note, only the sentencing enhancements in *Rothenberg* and the conviction in the senior-prom hypothetical would be reversed, and the sentencing enhancements could still be applied to *Rothenberg* if he had taken any step, beyond mere conversation, toward the facilitation of illegal sexual activity in the chat-room conversations. Thus, the only defendants who would be relieved of criminal liability under this Note’s proposed reform would be those who never communicated directly with a minor and whose conduct never went beyond mere conversation, as well as those who attempted to persuade, induce, entice, or coerce a minor to engage in a consensual sexual act with a partner sufficiently close in age. By eliminating the absurd outcomes made possible by *Rothenberg* without undermining the theoretical bases of the substantial-step requirement in federal criminal law, this proposed reform would ensure that individuals like Tim avoid conviction and imprisonment—without impeding the swift prosecution of Internet sex predators like Murrell, Yost, and Lee.

199. Recall that such a standard—the application of which would be limited to only pedophile-to-adult communications under this Note’s proposed reform—is strikingly similar to the standard implicitly applied by Judge Posner in *Gladish*, a 2008 case involving pedophile-to-minor communications. *See supra* note 179.