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**VIRTUAL OR REALITY: PROSECUTORIAL PRACTICES IN
CYBER CHILD PORNOGRAPHY RING CASES**

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By Michal Gilad*

I. INTRODUCTION

[1] With the rising use of the Internet over the past decade, the boundaries between our physical space and cyberspace are quickly fading. The Internet has become an integral and inseparable part of modern being, and its dominance in our lives is undeniable. Actions taken online are no longer a mere virtual fantasy, but directly relate to our “offline” everyday living. Modern criminal trends also demonstrate the strong link between the virtual and physical worlds.¹

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¹ See U.S. DEP’T JUSTICE, CYBERSTALKING: A NEW CHALLENGE FOR LAW ENFORCEMENT AND INDUSTRY 1 (1999), available at <http://www.justice.gov/criminal/cybercrime/cyberstalking.htm>.

[2] Cyber Child Pornography Rings² (CCPRs) are organized communities dedicated to the illegal depiction of minors engaged in sexually explicit acts, and utilize the Internet in one way or another to further their criminal activity.³ Law enforcement and prosecution agencies continuously develop new methods to eradicate this harmful phenomenon.⁴ Currently, the recognition of CCPRs as one organizational unit pursuing a common criminal scheme is inconsistent.⁵ Consequentially, prosecutors in CCPR cases treat the cyber components of the ring's activity as separate and differentiated from their meatspace⁶ operation, and different legal doctrines are used to address each component.⁷ While prosecutors seem willing to associate cyber activity with the entire group, usually under the traditional conspiracy doctrine,

² The term "ring" is used throughout the paper interchangeably with the words "group" and "community."

³ See Torsten Ove, *Child Sexual Abuse, While Not New, Still Shocks*, PITT. POST-GAZETTE.COM (Aug. 8, 2004), <http://www.postgazette.com/pg/04221/357832.stm> (stating that child pornography rings would not be possible without the Internet).

⁴ See *Protecting Our Children with Technology and Partnerships*, FED. BUREAU INVESTIGATION (Oct. 3, 2011), http://www.fbi.gov/news/stories/2011/october/cyber_100311/cyber_100311 (describing the FBI's new software called the Child Exploitation Tracking System (CETS)).

⁵ See Ove, *supra* note 3 ("We tend to think of these things as a pyramid, where there's a boss . . . [b]ut these things are more like a spider web.") (internal quotation marks omitted).

⁶ See DICTIONARY.COM, <http://dictionary.reference.com/browse/meatspace> (last visited Oct. 28, 2011) (defining "meatspace" as "the real physical world, as contrasted with the world of cyberspace").

⁷ See discussion *infra* Section III.

meatspace criminal deeds are almost exclusively associated with individuals.⁸

[3] To better adapt to the modern reality of Internet use, criminal indictments in CCPR cases should reflect the strong ties and interrelation between deeds occurring “offline”—in meatspace—and those occurring in cyberspace.⁹ To meet this objective, two essential steps should be taken. First, a comprehensive, enterprise-oriented prosecutorial strategy, which perceives the ring as a single organization or conspiracy, should be implemented. Second, the definition and scope of the ring’s criminal responsibility should be broadened to capture the range of offences within the CCPR’s operation, from possession of child pornography to child abuse and trafficking, whether committed online or offline.

[4] Under this suggested construction, criminal indictments will define the boundaries of the prosecuted CCPR to extend beyond cyber activity and include all aspects of child exploitation committed by members within the ring’s pattern of operation. Accordingly, every ring member should be held responsible for the entire criminal scheme of the group, including the overt acts committed by his/her fellow ring members in meatspace. This broader perspective more realistically reflects the organizational structures of CCPRs that link individual offences and offenders, and allows accurate contextualization of the facts and events occurring online and offline. It will enable the courts and the public to better understand the pervasiveness and severity of CCPR operations and the societal harms they cause. Most importantly, the suggested strategy will clarify and uphold the accountability and culpability of CCPR members, and afford just acknowledgement and compensation to their young victims.

⁸ See discussion *infra* Section III.

⁹ See discussion *infra* Section VI.

[5] Section II will portray the organizational structure and manner of operation of CCPRs. Section III will illustrate the close and inseparable ties between the online and offline activity of CCPRs. Section IV will define and explain the differences between individual-oriented and enterprise-oriented prosecutorial strategies. This section will also discuss the use of legal instruments, such as traditional conspiracy, the Child Exploitation Enterprise provision,¹⁰ and the Racketeer Influenced and Corrupt Organizations Act (RICO),¹¹ to effectively construct an enterprise-oriented strategy. Section V will elaborate on existing prosecutorial practices in CCPR cases and offer possible improvements. Section VI presents the strengths of the suggested strategy, while counter arguments and potential weaknesses will be outlined in Section VII.

II. CYBER CHILD PORNOGRAPHY RINGS

[6] In recent years, the fast-growing popularity of the Internet, as well as increased enforcement measures, have transformed the child pornography arena.¹² It is becoming increasingly rare for Internet users to obtain illegal pornographic images of minors through commonly used search engine searches.¹³ To evade detection by law enforcement, cyber communities, networks and “private, members only” sites, referred to by

¹⁰ See 18 U.S.C. § 2252A(g) (2006).

¹¹ See generally 18 U.S.C. §§ 1961-1968.

¹² See generally *Child Pornography*, U.S. DEP’T OF JUSTICE, CHILD EXPLOITATION & OBSCENITY SEC., <http://www.justice.gov/criminal/ceos/childporn.html> (last updated Nov. 6, 2007) (“The technological ease, lack of expense, and anonymity in obtaining and distributing child pornography has resulted in an explosion in the availability, accessibility, and volume of child pornography.”).

¹³ See also 18 U.S.C. § 2258A (Supp. 2008) (requiring Internet service providers to report information that suggests child pornography has been transmitted by its members).

the media and law enforcement agencies as Cyber Child Pornography Rings, are forming in order to foster the sale, exchange and production of graphic images of child sex abuse over the Internet.¹⁴ In order to obtain the illegal images, membership in these rings is necessary.¹⁵ Admission to the groups requires special approval and initiation, and members are bound by strict rules and regulations to maintain their membership.¹⁶ Most rings have a structured organizational hierarchy, and members climb the hierarchal ladder by demonstrating commitment and contribution to the group.¹⁷ It is apparent that CCPRs have come to resemble more traditional organized crime syndicates.¹⁸ The formation of these organized structures for the pursuit of a common objective, as well as the commitment of members to the group, justify treating the entire operation of the ring, online and offline, as a single inseparable scheme for which all members should be held accountable.

¹⁴ See, e.g., Press Release, U.S. Dep't of Justice, Attorney General and DHS Secretary Announce Largest U.S. Prosecution of International Criminal Network Organized to Sexually Exploit Children (Aug. 3, 2011), <http://www.justice.gov/opa/pr/2011/August/11-ag-1001.html> [hereinafter DOJ Press Release].

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See John Hudson, *The Vile Hierarchy of a Child Porn Enterprise*, THE ATLANTIC WIRE (Aug. 3, 2011), <http://www.theatlanticwire.com/politics/2011/08/vile-hierarchy-child-porn-enterprise/40798/>.

¹⁸ Cf. Gretchen Ruethling, *27 Charged in International Online Child Pornography Ring*, N.Y. TIMES, Mar. 16, 2006, www.nytimes.com/2006/03/16/national/16porn.html (discussing how one ring's primary host used a screen name "G.O.D." and restricted access to member who did not obey the rules); Jason Ryan, *'Sophisticated' Child Porn Ring Busted*, ABC NEWS (Mar. 4, 2008), <http://abcnews.go.com/TheLaw/story?id=4388379> (discussing how a ring was run like a business). But see Ove, *supra* note 3.

[7] It is well known that the Internet provides an effective platform for individuals to get together and communicate.¹⁹ Similarly, it “allows people who share an interest in sex with children to get together online in the safety of their own homes.”²⁰ As a result, the phenomenon of the ring-style operation becomes more possible and common.²¹ The Internet does not only facilitate communication, but also helps individuals to rationalize and justify deviant behaviors.²² People become part of a network of like-minded individuals who accept them rather than view them as sick, weird or abnormal.²³ Moreover, founders and ring members utilize new technologies to increase security and avoid detection through encryption, complex password protections, codes, and other sophisticated methods.²⁴ It is argued that the anonymity, availability and perceived comfort of this

¹⁹ See Press Release, U.S. Dep’t of Justice, Department of Justice Announces Ongoing Global Enforcement Effort Targeting Child Pornographers Operation Highlights Increased Law Enforcement Cooperation Between United States and European Union (Dec. 12, 2008), available at <http://www.fbi.gov/news/pressrel/press-releases/departments-of-justice-announces-ongoing-global-enforcement-effort-targeting-child-pornographers> (“The Internet has connected all of us into one world without oceans and boundaries . . .”).

²⁰ Ove, *supra* note 3.

²¹ *Id.*; see also United States v. Williams, 444 F.3d 1286, 1290, 1290 n.3 (11th Cir. 2006) (“Total federal prosecutions of child pornography cases increased more than 452% from 1997 to 2004.”).

²² Ove, *supra* note 3; see Williams, 444 F.3d at 1290 (“The anonymity and availability of the online world draws those who view children in sexually deviant ways to websites and chat rooms where they may communicate and exchange images with other like-minded individuals.”).

²³ See Ove, *supra* note 3.

²⁴ Ruethling, *supra* note 18; Ryan, *supra* note 18.

platform often “presents [some individuals] with more opportunit[ies] to act on their impulses than they otherwise would have had before the computer age.”²⁵ In sum, the Internet “has made certain crimes against children, especially child pornography crimes, easier to commit but harder to prevent.”²⁶

[8] The process of admission to most cyber rings is much more complex and demanding than the online subscription process most Internet users are accustomed to.²⁷ To maintain security and exclusivity, the groups establish strict screening and initiation processes.²⁸ These processes often include background checks for new members.²⁹ Vetting systems are established, some of which require existing prominent members to vouch for any new members who wish to join.³⁰ Members have to prove their commitment to the organizations’ obscene purpose by posting their own child pornography. New members often must prove ownership of as many as 10,000 unique lewd images³¹, and agree to share

²⁵ Ove, *supra* note 3.

²⁶ Jelani Jefferson Exum, *Making the Punishment Fit The (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8, ¶ 6 (2010), <http://jolt.richmond.edu/v16i3/article8.pdf>.

²⁷ DOJ Press Release, *supra* note 14.

²⁸ See Ryan, *supra* note 18.

²⁹ See *id.*

³⁰ STATE OF NEW JERSEY COMMISSION OF INVESTIGATION & ATTORNEY GENERAL OF NEW JERSEY, *Computer Crime: A JOINT REPORT 8* (June 2000), available at <http://csrc.nist.gov/publications/secpubs/computer.pdf>; Michael Martinez, *Federal Authorities Say They Broke Up a Global Child Porn Ring*, CNN.com (Dec. 14, 2010), http://articles.cnn.com/2010-1214/justice/california.child.porn_1_child-pornographyglobal-child-ring-member?_s=PM:CRIME.

and exchange them with other members in order to obtain membership.³² Some groups nominate a “host” and “administrators” to “establish rules for membership” and to determine which individuals may participate.³³ These practices limit membership only to individuals with specific intent and willful determination to become part of a community devoted to illegal child pornography and the sexual exploitation of children.³⁴ The Tenth Circuit’s decision in *United States v. Robinson* supports this position, holding that when a group has a specific illegal objective, membership in the organization is admissible evidence that each individual member shares that same criminal intent of the organization itself.³⁵

[9] Even after obtaining membership, group members are closely monitored and must comport to elaborate guidelines and regulations.³⁶

³¹ See, e.g., *United States v. Williams*, 444 F.3d 1286, 1290 n.4 (11th Cir. 2006) (discussing membership requirements for the “Wonderland Club,” an Internet child pornography ring cracked by police in 1998).

³² See *id.*

³³ See, e.g., Indictment, *United States v. Annoreno*, 06 C.R. 33, at 3 (N.D. Ill. Feb. 1, 2005), available at http://www.justice.gov/usao/iln/indict/2006/us_v_annoreno_et_al.pdf [hereinafter Indictment].

³⁴ See, e.g., *Williams*, 444 F.3d at 1290 n.4 (discussing a child pornography ring that required ownership of at least 10,000 illegal images to join and a continued effort to add new images in order to maintain membership).

³⁵ See *United States v. Robinson*, 978 F.2d 1554, 1565 (10th Cir. 1992) (admitting evidence of defendant’s gang affiliation to show an intent to pursue that gang’s purpose of distributing cocaine). *Contra* *United States v. Garcia*, 151 F.3d 1243, 1246 (9th Cir. 1998) (refusing to recognize gang affiliation as sufficient evidence of conspiracy).

³⁶ See *Martinez*, *supra* note 30.

Once accepted, some groups require members to continuously “post child pornography [images and videos] to remain in good standing,” maintain membership, gain additional privileges, and to climb the hierarchical ladder.³⁷ Other groups appoint administrators to monitor the activity of the members and ban or remove individuals who do not abide by the rules of conduct or could possibly be affiliated with law enforcement.³⁸

[10] The individual’s duties and responsibilities towards the cyber community do not end once admission is acquired. Continual efforts are demanded throughout the membership period. Hence, membership in CCPRs, at any level, could not be incidental or casual, but signifies an unwavering commitment to the ring and its objectives. The 9th Circuit has also discussed the significance of “membership” in *United States v. Gourde*.³⁹ The court held the defendant’s status as a member “manifested his intention and desire to obtain illegal images.”⁴⁰ The active process of obtaining membership is described as “intentional and . . . not insignificant.”⁴¹ By establishing membership, the defendant expressed his knowing and willing intent to obtain unlimited access to child pornography.⁴²

³⁷ *Id.*

³⁸ John Stith, *Feds Crack Internet Child Porn Ring*, SECURITY PRO NEWS (Mar. 15, 2006), <http://www.securitypronews.com/news/securitynews/spn-45-20060315FedsCrackInternetChildPornRing.html>.

³⁹ *See United States v. Gourde*, 440 F.3d 1065, 1070 (9th Cir. 2006) (en banc).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1071.

[11] Although these holdings concern the use of proof of membership as a probable cause required to obtain a search warrant, inferences can be made to the proof of agreement and intent of members to participate in the ring's criminal scheme.⁴³ In comparison to the defendant in *Gourde*, who subscribed to the illegal website, provided contact information, a method of payment, and maintained membership by paying monthly fees, the requirements for obtaining and maintaining membership in most rings, as described above, are considerably more demanding.⁴⁴ Hence, based on the statements of the court, these continuous, active steps should be interpreted as a clear indication of intent, willingness and desire to become an integral part of the ring's scheme of operation.⁴⁵

[12] Statements posted by some CCPR members, discovered by law enforcement during dismantling operations, can also imply a commitment to the group and devotion to the "cause."⁴⁶ A member of the "Candyman" group, which was busted by the FBI in 2002, posted to other members that "[i]f we all work together we will have the best group on the Net."⁴⁷ James Freeman, also known as "Mystikal," a member of another cyber ring indicted and arrested for his participation in the ring's operations posted: "[m]y thanks to you and all the others that, together, make this the

⁴³ See *id.* at 1070.

⁴⁴ *Gourde*, 440 F.3d at 1070; see, e.g., Martinez, *supra* note 30.

⁴⁵ See *Gourde*, 440 F.3d at 1070.

⁴⁶ See, e.g., Joel Roberts, *Child Porn Ring Smashed*, CBS NEWS (Feb. 11, 2009), <http://www.cbsnews.com/stories/2002/03/18/national/main503982.shtml>; Ryan, *supra* note 18.

⁴⁷ See Roberts, *supra* note 46.

greatest group of pedos to gather in one place . . . I'm honored just to be a part of it."⁴⁸

[13] Not all CCPRs are identically structured, but law enforcement experts commonly describe these rings as having a highly organizational structure.⁴⁹ Some are designed in a hierarchal pyramid structure, with a “chairman”,⁵⁰ “host”,⁵¹ or “gatekeeper”⁵² and a squad of members with lesser administrative privileges often referred to as “administrators” or “moderators.”⁵³ Ring members are hierarchically ranked and receive differing privileges based on their level of contribution to the group.⁵⁴ Another documented organizational structure is the “spider web,” described as an “interlocking network.”⁵⁵ Some rings have a business-like structure based on a franchise model.⁵⁶ Often, enormous sums of money

⁴⁸ See Ryan, *supra* note 18.

⁴⁹ See Nick Davies & Jeevan Vasagar, *Global Child Porn Ring Broken*, THE GUARDIAN (Jan. 11, 2001), available at <http://www.guardian.co.uk/society/2001/jan/11/socialcare>.

⁵⁰ See *United States v. Williams*, 444 F.3d 1286, 1290 n.4 (2006).

⁵¹ Stith, *supra* note 38.

⁵² Brian Bowling, *Guilty Plea Made in Child Porn Ring*, PITT. TRIBUNE (July 14, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/news/pittsburgh/s_690189.html.

⁵³ See Stith, *supra* note 38.

⁵⁴ See *id.*

⁵⁵ Ove, *supra* note 3.

⁵⁶ Isaac Wolf, *Authorities Bust Child Porn Ring*, ABC15.COM (Sept. 21, 2010), http://www.abc15.com/dpp/news/local_news/investigations/child-porn-ring-with-a-link-to-arizona.

exchange hands, or sexually explicit images are used as valuable “currency, instead of cash.”⁵⁷ From this perspective, it is possible to equate CCPRs to membership in traditional organized crime families and syndicates, where the organizational structure is dedicated to the achievement of criminal ends.⁵⁸

[14] The tight organizational structures and methods of operation and administration, which demand ongoing commitment and involvement with the cyber community, substantiate the assertion that all activities of the ring become part of a unified scheme in furtherance of a common goal, to which all group members are integral, regardless of their position in the hierarchal structure.

III. VIRTUAL AND REALITY

[15] CCPRs use computers and the Internet as means of community formation, communication between members, and as a platform to possess, distribute, receive, and advertise illegal child pornography.⁵⁹ Nevertheless, these cyber activities are inseparably intertwined with criminal deeds taking place beyond the computer monitors and Internet browsers. This additional component of the rings’ operations does not only involve digital images, but flesh and blood children who are abused, molested and exploited by members in various ways.⁶⁰ Relying on

⁵⁷ Ryan, *supra* note 18.

⁵⁸ Richard Wortley & Stephen Smallbone, *Child Pornography on the Internet*, in PROBLEM-ORIENTED GUIDES FOR POLICE PROBLEM-SPECIFIC GUIDES SERIES 2006, at i, 9 (Community Oriented Policing Services No. 41, 2006), available at <http://www.cops.usdoj.gov/files/ric/Publications/e04062000.pdf>.

⁵⁹ *See id.* at 8.

⁶⁰ *See id.* at 7.

publicly shared information regarding some of the rings' methods of operation and the content of communication among ring members, it can be concluded that these meatspace deeds are an inherently integral part in the groups' scheme of operation.

[16] In 2002, the FBI discovered and dismantled a CCPR named "the Club."⁶¹ The ring included parents who molested their own minor children and exchanged pictures of the abuse online.⁶² Communication among ring members revealed messages in which members requested "custom made" pictures of children engaged in particular "sexually explicit activities."⁶³ The group's operation included the abuse of at least forty-five children around the world, thirty-seven of which were in the U.S.⁶⁴ Some of the images found and seized by authorities displayed "The Club" members themselves engaged in sexual acts with minors.⁶⁵ As part of the ring's operation, members "engaged in chat sessions on the Internet to discuss production and transmission of the pictures of children engaged in sexually explicit conduct."⁶⁶

⁶¹ JOHN DOUGLAS & STEPHEN SINGULAR, *ANYONE YOU WANT ME TO BE: A TRUE STORY OF SEX AND DEATH ON THE INTERNET* 227 (2003).

⁶² Bill Wallace, *Parents Held in Child-Porn Ring/Alleged Leader Fresno Chiropractor*, SFGATE.COM (Aug. 10, 2002), http://articles.sfgate.com/2002-08-10/news/17555949_1_international-child-pornography-ring-molested-lloyd-alan-emmeron.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Web Child Porn Ring Broken*, CNN (Aug. 9, 2002), http://articles.cnn.com/2002-08-09/us/internet.child.porn.bust_1_danish-police-danish-man-ring?_s=PM:US.

[17] In 2009, international collaborative efforts of law enforcement agencies across several countries brought down the “Lost Boy” ring.⁶⁷ In addition to trading pornographic photos and videos of minors, group members also developed and shared a handbook on how to “find and groom boys into engaging in sex, how to deal with physical aspects of sexual contact [with children], and how to move on to other victims when the current victim grows too old to be attractive.”⁶⁸ According to the U.S. Department of Justice press release, the investigation led authorities to the discovery of “individuals who abused children, made their own child pornography and shared their disturbing product with others on the Internet.”⁶⁹ United States Assistant Attorney General Lanny A. Breuer stated that the group’s “principal purpose was to victimize children.”⁷⁰

[18] The “Kiddypics & Kiddyvids” ring was discovered in 2005.⁷¹ The ring operated a private, member-only, password protected online chat room.⁷² According to an indictment filed against three of the ring members, some members used minors to produce images and videos of

⁶⁷ Press Release, U.S. Dep’t of Justice, Georgia Man Pleads Guilty to Participating in International Child Pornography Ring Dismantled by International Law Enforcement Effort (Dec. 14, 2010), *available at* <http://www.justice.gov/opa/pr/2010/December/10-crm-1439.html> [hereinafter Press Release: Georgia Man Pleads Guilty].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Catherine Donaldson-Evans, *Global Pedophile Ring Investigation that Netted 700 Suspects Stemmed in Part From Earlier U.S. Case*, FOXNEWS.COM (June 19, 2007), <http://www.foxnews.com/story/0,2933,284137,00.html>.

⁷² Ruethling, *supra* note 18; *see also* Stith, *supra* note 38.

child pornography.⁷³ In addition to trading and advertising images of minors engaged in sexually explicit acts, members transmitted and shared with one another live video streams of children being molested.⁷⁴ Some of these videos and images depicted the members themselves molesting the minors.⁷⁵

[19] In 1998, the “Wonderland Club” was declared to be the “most sophisticated ring of child pornographers yet found.”⁷⁶ Some of the club’s members “owned production facilities and transmitted live child-sex shows over the Web” to share with other members.⁷⁷ The viewing members “directed the sex acts by sending instructions to the producers via Wondernet chat rooms.”⁷⁸ According to Glenn Nick, a U.S. Customs agent who took part in the ring’s investigation, the group’s rules of conduct allowed any type of image to be posted except “snuff pictures” which depicted “the actual killing of somebody.”⁷⁹ However, Agent Nick disclosed that a “couple of members were barred from [the Wonderland Club] because they trafficked in those pictures.”⁸⁰

⁷³ See Indictment, *supra* note 33, at 9-10.

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ Elaine Shannon, *Main Street Monsters*, TIME MAGAZINE (Sept. 14, 1998), available at <http://time.com/time/magazine/article/0,9171,9899-82,00.html#ixzz1J3t7Jbf5>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

[20] These accounts demonstrate that CCPR operations cross the boundaries of cyberspace and penetrate the real lives of helpless children across the world who are being victimized. It is also clear that in this reality, where molestation episodes are directly broadcast over the web and ring members use the Internet to share instructions to facilitate the abuse of children, it is essentially impossible to isolate the cyber activities from meatspace deeds. Hence, it is justified to treat the two components as an undivided criminal scheme, pursued by all members of the ring. The next section will describe some of the legal doctrines that prosecutors can use to pursue this objective.

IV. INDIVIDUAL-ORIENTED STRATEGIES V. ENTERPRISE-ORIENTED STRATEGIES

[21] Legal doctrines are prisms through which facts and events are filtered when approaching the criminal justice system. The prosecution's choice of legal charges greatly influences the construction of the case, the relevance of factual elements, and the array of evidence admissible in court.⁸¹ Particularly significant is the choice between an individual-oriented strategy and an enterprise-oriented strategy.⁸² This section will explore the relevant differences between individual-oriented and enterprise-oriented prosecution in the context of CCPR cases. It will also elaborate on three legal doctrines that can be strategically used as part of enterprise-oriented prosecutions: traditional conspiracy, RICO⁸³ and the Child Exploitation Enterprise provision.⁸⁴

⁸¹ Cf. Gerard E. Lynch, *Rico: The Crime of Being A Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 970 (1987) (discussing the "importance of context . . . to individual criminal acts").

⁸² See generally *id.* at 961 (discussing how the different prosecutorial models affect criminal procedure).

⁸³ 18 U.S.C. § 1962(c) (2006).

[22] Since computer crimes and internet related offences are predominantly prosecuted under federal jurisdictions,⁸⁵ the scope of this paper will be limited to federal law. Federal jurisdiction is particularly necessary in CCPR cases because ring members almost always come from different states, and often different countries.⁸⁶ This is not to say that charges cannot be brought, under some circumstances, by state prosecution.⁸⁷ In some cases, charges are distributed between state and federal jurisdictions: the Internet related charges fall under federal jurisdiction, while child abuse charges fall under state jurisdiction.⁸⁸ This paper will not discuss these cases, although some inferences can still be drawn from bi-jurisdictional cases.

[23] The purest form of individual-oriented prosecution focuses exclusively on the direct actions of an individual defendant.⁸⁹ The

⁸⁴ 18 U.S.C. § 2252A(g).

⁸⁵ H. MARSHALL JARRETT ET AL., PROSECUTING COMPUTER CRIMES 1 (Scott Eltringham et al. eds., 2010), available at <http://www.cybercrime.gov/ccmanual/ccmanual.pdf> (listing multiple statutes which confer federal jurisdiction over computer-related crimes).

⁸⁶ See generally Shannon, *supra* note 76 (discussing the location of members in forty-seven other countries and multiple states and a raid in thirteen countries).

⁸⁷ See, e.g., United States v. Juwa, 508 F.3d 694, 698 (2d Cir. 2007) (discussing sentencing stemming from both state and federal charges).

⁸⁸ See *id.* at 696.

⁸⁹ Cf. Lynch, *supra* note 81, at 970 (discussing how the traditional model of prosecution focuses on the actions of individuals). On many occasions a hybrid strategy is used, combining elements of individual-oriented and enterprise-oriented strategies. Only rarely a strictly pure form of one strategy or another is used. However, for demonstration purposes, the pure form of each strategy is outlined in order to clarify the differences between the two trends.

individual is viewed as an entirely isolated and contextually disconnected actor.⁹⁰ It ignores the defendant's organizational affiliation and involvement, relations to other defendants, and organizational related motives for the crime.⁹¹ For example, two members of a street gang act to facilitate the gang's drug distribution operation. One stands on a street corner and sells illegal substances, while the other assaults a member of a rival group who threatens to invade the gang's distribution turf and interfere with the operation. These two actors, although closely related in action and affiliation, will be viewed as mutually exclusive individuals. During the trial, the prosecution cannot show evidence related to the context of the commission of the crimes, the relations between the two defendants, their motive to promote the gang's interest by the commission of the crimes, or even their affiliation with the gang and their role in the gang's drug distribution operation.⁹² Under the individual-oriented strategy, these pieces of evidence are deemed "irrelevant and highly prejudicial," and therefore inadmissible.⁹³

[24] Similarly, under a purely individual-oriented prosecution, an official member of the "Wonderland Club" who (1) obtained membership for the purpose of gaining access to the adverse materials produced and distributed by the ring; (2) served as an audience to the materials; and (3) as a member, downloaded to his computer the live videos depicting children being abused, would be charged solely on charges of receiving and possessing child pornography. Presumably, the defendant's membership in the ring will be disclosed only to the limited extent

⁹⁰ *Cf. id.* (discussing individual acts of defendants).

⁹¹ *Cf. id.*

⁹² *See id.* at 935, 961.

⁹³ *Id.* at 940.

relevant to establish the defendant's "knowing" state of mind.⁹⁴ Moreover, the activity of other ring members as part of the ring's operation, and the context in which the defendant operated as a ring member will be deemed prejudicial and therefore excluded.⁹⁵ The court, consequently, will only be presented with the limited facts necessary to establish the elements of the particular offenses on the indictment, and will not be able to consider the broader context in which the offenses were committed.⁹⁶

[25] An enterprise-oriented strategy, on the other hand, is not centered exclusively on the individual, but on the organizational structure in which the individual operated.⁹⁷ Its objective is not only to punish and incapacitate the individual, but to eradicate the organization and assure that it ceases to operate.⁹⁸ This strategy is often used in the prosecution of organized crime families⁹⁹ and street gangs.¹⁰⁰ The application of this

⁹⁴ See, e.g., *United States v. Gourde*, 440 F.3d 1065, 1071 (9th Cir. 2006).

⁹⁵ *Lynch*, *supra* note 81, at 940.

⁹⁶ *Id.* at 940-41.

⁹⁷ *Id.* at 928.

⁹⁸ See Jennifer G. Randolph, *Supreme Court Review: RICO - The Rejection of an Economic Motive Requirement Now v. Scheidler*, 114 S. Ct. 798 (1994), 85 J. CRIM. L. & CRIMINOLOGY 1189, 1217 (1995).

⁹⁹ See, e.g., *United States v. Persico*, 774 F.2d 30, 31 (2d Cir. 1985); see also *United States v. Ruggiero*, 726 F.2d 913, 915 (2d Cir. 1984); *United States v. Sinito*, 723 F.2d 1250, 1253 (6th Cir. 1983); *United States v. Riccobene*, 709 F.2d 214, 216 (3d Cir. 1983).

¹⁰⁰ See, e.g., *United States v. Coonan*, 938 F.2d 1553, 1556 (2d Cir. 1991); *United States v. Watchmaker*, 761 F.2d 1459, 1463 (11th Cir. 1985).

strategy has proved effective in crippling the Mafia's operation in the US.¹⁰¹ The enterprise-oriented construction allows the court to view the criminal deeds in the context of their commission, to understand the interrelations between several defendants, their organizational affiliation, the position of each defendant within the organization, and the broader motives behind the offenses.¹⁰² Moreover, a conviction under the enterprise-oriented strategy provides for broader accountability of the organization's members, not only for the direct acts of each individual, but for the organization's entire criminal scheme.¹⁰³ In CCPR cases, this strategy will permit an elaborate view of the ring's methods of operation, its structure and hierarchy, the full scope of its criminal activity in cyberspace and beyond, the position and role of each member in the organizational structure, and the interrelation between ring members.¹⁰⁴ The collective legal perspective is also absolutely indispensable for holding the individual members accountable for the physical abuse of children they facilitate by participating in the ring's criminal scheme.

[26] Several legal doctrines can help prosecutors construct indictments based on the enterprise-oriented strategy.¹⁰⁵ The first, and most commonly used, is the traditional conspiracy doctrine.¹⁰⁶ Federal

¹⁰¹ Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH. U. L. REV. 579, 580 (1993).

¹⁰² See Lynch, *supra* note 81, at 931.

¹⁰³ *Pinkerton v. United States*, 328 U.S. 640, 646 (1946).

¹⁰⁴ See generally Lynch, *supra* note 81, at 941.

¹⁰⁵ See *supra* text accompanying notes 83 and 84.

¹⁰⁶ See *id.* at 954 (“[C]onspiracy law has fostered an erosion of the transaction model of criminal law and criminal procedure.”).

conspiracy stems both from common law principles and statutory provisions.¹⁰⁷ Section 371 of the United States Code defines “Conspiracy to Commit Offense or to Defraud the United States” as “[i]f two or more persons conspire to commit [] any offense . . . and one or more of such persons do any act to effect the object of the conspiracy”¹⁰⁸ In order to prove a conspiracy, the government must present sufficient evidence to demonstrate both an overt act and an agreement to engage in the specific criminal activity.¹⁰⁹ An explicit agreement is not required, but can be inferred from circumstantial evidence.¹¹⁰ A conspirator does not need to agree to, or even to know about, all of the objects of the conspiracy to be held responsible for his\her involvement.¹¹¹ A conspiracy charge can be brought “without regard to the consummation of the criminal plan.”¹¹² According to the “Pinkerton Rule,” for the duration of the conspiracy, members act for each other in carrying the conspiracy forward, and each

¹⁰⁷ 18 U.S.C. § 371 (2006); *see* *United States v. Feola*, 420 U.S. 671, 692 (1975).

¹⁰⁸ 18 U.S.C. § 371.

¹⁰⁹ *United States v. Ramos-Rascon*, 8 F.3d 704, 709 (9th Cir. 1993) (“In sum, the government’s evidence of countersurveillance [sic] is simply insufficient to establish that [the defendants] played a role in the conspiracy. Therefore, it is also insufficient to establish that their role was to act as lookouts and enforcers on behalf of the Piar organization.”); *see also* *United States v. Hernandez*, 876 F.2d 774, 777 (9th Cir. 1989); *United States v. Melchor-Lopez*, 627 F.2d 886, 890-91 (9th Cir. 1980).

¹¹⁰ *United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994), *cert. denied*, 1994 U.S. LEXIS 6109 (Oct. 3, 1994).

¹¹¹ *United States v. Gleason*, 616 F.2d 2, 16 (2d Cir. 1979).

¹¹² *Lynch*, *supra* note 81, at 945.

member is accountable for the overt acts committed by the others in furtherance of the conspiracy objective.¹¹³

[27] As will be illustrated in Section IV, the conspiracy doctrine was used in some CCPR cases.¹¹⁴ However, the conspiracy charges in most cases covered only cyber acts such as possessing, distributing, receiving, transporting, or advertising child pornography.¹¹⁵ In few cases, the production of child pornography was incorporated into the conspiracy charges.¹¹⁶ Yet, even in those cases, only individuals directly involved in production were incorporated into the conspiracy, while ring members not physically involved were charged individually.¹¹⁷

[28] The conspiracy doctrine requires proving fewer elements and allows prosecutors relative flexibility to frame the indictment and define the boundaries of the criminal scheme.¹¹⁸ If properly utilized, the doctrine can quite effectively construct an enterprise-oriented prosecution strategy.¹¹⁹ Yet, it is limited in comparison to the other doctrines

¹¹³ See *Pinkerton v. United States*, 328 U.S. 640, 646 (1946).

¹¹⁴ See, e.g., *Indictment*, *supra* note 33, at 1-3.

¹¹⁵ See *id.*

¹¹⁶ See *id.* at 6-7.

¹¹⁷ See *id.* The cyber rings, which included parents who abused their children, exposed in 2001, is an example for the use of conspiracy for actual child exploitation and production of child pornography. In this case all indicted defendant were directly involved in the physical abuse of the child victims. See *supra* text accompanying notes 62-67.

¹¹⁸ See *Lynch*, *supra* note 81, at 965.

¹¹⁹ See, e.g., *United States v. Coonan*, 938 F.2d 1553, 1559-62 (2d Cir. 1991); *United States v. Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985) (noting that in both cases,

mentioned below.¹²⁰ There are also jurisdiction and venue barriers that apply in conspiracy cases and may prevent prosecutors from presenting all the evidence relating to a single conspiracy in the same trial.¹²¹ Also, conspiracy is generally narrower in scope and requires a relative degree of similarity between the overt acts. Difficulties in proving a common agreement can arise in cases involving very complex and diverse criminal organizations with a large number of members.¹²²

[29] Currently this problem is relatively mild in CCPR cases, but as the complexity and sophistication of some rings increase, facilitated by the use of internet and new technologies, this problem is expected to intensify in the future.¹²³ Moreover, some might argue that cyber child pornography crimes are not sufficiently similar to offenses for actual physical molestation of children, which may explain the scarcity of cases combining the two categories under conspiracy charges. However, as outlined in the next section, a broader and more accurate definition of the conspiracy can resolve this issue.

the prosecution successfully convicted the defendants based on an enterprise-oriented prosecution strategy).

¹²⁰ See, e.g., 18 U.S.C. § 2252A(g)(1) (providing that anyone who engages in a child exploitation enterprise shall be imprisoned for no less than twenty years, which is substantially more time than for conspiracy alone); 18 U.S.C. § 1962(c). § 1962(c) could theoretically apply with the participation of only one defendant whereas conspiracy requires two or more participants.

¹²¹ See Lynch, *supra* note 86, at 922.

¹²² See *id.* at 950.

¹²³ See generally Katie Raml & Nicole Longhini, HUGE Child Porn Ring with Arizona Link (September 21, 2010), http://www.abc15.com/dpp/news/local_news/investigations/child-porn-ring-with-a-link-to-arizona (providing an example of a sophisticated CCPR).

[30] The most significant limitation, however, is that conspiracy charges lack the powerful rhetorical and symbolic effect encompassed by RICO and the Child Exploitation Enterprise exception.¹²⁴ A conspiracy suggests a smaller operation with less structural integrity than “organized crime” or a “criminal enterprise.”¹²⁵ Likewise, the term “conspiracy” does not sufficiently express the magnitude of the potential harm of the predicate acts.¹²⁶ The penalty attached is also considerably lower,¹²⁷ therefore, its prospective effect on public perception is less substantial than that associated with the other two doctrines.

[31] The Racketeering Influenced and Corrupt Organizations Act (RICO) was enacted as part of the Organized Crime Control Act of 1970.¹²⁸ The underlying purpose of the act was to allow enhanced response to traditional and untraditional forms of organized crime.¹²⁹ RICO provides severe criminal and civil remedies for violation of its

¹²⁴ See, e.g., 18 U.S.C. § 2252A(g) (2006) (mentioning the phrase “Child Exploitation Enterprises,” while the term “conspiracy” is more generalized in nature and covers acts other than child abuse).

¹²⁵ Compare BLACK’S LAW DICTIONARY 1210 (9th ed. 2009) (definition of “organized crime”), with BLACK’S LAW DICTIONARY 351 (9th ed. 2009) (definition of “conspiracy”).

¹²⁶ See *id.*

¹²⁷ Compare 18 U.S.C. § 241 (providing that no one who violates this section of the code will be imprisoned for “no more than ten years”), with 18 U.S.C. § 2252A(g)(1) (providing that anyone who engages in a child exploitation enterprise shall be imprisoned for “not less than 20 or for life”).

¹²⁸ 18 U.S.C. §§ 1961-1968.

¹²⁹ See Ann K. Wooster, *Validity, Construction, and Application of Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.A. §§ 1961 et seq—Supreme Court Cases*, 171 A.L.R. Fed. 1 § 2[a] (2001).

provisions. The 1998 Amendments to RICO include a variety of child pornography offenses and sexual abuse of children as part of the enumerated offences in § 1961(1), which create a “pattern of racketeering” under the act.¹³⁰ Yet, to date, the statute was rarely used in the cyber child pornography context.¹³¹

[32] RICO created three different substantive violations of which § 1962(c) is most relevant to our case.¹³² Section 1962(c) makes it a crime to conduct or to participate in the affairs of an enterprise affecting interstate or foreign commerce, through a “pattern of racketeering activity.”¹³³ In general terms, a substantive RICO violation occurs when a defendant commits, as part of an “enterprise,” two or more of the federal and state offences enumerated in § 1961(1), within 10 years of one another.¹³⁴ The term “enterprise” is defined broadly by the legislature and the Court.¹³⁵ A CCPR qualifies as an enterprise under the Act, as a “group

¹³⁰ 18 U.S.C. § 1961(1) (2006).

¹³¹ Cf. Press Release, White House Office of the Press Sec’y, Fact Sheet: Cybersecurity Legislative Proposal (May 12, 2011), *available at* <http://m.whitehouse.gov/the-press-office/2011/05/12/fact-sheet-cybersecurity-legislative-proposal> (noting that RICO currently does not apply to cyber crimes).

¹³² 18 U.S.C. § 1962(c).

¹³³ *Id.*

¹³⁴ 18 U.S.C. § 1961(1), (5).

¹³⁵ 18 U.S.C. § 1961(4) (“[E]nterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”); *United States v. Turkette*, 452 U.S. 576, 593 (1981) (“The language of the statute, however-the most reliable evidence of its intent-reveals that Congress opted for a far broader definition of the word ‘enterprise,’ and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect.”).

of individuals associated in fact although not a legal entity.”¹³⁶ Therefore, theoretically, if a ring member saves a counterfeit image on his computer, violating § 2252A(a)(5), and shares it with other ring members, which qualifies as distribution under § 2252A(a)(2), a RICO violation under § 1962(c) occurs.¹³⁷

[33] The RICO Act compensates for some of the shortcomings of the traditional conspiracy doctrine.¹³⁸ RICO has a broader jurisdictional scope and can be used to jointly “prosecute trans-jurisdictional schemes.”¹³⁹ It also permits the admissibility of a greater variety of evidence to the court including “evidence of the defendant's associations, and of criminal activity conducted by his associates, in order to prove the existence of an enterprise, and the defendant's participation in its affairs.”¹⁴⁰

[34] In CCPR cases, this flexibility would allow conveying a true-to-reality picture of the ring's operation, its organizational characteristics and the interrelation between members. The central involvement of the Internet in the CCPR's operation further necessitates the use of RICO to address issues involving evidentiary complexities and cross-jurisdictional boundaries. Additionally, differently than traditional rules of joinder, jurisdiction and venue, RICO enables prosecutors to “link together a wide

¹³⁶ 18 U.S.C. § 1961(4).

¹³⁷ 18 U.S.C. § 2252A(a)(2), (5); 18 U.S.C. § 1962(c). *But cf.* Fact Sheet: Cybersecurity Legislative Proposal, *supra* note 131.

¹³⁸ *See* Lynch, *supra* note 81, at 931.

¹³⁹ *See id.* at 923.

¹⁴⁰ *Id.* at 961.

range of different offenses committed by numerous individuals, linked together by common aims, overlapping patterns of complicity, and general awareness that others committed to the same goals were engaged in similar illegal acts. . . .”¹⁴¹ Thus, it forms almost no barrier to the incorporation of both cyber and physical offenses in one indictment, charging all ring members jointly.¹⁴² Its use enables prosecutors to confront the growing complexity of the rings’ organizational structure and methods of operation.

[35] In 2006, § 2252A(g) was enacted, making it a crime to engage in a Child Exploitation Enterprise.¹⁴³ For § 2252A(g) to apply, a defendant has to violate any of the offenses enumerated in § 2252A(g)(2), on “three or more separate instances . . . involving more than one victim . . . in concert with three or more other persons.”¹⁴⁴ The minimum penalty under the term is twenty years imprisonment.¹⁴⁵ This section is very similar in structure to the broader RICO act, but specifically designed to address child exploitation.¹⁴⁶ It is unclear whether this specialized provision

¹⁴¹ *Id.* at 931.

¹⁴² See *Cybercrime: Updating the Computer Fraud and Abuse Act to Protect Cyberspace and Combat Emerging Threats: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 3 (Sept. 7, 2011) (statement of James A. Baker, Associate Deputy Att’y Gen. of the United States) (“Just as [RICO] has proven to be an effective tool to prosecute the leaders of these organizations who may not have been directly involved in committing the underlying crimes and to dismantle whole organizations, so too can it be an effective tool to fight criminal organizations who use online means to commit their crimes.”).

¹⁴³ 18 U.S.C. § 2252(g) (2006).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Compare 18 U.S.C. §§ 1961-1962, with 18 U.S.C. § 2252(g).

prohibits the use of RICO in cases that fail to meet the conditions of § 2252A(g).¹⁴⁷

[36] These two doctrines function similarly by providing a platform to develop an enterprise-oriented prosecution strategy, despite minor differences in their formulation.¹⁴⁸ First, the conditions of § 2252A(g) are more restrictive than § 1962(c).¹⁴⁹ Section 2252A(g) requires the involvement of at least four offenders in the ring's operation, while § 1962(c) could theoretically apply with the participation of only one defendant.¹⁵⁰ While § 2252A(g) requires violation of the enumerated overt acts on at least three occasions, for the purpose of § 1962(c) two violations suffice.¹⁵¹ Lastly, § 1962(c) does not require that the offense include more than one victim.¹⁵²

[37] Section § 2252A(g)(2) of the Child Exploitation Enterprise provision defines a minimum mandatory sentence of twenty years imprisonment.¹⁵³ This is a harsh threshold that leaves the sentencing judge only minimal flexibility to adjust the sentence to the varying circumstances of each case.¹⁵⁴ It reflects the astonishing degree of harm

¹⁴⁷ 18 U.S.C. § 2252A; 18 U.S.C. § 1962.

¹⁴⁸ *See id.*

¹⁴⁹ 18 U.S.C. § 2252A(g); 18 U.S.C. § 1962(d).

¹⁵⁰ *Id.*

¹⁵¹ 18 U.S.C. § 2252A(g)(2); 18 U.S.C. § 1962(c).

¹⁵² 18 U.S.C. § 1962(c).

¹⁵³ 18 U.S.C. § 2252A.

¹⁵⁴ *See* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, WASH. L. REV. 853, 899-900 (2011).

caused by these crimes to both the individual victims and society as a whole.¹⁵⁵ Repeated violations of the statute by CCPR members causes an enormous amount of harm, and by working together towards a common goal, the whole of their actions becomes “more than the sum of its parts.”¹⁵⁶

[38] Yet, § 2252A’s lack of flexibility makes it difficult for prosecutors to use against all ring members uniformly.¹⁵⁷ An effective strategy could use it in combination with one of the other two doctrines. Thus, prosecutors should use the Child Exploitation Enterprise provision against the ring’s leadership, then use a conspiracy charge or RICO to tie together the entire group. This way, the objective of the enterprise-oriented strategy will be achieved without interfering with the judiciary’s discretion over sentencing.

[39] When comparing RICO and § 2252A with the traditional conspiracy doctrine, it is unclear whether the *Pinkerton* Rule applies to charges under RICO and the Child Exploitation Enterprise provision as well.¹⁵⁸ Courts have yet to determine this issue.¹⁵⁹ Nevertheless, existing

¹⁵⁵ Cf. Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL’Y REV. 545, 560 (2011).

¹⁵⁶ Lynch, *supra* note 81, at 967; see Michael A. Kaplan, *Mandatory Restitution: Ensuring that Possessors of Child Pornography Pay for Their Crimes*, 61 SYR. L. REV. 531, 533, 553 (2011).

¹⁵⁷ Cf. Lynch, *supra* note 81, at 967.

¹⁵⁸ Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions*, 56 MO. L. REV. 931, 984 (1991).

¹⁵⁹ *Id.*

case law can support this application.¹⁶⁰ In *United States v. Wayerski*, the 11th Circuit held that § 2252A(g) embodies all the elements of traditional conspiracy, and requires the same proof of an agreement.¹⁶¹ Thus, the conspiracy offence is considered to be a “lesser included offense” integral to the Child Exploitation Enterprise provision for Double Jeopardy Clause purposes.¹⁶² Based on this holding, since the Child Exploitation Enterprise provision encompasses all the elements of conspiracy, it appears that the *Pinkerton* Rule, a common law supplement of traditional conspiracy, must apply in § 2252A(g) cases.¹⁶³

[40] Despite the similarities between § 2252A(g) and § 1962(c), the application of the *Pinkerton* rule to the RICO provision is more obscure.¹⁶⁴ First, theoretically, a RICO violation can occur with only one defendant, in which case, an agreement does not technically form, although a sort of an agreement between the defendant and the enterprise still exists.¹⁶⁵ Second, the RICO Act itself includes a conspiracy provision apart from § 1962(c).¹⁶⁶ Therefore, it is problematic to argue that conspiracy is contained within § 1962(c). Nevertheless, it is possible to

¹⁶⁰ See *United States v. Campione*, 942 F.2d 429, 437 (7th Cir. 1991); *United States v. Caliendo*, 910 F.2d 429, 438 (7th Cir. 1990); *United States v. Delatorre*, 581 F. Supp. 2d 968, 992 (N.D. Ill. 2008).

¹⁶¹ *United States v. Wayerski*, 624 F.3d 1342, 1351 (11th Cir. 2010).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions*, 56 MO. L. REV. 931, 984 (1991).

¹⁶⁵ 18 U.S.C. § 1962 (2006).

¹⁶⁶ 18 U.S.C. § 1962(d).

argue that a § 1962(c) violation, which includes more than one defendant, requires proof of an agreement regarding the commission of the overt acts that compose the “pattern of racketeering,” while a RICO conspiracy violation under § 1962(d) requires an agreement regarding the commission of several separate substantive RICO violations.¹⁶⁷ However, this argument proves problematic since RICO seeks to bypass many of the evidentiary burdens associated with these cases, such as the proof of the existence of one inclusive agreement to conspire.¹⁶⁸

[41] Notwithstanding the noted dissimilarities, the three doctrines serve a similar function—to facilitate the construction of enterprise-oriented prosecutorial strategies. With the operation of CCPRs resembling more and more of organized crime syndicates, an enterprise-oriented strategy is arguably an appropriate prosecutorial approach to effectively address this growing phenomenon. If applied correctly, an enterprise-oriented strategy will also allow the incorporation of both cyber and meatspace elements of the rings’ operation in order to realistically reflect their full scope of criminality.

V. CURRENT PRACTICES

[42] This section attempts to outline some of the existing prosecutorial practices in CCPR cases, pinpoint possible deficits, and offer potential improvements. This analysis is based on two case studies.¹⁶⁹ These particular cases were chosen since sufficient information was publicly available regarding their facts and procedural history, which allowed forming a reasonably accurate factual account. Media reports, official

¹⁶⁷ Compare 18 U.S.C. § 1962(d), with 18 U.S.C. § 1962(c).

¹⁶⁸ See generally 18 U.S.C. § 1962.

¹⁶⁹ See Ruethling, *supra* note 18; Press Release: Georgia Man Pleads Guilty, *supra* note 67.

announcements, press releases by government agencies, and legal documents were assembled to determine factual and procedural histories.¹⁷⁰

[43] Note that several unavoidable factors affect the accuracy of the analysis, and therefore should be taken into account. The majority of child pornography cases are concluded with a plea bargain, rather than a full-blown trial.¹⁷¹ As a result, many defendants plea to lesser charges, and the original charges prosecutors intended to bring are concealed.¹⁷² Additionally, when a plea bargain takes place, a trier of fact does not review and scrutinize the evidence.¹⁷³ Hence, this discussion may not include all the relevant facts. Furthermore, federal criminal indictments are not consistently publicized.¹⁷⁴ Therefore, this discussion places greater reliance on secondary materials, such as press releases and media reports, which may have less legal weight.¹⁷⁵

¹⁷⁰ See generally Indictment, *supra* note 33; Donaldson-Evans, *supra* note 71; Mary Owen, *Aurora Man Gets 20 Years for Child Pornography*, CHI TRIBUNE (Mar. 26, 2008), http://articles.chicagotribune.com/2008-03-26/news/0803250581_1_pornography-chat-room-daddy-daughter; Ruethling, *supra* note 18; Press Release: Georgia Man Pleads Guilty, *supra* note 67; Press Release, U.S. Attorney Office of the E. Dist. of Pa., Bucks County Man Sentenced to Six Years for Possession of Child Pornography (Jan. 24, 2011), available at http://www.justice.gov/usao/pae/News/Pr/2011/Jan/ivins_release.pdf [hereinafter Press Release: Bucks County Man].

¹⁷¹ See Exum, *supra* note 26, ¶ 37.

¹⁷² Cf. FED. R. CRIM. P. 11(c).

¹⁷³ Cf. *id.*

¹⁷⁴ FED. R. CRIM. P. 6(e)(4).

¹⁷⁵ Several efforts were made to cope with these constrains and limitations. First, I attempted to cross-reference facts and sources whenever possible, to enhance factual

[44] The first case study concerns the “Kiddypics & Kiddyvids” ring.¹⁷⁶ The ring’s operations included possession, distribution, exchange and production of thousands of child pornography images and video, and the molestation of several minor victims broadcasted live to ring members over the web.¹⁷⁷ Twenty-seven of the ring’s members were identified and prosecuted either in the United States or abroad.¹⁷⁸ Although federal jurisdictional rules generally allow joinder of all defendants involved in one conspiracy or criminal scheme, here, the ring members were charged across various jurisdictions with no single indictment covering the entire scope of the ring’s operations.¹⁷⁹

[45] The central indictment was filed in the United States District Court of the Northern District of Illinois against three prominent ring members.¹⁸⁰ The indictment included a general conspiracy charge, as well as individual charges.¹⁸¹ It stated that the conspiracy intended to “facilitate the trading of images of child pornography” among ring members.¹⁸² Although acts of child molestation, perpetrated by two out of

accuracy. Second, I aimed to find support to the presented arguments in primary legal documents and the few publicly available original indictments.

¹⁷⁶ See generally Ruethling, *supra* note 18.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ FED. R. CRIM. P. 8(b); Donaldson-Evans, *supra* note 71 (“The American probe was comprised of investigations in at least 11 states, resulting in the 13 indictments in nine states . . .”).

¹⁸⁰ Indictment, *supra* note 33, at 1.

¹⁸¹ *Id.* at 4-9.

¹⁸² *Id.* at 5.

the three defendants, made up a significant part of the ring's operation, the filed indictment did not include such offenses as part of the conspiracy.¹⁸³ Accordingly, the conspiracy's overt acts only included the receipt, transportation and shipment in interstate commerce, publication of a notice and advertisement, and possession of child pornography.¹⁸⁴ Acts of production of child pornography and abuse of minors were mentioned in the facts supporting the conspiracy charge, however, their mention was only to support the underlined objective of the conspiracy.¹⁸⁵ Actual charges on those counts were brought only on an individual basis against the defendants who physically took part in the abuse.¹⁸⁶ The other ring members who allowed the abuse to happen, provided an acceptable platform for the commission of the acts, encouraged the acts, and served as an active audience, were not charged with the offline abuse.¹⁸⁷ Most other ring members were convicted only on charges of receiving, possessing and transporting child pornography.¹⁸⁸ One member was charged with possession only.¹⁸⁹ Only four out of twenty-seven

¹⁸³ *Id.* at 4-9 (including only the physical acts of abuse committed by defendant Annoreno).

¹⁸⁴ *Id.* at 4-5.

¹⁸⁵ Indictment, *supra* note 33, at 6-9.

¹⁸⁶ *Id.* at 12-13 (charging defendant Annoreno individually for “us[ing] a minor under the age of eighteen with the intent that the minor engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct, namely, a live streaming video . . .”).

¹⁸⁷ *See id.* at 4-5.

¹⁸⁸ *See id.*; Donaldson-Evans, *supra* note 71; Owen, *supra* note 170 (noting that some of the convictions were a result of guilty pleas and plea bargains).

¹⁸⁹ Press Release: Bucks County Man, *supra* note 170.

defendants were charged with the molestation of children, which the ring's pattern of operation relied upon.¹⁹⁰

[46] In this case, the prosecution chose a semi-enterprise-oriented strategy.¹⁹¹ The traditional conspiracy doctrine was used to recognize some aspects of the common efforts made by ring members to pursue a collective interest.¹⁹² This construction also allowed communicating to the court the methods of operation of the ring, and some details about its organizational structure and hierarchy.¹⁹³ Therefore, a more accurate account of the offenses took place, and the role of each defendant in the operation was clarified by putting the individual acts into context. Nevertheless, as demonstrated above, the prosecution did not utilize the enterprise-oriented strategy to its full potential.¹⁹⁴ Instead of incorporating all components of the ring's criminal scheme, including the actual molestation, into the conspiracy charge, the prosecution only included the cyber elements.¹⁹⁵

[47] This artificial distinction should be avoided by broadening the definition of the conspiracy in criminal indictments. The "Kiddypics &

¹⁹⁰ Ruethling, *supra* note 18.

¹⁹¹ *See generally* Indictment, *supra* note 33.

¹⁹² *See id.* It should be noted that at the time that most of the "Kiddypics & Kiddyvids" indictments were filed the Child Exploitation Enterprise provision was in its infancy and was yet to be used. *See* 18 U.S.C § 2252A(g) (2006).

¹⁹³ *See generally* Indictment, *supra* note 33.

¹⁹⁴ *See generally id.*; *see also* Lynch, *supra* note 81, at 967 (describing the "cumulative power" of using a full enterprise-oriented strategy under RICO).

¹⁹⁵ *See* Indictment, *supra* note 33, at 4-5.

Kiddyvids” organization participated indiscriminately in both the trading and manufacturing of pornographic materials depicting minors. Members intentionally joined this platform through which they could witness and have access to live molestation of children.¹⁹⁶ Hence, the conspiracy should have been defined with the exploitation of children as part of its objective. Accordingly, the molestation and manufacturing charges should have been included as an integral part of the conspiracy, which attaches to all the co-conspirators, instead of only selectively attributed to the individual offenders. This extended accountability would provide a truthful reflection of the underline facts, and accurately represent the true extent of harm experienced by the victims.

[48] Furthermore, incorporating all the ring members in one inclusive indictment under one jurisdiction would promote efficiency. This would have been possible under the federal rules.¹⁹⁷ According to 18 U.S.C. § 3237, an entire conspiracy scheme may be prosecuted in any district where any overt act was committed.¹⁹⁸ Since the factual infrastructure of all cases against members of a particular CCPR is virtually identical, they could be heard jointly to promote judicial and prosecutorial efficiency.¹⁹⁹ Thus, the court may better understand the role of each member in relation to the others, and the prosecutor could more effectively and accurately relate the entire criminal scheme to the court.²⁰⁰ The resulting joint decision would also help ensure that all the young victims that were harmed by the conspiracy would be properly compensated, by distributing

¹⁹⁶ Ruethling, *supra* note 18.

¹⁹⁷ 18 U.S.C. § 3237; FED. R. CRIM. P. 8(b).

¹⁹⁸ 18 U.S.C. § 3237(a); Lynch, *supra* note 81, at 923.

¹⁹⁹ Lynch, *supra* note 81, at 924.

²⁰⁰ *See generally id.*

the burden between all the convicted defendants based on the extent of their involvement.

[49] Today, the Child Exploitation Enterprise provision could have also been incorporated in this case, since at least seven victims and twenty-seven co-conspirators were involved in the ring's scheme, and during its period of operation, which lasted over a year, most defendants violated the enumerated offences on more than three separate occasions.²⁰¹ The use of this provision also has a strong rhetorical significance, since it indicates the existence of an established criminal organization, rather than a random group of individuals.

[50] The second case is the "Lost Boy" case, which concerned a CCPR more recently discovered in 2009.²⁰² According to information released by the Department of Justice, ring members exchanged, possessed and distributed thousands of images of child pornography.²⁰³ Membership required the possession of a large number of images and willingness to distribute them.²⁰⁴ Additionally, members created and shared an online "handbook" that provided guidance and instruction for methods to lure and abuse young boys.²⁰⁵ Some members also "abused children, made their own child pornography and shared their disturbing products with the

²⁰¹ See 18 U.S.C. § 2252A(g) (2006); see also Ruethling, *supra* note 18.

²⁰² Press Release: Georgia Man Pleads Guilty, *supra* note 67.

²⁰³ *Id.*

²⁰⁴ *See id.*

²⁰⁵ *Id.*

others over the Internet.”²⁰⁶ Sixteen of the thirty-five members have been charged in the United States.²⁰⁷

[51] In this case, the prosecution took an entirely different course of action than that used four years prior as part of the “Kiddypics & Kiddyvids” affair.²⁰⁸ The prosecution defined the “principal purpose” of the “Lost Boy” group as “to victimize children . . . [to] facilitate the sexual abuse of children and enable its users to produce and share child pornography.”²⁰⁹ This is a more comprehensive definition of the criminal scheme, which justifiably bridges the cyberspace and meatspace offenses.²¹⁰ This time, both traditional conspiracy and the Child Exploitation Enterprise provision were employed to pursue an enterprise-oriented strategy and to address the “Lost Boy” ring’s organizational structure.²¹¹

[52] Nevertheless, the actual charges brought do not fully reflect this strategy.²¹² Public documents reveal that most defendants were charged with offenses ranging from conspiracy to transport child pornography, conspiracy to advertise child pornography, transporting, receiving and

²⁰⁶ *Id.*

²⁰⁷ Press Release: Georgia Man Pleads Guilty, *supra* note 67.

²⁰⁸ *See id.*; *see also supra* text accompanying notes 180-190 (discussing the prosecution of defendants in “Kiddypics & Kiddyvids”).

²⁰⁹ Press Release: Georgia Man Pleads Guilty, *supra* note 67.

²¹⁰ *See generally id.* (discussing the online and offline actions the defendants used to commit the crimes).

²¹¹ *See id.*; *see also supra* text accompanying notes 157-60.

²¹² *See generally id.*

possessing child pornography.²¹³ Only very few of the identified members were charged with more serious charges of engaging in a child exploitation enterprise, producing child pornography, and the molestation of children.²¹⁴ Therefore, very limited accountability was attributed to the ring members for criminal acts beyond the boundaries of cyberspace.²¹⁵ This is despite the fact that a significant portion of the ring's Internet bulletin board was dedicated to the "handbook," through which members actively encouraged each other to engage in acts of molestation and provided "tips" and instruction to facilitate the molestation of minors.²¹⁶ Also, the cyber discussion amongst members involved documentation of actual abuse and molestation, methods of avoiding detection, and contained self-produced child pornography images.²¹⁷ A more comprehensive enterprise-oriented prosecutorial strategy would have more accurately reflected this evidently principal role of meatspace molestation in the ring's scheme of operation.²¹⁸

VI. ADVANTAGES

[53] The transition to a fully enterprise-oriented prosecutorial strategy in the CCPR context can be beneficial for several reasons in addition to those mentioned above. The proposed strategy rests on a belief that

²¹³ *See id.*

²¹⁴ Press Release: Georgia Man Pleads Guilty, *supra* note 67.

²¹⁵ *See generally id.* (describing defendant's charges which were mostly for criminal acts committed in cyberspace).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

criminal proceedings embody a much greater value than the end sentences imposed on the defendants, which are often inaccurately viewed as the ultimate goal of criminal prosecution.²¹⁹ The contents, rhetoric, standards and procedures incorporated in the proceedings can be extremely influential in forming public opinions, policies, moral and legal standards, as well as feeding the democratic debate.²²⁰ Therefore, the evaluation of the potential outcomes of the strategy will take a holistic approach that looks beyond its effect on sentencing, to its potential impact on law enforcement, the legal system, the public, and the victims.²²¹

[54] A criminal indictment can be very powerful tool. In effect, it serves as a public statement made by a government agency, communicating normative standards and denouncing certain practices.²²² Even though the full text of indictments is not always made public, the simplified content is regularly imparted to the public by press releases and public announcements.²²³ The design of an indictment also frames and

²¹⁹ See generally SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 79 (Aspen Publishers 8th ed. 2007) (discussing the theories of criminal punishment); MODEL PENAL CODE § 1.02(2) cmt. a (Tentative Draft 1, 2007) (discussing utilitarian goals of criminal prosecution, including deterrence, rehabilitation, and incapacitation to prevent future crimes).

²²⁰ See James Lupo, *Court Speech as Political Action: Isocrates' Rhetorical Ideal and the Legal Oratory of Daniel Webster*, 3 J. ASS'N OF LEGAL WRITING DIRECTORS 48, 48-50 (2006).

²²¹ *Id.*

²²² See Lynch, *supra* note 81, at 969 (arguing that criminal trials are an exercise in “public education an ritual denunciation of criminal activity). See generally BLACK’S LAW DICTIONARY 842 (9th ed. 2009) (defining a criminal indictment).

²²³ See, e.g., Press Release: Georgia Man Pleads Guilty, *supra* note 67 (providing a sample of a simplified government press release about the indictment of a Georgia man in an international child pornography ring).

shapes the criminal trial to follow, where the public joins the jury as an audience.²²⁴ Some argue that the language of an indictment is insignificant because most child pornography cases conclude with a plea bargain and never go to trial.²²⁵ However, this argument is more relevant for simple cases of receipt and possession of child pornography, since many of the more complex conspiracy and engagement in a Child Exploitation Enterprise cases do go to trial.²²⁶ Furthermore, even when a trial does not occur, many CCPR cases are extremely high-profile, even in preliminary stages, and, the prosecution's discourse is often echoed in media reports.²²⁷ Therefore, the prosecution's rhetoric is absolutely imperative.

²²⁴ See generally, e.g., Lynch, *supra* note 81, at 969 (referring to the jury as an “audience for the story the government seeks to tell in an illicit enterprise”).

²²⁵ See generally ANTHONY REYES ET AL., CYBER CRIME INVESTIGATIONS: BRIDGING THE GAP BETWEEN SECURITY PROFESSIONALS, LAW ENFORCEMENT, AND PROSECUTORS 50-51 (2007), available at http://doc.hackbbs.org/Docs_HackAngel/Syngress%20-%20Cyber%20Crime%20Investigations.pdf (stating that in most cyber-crimes, attorneys enter a plea bargain to avoid trial).

²²⁶ See generally, e.g., United States v. Durham, 618 F.3d 921 (8th Cir. 2010) (determining if the use of Limewire to share child pornography images constituted distribution); United States v. Geiner, 498 F.3d 1104 (10th Cir. 2007) (dealing with group file sharing and distribution of child pornography to groups via a file sharing network); United States v. Martin, 426 F.3d 83 (2d Cir. 2005) (concerning a member of the “girls 12-16” child pornography trading group); United States v. Perez, 247 F. Supp. 2d 459 (S.D.N.Y., 2003) (holding that a search warrant affidavit listing defendant as a member of the “Candyman E-group” emailing list was not enough to establish probable cause for a search of his residence); Commonwealth v. Amirault, 677 N.E.2d 652 (1997) (convicting defendants in 11 separate trials of sexual abuse, including child pornography).

²²⁷ The use of the prosecution's language by the media is particularly overwhelming in the coverage of the ‘Lost Boy’ cases. See generally SUZANNE OST, CAMBRIDGE STUDIES

[55] The use of the enterprise-oriented strategy can be used to label CCPRs as “organized crime.”²²⁸ This rhetoric triggers the “denunciatory function of criminal justice.”²²⁹ It can help educate the public about the severity and form of the problem, along with the risk it creates to the “moral fabric of society at large” and our own children.²³⁰ Moreover, the use of the term “organized crime” is a very powerful tool to “draw the press . . . acquire law enforcement resources [and] gain public support for various legislative or enforcement crackdowns.”²³¹ Therefore, a more systematic use of this rhetoric by the prosecution can have significant and desirable policy and enforcement implications.

[56] Changing existing misperceptions, as well as educating the public and the legal community, is another important benefit of the use of enterprise-oriented prosecution strategies in CCPR cases.²³² Discussions

IN LAW AND SOCIETY, CHILD PORNOGRAPHY AND SEXUAL GROOMING: LEGAL AND SOCIETAL RESPONSES 168 (2009) (stating that media stories about online predators using the internet to gain access to young victims have been a staple of news coverage since the late 1990s).

²²⁸ See generally BLACK’S LAW DICTIONARY 1210 (9th ed. 2009) (defining “organized crime”); MARGARET E. BEARE & R.T. NAYLOR, MAJOR ISSUES RELATING TO ORGANIZED CRIME: WITHIN THE CONTEXT OF ECONOMIC RELATIONSHIPS, LAW COMMISSION OF CANADA 3 (1999), available at <http://dalspace.library.dal.ca/bitstream/handle/10222/10284/Nathanson%20Centre%20Research%20Economic%20and%20Organized%20Crime%20EN.pdf?sequence=1> (defining organized crime as “whatever the speaker wants it to be”).

²²⁹ Lynch, *supra* note 81, at 969.

²³⁰ United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990).

²³¹ BEARE & NAYLOR, *supra* note 228, at 4.

²³² See Lynch, *supra* note 81 (using criminal trials can serve “broader functions”).

surrounding the severity of penalties for child pornography possession suggest that most people, including judges and legal scholars, are not aware of current practices in the “child pornography underworld.”²³³ Although opponents, as well as proponents, recognize some of the harm inflicted by the possession of child pornography,²³⁴ very few relate to the organized-crime-like association of CCPRs often involved in this practice, which houses cyber and physical crimes under one roof. The majority of the public lacks an understanding of the true severity of child pornography possession, and many appear to believe that obtaining child pornography is very similar in nature to obtaining legal or obscene pornographic materials of adults.²³⁵ Generally, the public is oblivious to CCPR subcultures that have developed, which utilize emerging technologies and the Internet to trade, obtain, and manufacture child pornography without being detected by law enforcement.²³⁶

[57] By promoting the enterprise-oriented discourse and revealing in open court significant facts that would otherwise be excluded, prosecutors have the ability to help develop a better understanding, amongst all the parties involved, including the public, the courts and the legal community, of the existing practices and organizational schemes of CCPRs. It will

²³³ See HOLLIS STAMBAUGH ET AL., NAT’L INST. OF JUSTICE, ELECTRONIC CRIME NEEDS ASSESSMENT FOR STATE AND LOCAL LAW ENFORCEMENT 15 (2001), available at <https://www.ncjrs.gov/pdffiles1/nij/186276.pdf>.

²³⁴ Exum, *supra* note 26, ¶ 6; see also Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure To Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281, 1285 (2010); Mark Hansen, *A Reluctant Rebellion*, ABA JOURNAL (Jun 1, 2009), available at http://www.abajournal.com/magazine/article/a_reluctant_rebellion/.

²³⁵ See Hansen, *supra* note 234.

²³⁶ See Stambaugh, *supra* note 233, at 15.

also challenge the common view held by the public and the courts, of cyber-crimes as “virtual” and “victimless,”²³⁷ by factually demonstrating the connection between the possessors of images and the actual molestation of flesh-and-blood children. Therefore, a more informed and factually relevant debate can be initiated on the issue of child pornography sentencing.

[58] In addition to the symbolic and declaratory value, the use of the suggested strategy can also produce practical advantages. First, without the implementation of an inclusive enterprise-oriented prosecutorial strategy in CCPR cases, accountability of the entire body of ring members for meatspace crimes could not be achieved.²³⁸ Although the “real-world” molestation and exploitation of children is an integral part of the operation of most CCPRs, usually not all ring members are physically involved in this criminal activity.²³⁹ Some members may not have convenient access to children and must rely on virtual images to satisfy their sexual desires, while others convince themselves that supporting, encouraging and directing molestation through cyber-communication is somehow not a harmful deed.²⁴⁰ Nevertheless, their active membership and involvement in a ring, of which child molestation is an inherent component, prove their

²³⁷ Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 849 (2008).

²³⁸ See *supra* Section V.

²³⁹ See generally Indictment, *supra* note 33.

²⁴⁰ See Rogers, *supra* note 240, at 851-52. The author cites a survey in which 136 countries do not criminalize the possession of child pornography. See *Child Pornography: Model Legislation & Global Review*, INT'L CTR. FOR MISSING & EXPLOITED CHILDREN, at iv (2006), available at <http://www.childcentre.info/projects/internet/dbaFile12830.pdf>.

intent and justifies their criminal accountability.²⁴¹ Since many ring members have not met the molested children in person or had physical access to them, if viewed in isolation, their criminal responsibility for these acts cannot be legally proven.²⁴² However, viewing all ring members collectively as co-conspirators in one criminal scheme enables the proof of responsibility. Hence, the enterprise-oriented approach is vital for achieving the desirable goal of bridging the “online” and “offline” components of CCPRs’ criminal operation.

[59] Even more important is the suggested strategy’s ability to help assure the victims are justly compensated by defendants for the harm and suffering they endured. The Mandatory Restitution Provision obligates the courts to order restitution, in addition to other civil or criminal penalties, to victims of sexual exploitation and child abuse.²⁴³ The sum of restitution should cover the “full amount of the victim's losses,”²⁴⁴ recognizing the tremendous harm the victims endure. Nevertheless, the court’s application of this provision in cyber child pornography cases has been incredibly inconsistent.²⁴⁵ Very few courts order cyber child pornography victims the “full amount of [their] losses.”²⁴⁶ In most cases,

²⁴¹ See *supra* Section II and III.

²⁴² See *supra* Section III.

²⁴³ 18 U.S.C. § 2259 (2006); Jennifer Rothman, *Getting What They Are Owed: Restitution Fees For Victims of Child Pornography*, 17 CARDOZO J.L. & GENDER 333, 344 (2011).

²⁴⁴ 18 U.S.C. § 2259(b)(3).

²⁴⁵ See, e.g., *United States v. Chow*, 760 F. Supp. 2d 335 (S.D.N.Y. 2010) (failing to impose restitution); John Schwartz, *Child Pornography, and an Issue of Restitution*, N.Y. TIMES (Feb. 3, 2010), <http://www.nytimes.com/2010/02/03/us/03offender.html?hp>.

²⁴⁶ 18 U.S.C. § 2259(b)(3); see, e.g., *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204 (S.D. Fla. Sept. 2, 2009); *United States v. Freeman*, Case No.

the children are considered secondary victims while society is defined as the primary victim.²⁴⁷ Consequentially, courts adopt an exceptionally low base amount for restitution and generally disregard any evaluation of the victim's actual harm.²⁴⁸ Hence, the current focus of CCPR prosecution on cyber-crimes deprives victims of the possibility of compensation for their injuries and losses.²⁴⁹ It also denies them recognition as primary victims, which is not only vital to facilitate the healing process, but also minimizes “their experience and the horrific nature of the crime.”²⁵⁰

[60] Extending the responsibility of CCPR members to include the ‘physical’ crimes of child abuse, trafficking, and manufacturing of child pornography will facilitate just restitution for these invisible victims. Additionally, since the statute permits the court to make each offender liable for payment of the full amount of restitution, by expanding the number of ring members charged with the meatspace abuse of children, the suggested construction will tremendously increase the monetary sums the victims can recover. Furthermore, as stated by Senator John Kerry, increased monetary penalties could also serve as a deterrent for offenders of Internet-related crimes, especially those who get involved in CCPRs for

3:08cr22/LAC (N.D. Fla. Jul. 9, 2009) (Amended Judgment); *see also* Schwartz, *supra* note 249.

²⁴⁷ United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990); *see also* Rothman, *supra* note 243, at 338.

²⁴⁸ *See, e.g.*, United States v. Brown, No. CR 08-01435-RGK, 2009 U.S. Dist. LEXIS 113942, at *1 (C.D. Cal. Oct. 5, 2009); United States v. Ferenci, No. 1:08-CR-0414 AWI, 2009 WL 2579102, at *4, *7 (E.D. Cal. Aug. 19, 2009); *see also* Rothman, *supra* note 243, at 352.

²⁴⁹ *Ferenci*, 2009 WL 2579102, at *4, *7.

²⁵⁰ Rothman, *supra* note 243, at 338.

financial gain.²⁵¹ It may be preferable that either the courts or Congress lead this transformation in sentencing policy. However, since the first judicial recognition of the right of cyber child pornography victims to be compensated in 2008,²⁵² very little progress has been made towards a consistent restitution policy for victims.²⁵³ Therefore, alternative action should be taken to assure that the fast growing number of vulnerable victims are recognized and justly compensated. The implementation of the suggested strategy by prosecutors can serve this goal.

[61] The various strategies used by prosecutors in CCPR cases inevitably influence investigation methods, strategies, and practices used by law enforcement.²⁵⁴ Guidance, direction, and mutual brainstorming between prosecutors and investigators can alter the investigation and facilitate the development of new evidence collection techniques to adapt to the legal strategy chosen by the prosecution.²⁵⁵ Despite the high penalties associated with child pornography possession cases and the relative simplicity of proof, prosecutors should encourage investigators to examine how the defendant obtained the pornographic images, in accordance with the suggested strategy. A recent policy developed by the U.S. Attorney's Office requires the FBI agents investigating cyber child pornography cases to follow leads provided by the digital images discovered on perpetrators' computers in order to search and rescue the

²⁵¹ See 151 CONG. REC. S14187-03 (daily ed. Dec. 20, 2005) (statement of Sen. Kerry).

²⁵² See Rothman, *supra* note 243, at 349.

²⁵³ See, e.g., *id.* at 351-52.

²⁵⁴ See Lynch, *supra* note 81, at 963.

²⁵⁵ See *id.* at 965-66.

child victims.²⁵⁶ To further strengthen this policy, investigators can develop leads by tracing the organizational structure of CCPRs beyond their cyber activity to identify abusers and traffickers of minors. Implementation of the enterprise-oriented strategy can promote this objective by enhancing the understanding of the structure, hierarchy and methods of operation of the rings in cyberspace and meatspace, and the correlation between the two spheres. This understanding in itself can be extremely valuable to law enforcement. Following a bust of a CCPR in 2010, Matt Dunn of the Department of Homeland Security's Immigration and Custom's Enforcement said, "we're in a much better position than historically we have been because we have this global understanding of how it works"²⁵⁷

[62] Also, there are several reports of CCPRs led by members who were previously caught by law enforcement and prosecuted.²⁵⁸ Some resumed their operation upon completing their prison sentences.²⁵⁹ An enterprise-oriented strategy targets the organization as a whole, not only the individual members. By doing that, it aims to eradicate the organization and assure that it ceases to operate. The enterprise-oriented

²⁵⁶ Interview with Thomas J. Harrington, Associate Deputy Dir., Fed. Bureau of Investigation (Mar. 2011) (on file with author).

²⁵⁷ Katie Raml & Nicole Longhini, *HUGE Child Porn Ring with Arizona Link*, ABC 15 (Sept. 21, 2010), http://www.abc15.com/dpp/news/local_news/investigations/child-porn-ring-with-a-link-to-arizona.

²⁵⁸ See, e.g., Daryl Slade, *Repeat Child Porn Offender Promises He'll Never Be Back Before the Courts*, CALGARY HERALD (Nov. 10, 2001), http://www.calgaryherald.com/news/calgary/Repeat+child+pornoffender+promises+never+back+before+courts/5693232/story.html?cid=megadrop_story.

²⁵⁹ See *Convicted Pedophile Jailed Again*, BBC News (Nov. 1, 2004), http://news.bbc.co.uk/2/hi/uk_news/england/southern_counties/3972383.stm.

approach has proven in the past as more effective than individual-oriented prosecution in accomplishing this goal.²⁶⁰

[63] Distinguishing between different “types” of possession of child pornography images is another important advantage of using the enterprise-oriented strategy in relevant cases.²⁶¹ It will allow for differentiation between those who stumble upon child pornography on the Internet, and those who obtain images through membership in CCPRs, for which the use of enterprise-oriented charges is appropriate. The Ninth Circuit, in *United States v. Gourde*, recognized the importance of this differentiation.²⁶² The distinction can also be used for the purpose of developing personalized sentences for defendants.²⁶³ Although the association of the defendant with a CCPR could theoretically be disclosed to the court during the sentencing phase, even without the use of the proposed strategy, responsibility for the meatspace offenses will not be recognized, and a vast portion of the harm inflicted on the victims will not be acknowledged.²⁶⁴ Therefore, the difference in culpability cannot be

²⁶⁰ See Scott Zambo, Note, *Digital La Cosa Nostra: The Computer Fraud and Abuse Act's Failure to Punish and Deter Organized Crime*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 551, 569 (2007).

²⁶¹ See *id.* at 563.

²⁶² 440 F.3d 1065, 1070 (9th Cir. 2006).

²⁶³ Compare *United States v. Tagore*, 158 F.3d 1124, 1130-31 (10th Cir. 1998) (enhancing the sentence for the leader of a child pornography organization), with *United States v. Baird*, 580 F. Supp. 2d 889, 895 (D. Neb. 2008) (decreasing the sentence of defendant who downloaded several child pornography images).

²⁶⁴ See Exum, *supra* note 26, ¶ 23.

properly evaluated absent the implementation of the enterprise-oriented strategy by the prosecution.²⁶⁵

[64] Moreover, in the long run, the ongoing differential treatment of the two categories can affect the public's perception of the two types of offenders and induce policy change.²⁶⁶ One example might include a more specific definition of the term "use of a computer" as part of the sentencing enhancement of section 2G2.2(b)(6) of the U.S. Sentencing Guidelines Manual. A preferred definition will distinguish between the two categories of computer use. As stated by the Sentencing Commission itself, although not in relation to CCPRs, "[n]ot all computer use is equal."²⁶⁷ With approximately 97% of child pornography offenses committed using computers,²⁶⁸ a more "finely-tuned" sentencing policy must address the different uses of computers and their different levels of culpability.

[65] An enterprise-oriented strategy can also enhance sentences. The legal doctrines used to construct enterprise-oriented prosecution function as independent offenses with additional penalties.²⁶⁹ Some, like the Child

²⁶⁵ See *id.* ¶ 50; cf. Susan W. Brenner, *Cybercrime Metrics: Old Wine, New Bottles?*, 9 VA. J.L. & TECH. 13, 75 (2004).

²⁶⁶ Cf. Amir Efrati, *Making Punishments Fit the Most Offensive Crimes*, WALL ST. J., Oct. 23, 2008, at A14.

²⁶⁷ U.S. SENTENCING COMMISSION, REPORT TO THE CONGRESS: SEX OFFENCES AGAINST CHILDREN 29 (1996), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/199606_RtC_Sex_Crimes_Against_Children/199606_RtC_SCAC.PDF.

²⁶⁸ MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006 at 6 (2007), available at <http://www.bjs.gov/content/pub/pdf/fpcseo06.pdf>.

²⁶⁹ Lynch, *supra* note 81, at 940.

Exploitation Enterprise provision, carry extremely severe sentences.²⁷⁰ In light of the controversially harsh sentences already in effect, this is a relatively miniscule advantage that is also considerably problematic, as will be discussed in Section VII.²⁷¹ However, since membership in CCPRs does not seem to be an offense in itself,²⁷² in cases where a ring member can be directly charged only with a minor offense, the strategy can be used when appropriate, to reflect the individual's true involvement in the ring operations. For example, this can be relevant when sufficient evidence of involvement in some overt acts proves impossible to recover due to destruction by data-removal software and other evasion technologies commonly used by CCPRs.²⁷³

[66] Additionally, § 2G2.2(b) of the U.S. Sentencing Guidelines Manual does not recognize the commission of the crime in concert with others or as part of a group as a sentencing enhancement in child pornography cases.²⁷⁴ This differs from common practices in many other

²⁷⁰ 18 U.S.C. § 2252A(g) (2006) (sentencing to a minimum twenty years).

²⁷¹ See Exum, *supra* note 26, ¶ 27; Efrati, *supra* note 266.

²⁷² See generally 18 U.S.C. § 2252A (criminalizing the distribution, production, possession, sale, advertisement, transportation, and receipt of child pornography, but not the membership in a group involved in a CCPR). It should be noted, as explained throughout this paper, that although membership in itself is normally not an independent offense, in many CCPR cases individuals will be required to commit offenses, such as distribution or possession, in order to gain membership in the ring.

²⁷³ See, e.g., Dep't of Justice, Press Release: Dozens Charged In International Internet-based Child Pornography Investigation (2006), available at http://www.justice.gov/opa/pr/2006/March/06_crm_143.html.

²⁷⁴ See generally U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b) (2009) (enhancing sentences for child pornography involving children under 12, distribution of child

types of offenses, in which the collaboration with others in the commission of a crime is considered an aggravating factor.²⁷⁵ This probably results from existing misconception that child pornography offenses are an individual's act, committed in intimate settings, and not a group initiative committed by an organized syndicate.²⁷⁶ This paper discusses the aggravated harm resulting from crimes committed by an organized group, which should be reflected by sentencing decisions. The use of an enterprise-oriented strategy can serve as means to acknowledge this element in CCPR cases. The ultimate goal is to develop more accurate sentencing, sensitive to the factual characteristics of each case and the level of culpability and harm associated with crime.

[67] As is often the case, the suggested enterprise-oriented strategy is not the only possible legal solution to cope with the problems posed by CCPR cases. Statutory amendments, judiciary decisions, and changes in sentencing policies or modification of the sentencing guidelines might generate some of the benefits listed in this section.²⁷⁷ Nonetheless,

pornography and child pornography offenses involving computers among others, but not organized child pornography groups).

²⁷⁵ *E.g.*, 18 U.S.C. § 241 (1996) (mentioning conspiracy to deprive persons of their civil rights); 18 U.S.C. § 371 (1994) (mentioning conspiracy to defraud the United States); 18 U.S.C. § 372 (2002) (mentioning conspiracy to assault or impede a federal officer); 18 U.S.C. § 1962(d) (1988) (conspiracy to violate a provision of RICO); 21 U.S.C. § 846 (1988) (mentioning conspiracy to violate Controlled Substances Act); 21 U.S.C. § 963 (1988) (mentioning conspiracy to import or export controlled substance).

²⁷⁶ *See* Jefferson Exum, *supra* note 26, ¶ 17 (“It is too often the case[,] that a defendant appears to be a social misfit looking at dirty pictures in the privacy of his own home without any real prospect of touching or otherwise acting out as to any person.”).

²⁷⁷ *See* Valerie J. Hoekstra & Jeffrey A. Segal, *The Sheperding of Local Public Opinion: The Supreme Court and Lamb's Chapel*, 54 J. POL. 1081, 1082 (1996) (stating that judicial opinion can influence public opinion); Rothman, *supra* note 243 (stating how

implementation of the suggested enterprise-oriented strategy has several advantages over the alternatives.²⁷⁸ While statutory or common law solutions will specifically address every one of the above noted issues individually, the suggested strategy covers the whole range jointly.²⁷⁹ More importantly, the progressive and evolving nature of computer crimes require flexibility to respond to an ever-changing reality.²⁸⁰ Statutory amendments and judicial decisions take considerable time to implement, and depend on the willingness and ability of the courts and the legislature to act.²⁸¹ Prosecutorial practices on the other hand take effect instantaneously upon the decision of the prosecutor preparing the indictment. This provides leeway for adjustments according to developing technologies and practices. It also enables trial-and-error fine-tuning of the strategy based on the accumulating prosecutorial experience with CCPR cases.

legislation mandates restitution for sexual abuse of children); *cf.* BEARE & NAYLOR, *supra* note 228 (discussing the use of “organized crime” to win support for legislation).

²⁷⁸ *See, e.g.*, United States v. Persico, 774 F.2d 30 (2d Cir. 1985) (noting the eradication of crime family as an organization); United States v. Watchmaker, 761 F.2d 1459 (11th Cir. 1985) (noting the eradication of motorcycle club as an organization); Lynch, *supra* note 81, at 931 (linking offenders and exposing organizational structure).

²⁷⁹ *See* Zambo, *supra* note 264, at 574-75.

²⁸⁰ S. Rep. No. 104-357, at 5 (1996) (“Congress must remain vigilant to ensure that the Computer Fraud and Abuse statute is up-to-date and provides law enforcement with the necessary legal framework to fight computer crime.”); Charlotte Decker, *Cyber Crime 2.0: An Argument to Update the United States Criminal Code to Reflect the Changing Nature of Cyber Crime*, 81 S. CAL. L. REV. 959, 979 (2008).

²⁸¹ YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008), *available at* <http://www.fas.org/sgp/crs/misc/97-589.pdf>.

[68] There are numerous examples of cyber-law policies and legislations that quickly became irrelevant due to the ever changing reality and technological development.²⁸² One pertinent example is the “computer use” sentencing enhancement of § 2G2.2(b)(6).²⁸³ When this enhancement was added to the guidelines in 1996, many child pornography offences were still committed using post mail.²⁸⁴ Less than ten years later more than 97% of these offences are committed using computers.²⁸⁵ Consequently, this sentencing enhancement became extraneous and is mocked as comparable to “penalizing speeding but then adding an extra penalty if a car is involved.”²⁸⁶ The use of such prosecutorial policies and strategies to resolve issues related to cybercrimes minimizes such inconsistencies and enables timely and effective responses to ever-changing circumstances.

[69] The use of enterprise-oriented strategies in prosecuting CCPR cases may generate a multitude of positive outcomes. The broad spectrum includes: promoting judicial efficiency and flexibility; increasing factual accuracy; enhancing understanding of the organizational structures; providing context for the criminal acts and the role of each participant; educating the public and the legal community to correct existing misperceptions; enriching the public debate on the issue of sentencing;

²⁸² See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (2009).

²⁸³ See generally *id.*

²⁸⁴ See MOTIVANS & KYCKELHAHN, *supra* note 268.

²⁸⁵ Exum, *supra* note 26, ¶ 35 (citing MOTIVANS & KYCKELHAHN, *supra* note 268).

²⁸⁶ Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n, 5 (Nov. 2009) (statement of Hon. Robin J. Cauthron, W.D. Okla.), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091119-20/Cauthron.pdf.

initiating progressive policy changes; improving enforcement, investigation, and evidence collection techniques; distinguishing different types of offenders and levels of culpability; developing a comprehensive understanding of the full extent of the phenomenon and its harm to victims and society; and providing appropriate victim compensation. However, the application of the suggested construction is not free of impediments. The next section discusses the weaknesses and potential arguments against the implementation of the suggested strategy, and proposes methods for minimizing foreseeable negative effects.

VII. OBSTACLES TO OVERCOME

[70] The relative novelty of the suggested enterprise-oriented prosecutorial strategy—and the numerous complexities associated with prosecuting criminal behavior involving computers, the Internet, and new technologies in general—creates several obstacles.²⁸⁷ In order to fully utilize its potential, obstacles should be confronted and addressed to ensure that the enterprise-oriented strategy in CCPR cases is properly applied without violating fundamental criminal law principles.

[71] Criminal law is “founded on notions of personal culpability.”²⁸⁸ Seemingly, enterprise-oriented strategy defies this notion because it aims to hold individuals accountable for the acts of others.²⁸⁹ Accordingly, a

²⁸⁷ See generally U. S. Dep’t of Justice, *Prosecuting Crimes Facilitated by Computers and by the Internet*, COMPUTER CRIMES & INTELLECTUAL PROPERTY SECTION, www.cybercrime.gov/crimes.html#IXb (last visited Oct. 31, 2011) (providing several statements by prosecutors expert in cybercrime).

²⁸⁸ Robert L. Misner, *In Partial Praise of Boyd: The Grand Jury as Catalyst for Fourth Amendment Change*, 29 ARIZ. ST. L.J. 805, 866 (1997).

²⁸⁹ See, e.g., *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

ring member who has acted solely online could be charged with the sexual molestation of a minor, although he has never touched the child. However, recognizing the accountability of partners or associates for acts they did not directly commit is not a foreign concept in criminal law.²⁹⁰ The suggested enterprise-oriented construction does not invent new legal tools, but applies existing legal doctrines to different set of facts.²⁹¹ Traditional conspiracy doctrine, the *Pinkerton* Rule, and the Aiding and Abetting doctrine, are all acceptable methods of recognizing one's responsibility for the act of another.²⁹² The RICO Act and the Child Exploitation Enterprise provision build upon these traditional principles. The legal justification for the added responsibility is the agreement to pursue a specific criminal objective in concert with others, which makes a person responsible for any act taken by parties to the agreement in furtherance of this objective.²⁹³ The criminal intent to do the acts is established by the formation of the conspiracy.²⁹⁴

[72] Members of CCPRs knowingly and intentionally join groups whose specific objective is to make available illegal materials depicting

²⁹⁰ See, e.g., 18 U.S.C. § 371 (2006); *Pinkerton*, 328 U.S. at 647.

²⁹¹ See discussion *infra* Sections IV and V.

²⁹² See 18 U.S.C. § 371 (1994); 18 U.S.C. § 2 (1951); *Pinkerton v. U.S.*, 328 U.S. 640, 644-47 (1946); see also *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (“In order to aid and abet another to commit a crime it is necessary that a defendant ‘in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.’” (citing *United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir. 1938))).

²⁹³ *Pinkerton*, 328 U.S. at 646-47 (1946).

²⁹⁴ *Id.* at 647.

and facilitating the abuse and exploitation of children.²⁹⁵ Members also make significant efforts to be accepted into CCPRs and maintain membership.²⁹⁶ By these actions, they form an agreement with other members to act in furtherance of a common criminal objective.²⁹⁷ This agreement justifies holding each member responsible for all actions taken by other members in furtherance of the group's objective and all reasonably foreseeable outcomes: whether it is sharing existing illegal images, producing new images for the "enjoyment" of the others, or abusing children in accordance with instructions, facilitation and encouragements by group members. The fact that an "agreement" was made online does not mean actions taken offline are should not be recognized as overt acts committed in furtherance of the conspiracy.²⁹⁸ Hence, the suggested construction rests upon well-established legal rationales, and does not go beyond the boundaries of existing legal doctrines.

²⁹⁵ See, e.g., *United States v. Froman*, 355 F.3d 882, 885 (5th Cir. 2004) (quoting the Candyman eGroup's stated purpose, "This group is for People who love kids. You can post any type of messages you like too [sic] or any type of pics and vids you like too [sic]."); *U.S. v. Gourde*, 440 F.3d 1065, 1067 (9th Cir. 2006) (en banc) (quoting the Lolitagurls website, "Welcome to Lolitagurls. Over one thousand pictures of girls age 12-17! . . . with weekly updates!").

²⁹⁶ See, e.g., William R. Graham, Jr., *Uncovering and Eliminating Child Pornography Rings on the Internet: Issues Regarding and Avenues Facilitating Law Enforcement's Access to 'Wonderland'*, 2000 L. REV. MICH. ST. U. DET. C. L. 457, 461-62 (2000) (detailing the requirements for entry into the 'Wonderland' child pornography ring).

²⁹⁷ See, e.g., *Froman*, 355 F.3d at 855 (quoting the Candyman Egroup, "IF WE ALL WORK TOGETHER WE WILL HAVE THE BEST GROUP ON THE NET.").

²⁹⁸ Cf. Carline Meek-Prieto, *Just Age Playing Around? How Second Life Aids and Abets Child Pornography*, 9 N.C. J.L. & TECH. ON. 88, 98-99 (2008) (stating how crimes committed in online games can result in real world criminal convictions).

[73] Some argue that actions in cyberspace and acts committed in meatspace are not sufficiently similar, and since members conduct their “agreement” and interaction online, the scope of the agreement should be limited to this sphere.²⁹⁹ Moreover, it can be argued that actions taken over the Internet are commonly considered as more casual and less committing because they only require a click of a button.³⁰⁰ Nevertheless, in modern society, binding agreements and contracts made online have implications in our physical world.³⁰¹ The “cyber-world” is no longer an isolated sphere of illusions and fantasies. As revealed by press releases and the *Gourde* court, obtaining membership in a CCPR normally requires much more than a click of a button.³⁰² Every case should include an examination of the content of the communication and discussion among ring members, their actions, relations to one another, and the nature of their continuous involvement with the groups. These elements will uncover the intent of members and the common objective of the organization. These sets of facts often reveal a strong connection between

²⁹⁹ *Cf. id.* at 102-03 (creating virtual child pornography online does not actually harm children like real child pornography would.) Thus, actions occurring in cyberspace are sufficiently different from those occurring in the real world.

³⁰⁰ *Cf. United States v. Coreas*, 419 F.3d 151, 152-53 (2d Cir. 2005) (The ‘Candyman’ e-group, a renowned child pornography ring, only required the push of a button to attain membership.).

³⁰¹ *Cf. U.S. Census Bureau, Table 1055. Retail Trade Sales-Total and E-Commerce by Kind of Business: 2009*, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, 662 (Oct. 30, 2011), <http://www.census.gov/compendia/statab/2012/tables/12s1055.pdf> (showing the U.S. conducted 145 billion in online sales in 2009 and each sale required the formation of a contract for the sale of goods over in the Internet, which resulted in the receipt of a physical good.).

³⁰² *Compare United States v. Gourde*, 440 F.3d 1065, 1070 (9th Cir. 2006) (en banc), *with Coreas*, 419 F.3d at 152-53 (attaining membership only required the click of a button on the Candyman website).

cyber actions and physical acts, which fully justifies acknowledging the broader scope of the agreement and criminal objective of CCPRs.

[74] Another counter argument might be that the use of the “organized crime” rhetoric, the introduction of evidence of the association of defendants with the ring, and the joint prosecution of multiple offenders with varying degrees of involvement in the ring’s operation are prejudicial and will lead to an unfair trial.³⁰³ Supporters of this argument would claim that an individual defendant’s conviction would not be based on his own actions, but on his bad character, low morality, evidence related to the actions of others, and mere association with an unsavory group.³⁰⁴ Thus, an indictment based on the enterprise-oriented strategy may “effectively overrid[e] the various rules of evidence and procedure that have been devised for the specific purpose” of preventing unfairness and prejudice.³⁰⁵

[75] In response, proponents of the enterprise-oriented strategy contend that, in cases involving organized criminal operations similar to those of CCPRs, any evidence proving the defendant’s membership in the organization, association with other members, and the broad nature of the operation is “not merely extraneous information.”³⁰⁶ This evidence is essential for a jury to appreciate the threat to society posed by the defendants.³⁰⁷ “Only if the jury is permitted to see the fuller story - the pattern that links this particular defendant's acts to social harm - can a

³⁰³ Lynch, *supra* note 81, at 961-62.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 962.

³⁰⁶ *Id.* at 967.

³⁰⁷ *Id.*

judgment about his guilt be made.”³⁰⁸ Accordingly, the juries in enterprise-oriented cases are “not being overwhelmed by prejudice, but . . . are responding to a genuine difference in the facts presented.”³⁰⁹ Similarly, the concerted efforts of CCPR members to create the “greatest group of pedos to gather in one place,”³¹⁰ by supplying the pool of illegal images, feeding and encouraging each other’s ventures to produce original materials, and facilitating each other’s attempts to abuse and exploit children, are more harmful than an individual acting alone.

[76] Courts have recognized the permissibility of the flexible evidentiary and procedural rules in decisions challenging the RICO Act.³¹¹ They also recognized the probative value of evidence proving membership in a criminal syndicate, such as street gangs.³¹² Such evidence was accepted by courts to show the defendant’s motive,³¹³ intent, plan, design, ill-will, existence of a conspiracy or an enterprise,³¹⁴ the relationships between group members, “to explain parties’ actions, [and] to help the jury understand dynamics at work in given case”³¹⁵ These holdings should apply similarly to CCPR cases. Neglecting to introduce such

³⁰⁸ Lynch, *supra* note 81, at 967.

³⁰⁹ *Id.*

³¹⁰ Ryan, *supra* note 18.

³¹¹ See, e.g., *United States v. Hawkins*, 681 F.2d 1343, 1346 (11th Cir. 1982).

³¹² See *United States v. Baires*, 254 F. App’x 196, 199 (4th Cir. 2007).

³¹³ See *id.* at 199; *Commonwealth v. Gwaltney*, 442 A.2d 236, 240-41 (Pa. 1982).

³¹⁴ See *United States v. Westbrook*, 125 F.3d 996, 1006-07 (7th Cir. 1997); *Gwaltney*, 442 A.2d at 240-41.

³¹⁵ *United States v. Acosta*, 110 F. Supp. 2d 918, 931 (E.D. Wis. 2000).

evidence would severely distort the picture portrayed to the jury and fail to convey the true extent of the harm caused by the defendants' behavior. The central role of computers and the Internet in CCPR operations can be particularly misleading because the unknowing observer may believe each member is operating in isolation in front of his home computer, when their efforts are actually coordinated.³¹⁶

[77] The complexity of developing proof for indictments under the enterprise-oriented strategy is another noteworthy weakness. Most individual child pornography charges are extremely simple to prove, especially when involving computers, which record the transaction of data.³¹⁷ As a result, guilty pleas are entered in many cases, and no meaningful defense exists, unless some fault in the search and seizure procedures is identified.³¹⁸ Under these circumstances, the transition to enterprise-oriented prosecution will result in lengthy trials,³¹⁹ significant expenses to both the state and defendants,³²⁰ and a waste of valuable time for the courts and the prosecution. To adequately respond to this criticism, an empirical cost-benefit study should be conducted. Such analysis must also consider the more distant potential benefits, including greater public

³¹⁶ See Wortley & Smallbone, *supra* note 58, at 8.

³¹⁷ See *United States v. Pruitt*, 638 F.3d 763, 766 (11th Cir. 2011) (“Evidence that a person has sought out-searched for-child pornography on the internet and has a computer containing child pornography images-whether in the hard drive, cache, or unallocated spaces-can count as circumstantial evidence that a person has ‘knowingly receive[d]’ child pornography.”).

³¹⁸ See, e.g., *United States v. Grimmett*, 439 F.3d 1263, 1266 (10th Cir. 2006) (defendant attacked his child pornography conviction by questioning the legality of the search warrant).

³¹⁹ Lynch, *supra* note 81, at 970-71.

³²⁰ *Id.*

safety and the possibility of eliminating or shrinking the \$3 billion illegal child pornography market.³²¹ These factors can only be estimated with a limited degree of accuracy;³²² hence, at the end of the day, this would be a public policy decision based on subjective values and preferences.³²³

[78] The criticisms associated with the enterprise-oriented strategy are further accentuated when considering the severity of existing sentences for child pornography offences.³²⁴ Therefore, sentencing enhancement is not only unnecessary in most cases, it can also be extremely controversial and lead to de facto nullification. Even today, federal judges often depart downwards from the sentencing guidelines, and there is a risk that a further expansion of this phenomenon will turn the guidelines into an irrelevant document.³²⁵ The most challenging doctrine would be the Child Exploitation Enterprise provision, which carries a minimum mandatory sentence of 20 years. Its use will allow almost no leeway for sentencing judges to adjust the sentences to the unique circumstances and degree of

³²¹ *Porn Industry Statistics*, TOPTENREVIEWS (Feb. 6, 2004), <http://www.toptenreviews.com/2-6-04.html>.

³²² See Wortley & Smallbone, *supra* note 58, at 12.

³²³ Cf. MARJORIE HEINS ET AL., BRENNAN CENTER FOR JUSTICE AT THE NEW YORK SCHOOL OF LAW, INTERNET FILTERS: A PUBLIC POLICY REPORT 1 (2006), <http://www.fepproject.org/policyreports/filters2.pdf>.

³²⁴ See 18 U.S.C. 2252A(g) (2006) (providing a minimum sentence of twenty years); U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2009); see generally *Dru Sjodin National Sex Offender Public Website*, U.S. DEPT. OF JUSTICE (last visited Oct. 25, 2011), <http://www.nsopw.gov/Core/Portal.aspx?AspxAutoDetectCookieSupport=1>.

³²⁵ U.S. Sentencing Commission, *Table 28: Sentences Relative to The Guideline Range By Each Primary Sentencing Guideline Fiscal Year 2007*, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2007), available at <http://www.ussc.gov/annrpt/2007/Table28.pdf>; see also Exum, *supra* note 26.

culpability of individual defendants. Consequently, the goal of fitting the sentence to the degree of harm and level of culpability can be difficult to achieve.

[79] Under some circumstances, concurrent sentences can ensure case appropriate sentences while taking advantage of the benefits of the enterprise-oriented strategy.³²⁶ Most importantly, the enterprise-oriented strategy provides extensive information and evidence to judges that allows them to better evaluate each case and reach informed decisions regarding the degree of harm and culpability attributable to each defendant.³²⁷ The evidence will also help differentiate between different categories of defendants and types of computer uses, and adjust sentences accordingly.³²⁸ These tools are particularly important in the evolving context of computer crimes to help sentencing judges understand the newly developing practices and their effect on the analysis of the harm inflicted.³²⁹ Despite potential complexities, if the prosecution and the judiciary effectively use the strategy, it can help refine sentences and resolve some existing difficulties.

[80] Lastly, the use of enterprise-oriented strategies is criticized for being overly dependent on prosecutorial discretion, which traditionally, is

³²⁶ See generally 21 AM. JUR. 2D *Criminal Law* § 793 (2011) (describing concurrent sentences as compared to consecutive sentences).

³²⁷ See Lynch, *supra* note 81, at 945 ("RICO trials, however, permit a much wider exploration of the context of the particular predicate acts, both in the defendant's history, and within the institutions and communities of which he is a part.").

³²⁸ See generally *supra* Section VI.

³²⁹ See Exum, *supra* note 26, ¶ 27 ("Instead, the sentencing of child pornography possessors has become quite unpredictable for both district and appellate courts. At least some of this inconsistency is due to a lack of uniform understanding of the role of computers and the Internet in child pornography possession.").

not scrutinized by courts in the United States.³³⁰ An abuse of discretion can result in unequal treatment, over-zealous application of the strategy, prejudice, factual distortion, and unjustifiable inflation of penalties.³³¹ Under state and federal criminal codes, “[a] single act may violate a number of criminal statutes, and the double jeopardy clause provides only minimal protection”³³² The enterprise-oriented strategy does not broaden this discretion in any way since it only uses pre-existing provisions and provides guidance for the application of prosecutorial discretion in CCPR cases. Despite criticism by scholars and the public, there is very “little indication that the discretion is being routinely or seriously abused.”³³³

[81] An effective application of the enterprise-oriented strategy highly depends on the prosecution, an aspect some view as problematic.³³⁴ The strategy relies on prosecutors to exercise their professional discretion in a manner that does not strive to inflate penalties, but to accurately reflect the

³³⁰ See Lynch, *supra* note 81, at 978-79.

³³¹ See generally Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 410-15 (2001) (describing the powers that prosecutors hold and their potential for abuse).

³³² Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 722 (1987) (illustrating the discretion held by prosecutors to either widen or narrow the selection of potential charges in seeking an indictment against defendant).

³³³ See *id.* at 723; see also Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008) (exploring efforts within the executive branch and within individual prosecutors' offices to control prosecutorial discretion). *But see* Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1084-87 (1994) (arguing that prosecutorial abuse of power is on the rise).

³³⁴ See Lynch, *supra* note 81, at 978.

factual circumstances of each case and to convey the accumulative harm inflicted on society and the victims through the organization's criminal scheme. It is imperative to encourage equal treatment of defendants through consistent practices and uniform application, leading to desirable policy changes. To this end, U.S. Attorney's Offices should develop internal rules and policies to guide prosecutors in the application of the strategy, which will define the normative and legal objectives that should be pursued in the prosecution of CCPR cases. Developing mechanisms for monitoring and debriefing case results nationwide can also be extremely useful for refining the practices based on cumulative practical experience.

VIII. CONCLUSION

[82] It is likely that the Internet's dominance over our lives will only increase to become an even more integral element of our daily routines. In this reality, the distinction between accountability for cyber and physical acts is an artificial byproduct of the past. Legal practices should adapt to this reality. Addressing the problems associated with the prosecution of CCPRs is one concrete example of this modern necessity. Like our own modern lives, the operation of CCPRs also integrally incorporates cyber and meatspace activities in pursuit of criminal goals. Considering these practices, the legal division between the two categories is no longer appropriate.

[83] The suggested enterprise-oriented strategy, which views CCPRs as criminal syndicates and permits accountability of all ring members for the entire criminal scheme of the organization, in cyberspace and meatspace, is one possible method to address this emerging legal problem. Similar to an abundance of other policy issues, the choice of appropriate legal policies hinges on controversial subjective, normative, social, and political perspectives and preferences. Notwithstanding the potential obstacles that will surely stand in the way and the weaknesses of the strategy, I believe the suggested legal construction can produce positive outcomes that will

take our arguably anachronistic legal system a small step towards modernity. Hopefully, it will also become a vital step in the pursuit of legal justice and public safety.