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Disentangling Child Pornography from Child Sex Abuse

Carissa Byrne Hessick
Arizona State University

DISENTANGLING CHILD PORNOGRAPHY FROM CHILD SEX ABUSE

CARISSA BYRNE HESSICK[*]

ABSTRACT

Recent years have seen a significant increase in the criminal penalties associated with possession of child pornography. The new severity appears to be premised on arguments that blur the distinction between those who possess images of child pornography and those who sexually abuse children. In particular, sentences have been increased based on arguments that possession of pornography is equivalent to or worse than child sex abuse, arguments that viewing child pornography increases the risk that an individual will sexually abuse a child, and arguments that those who possess child pornography are abusing children undetected. This Article identifies instances where possession of child pornography and child sex abuse have been conflated, critically evaluates the arguments that promote such conflation, and identifies independent concerns with conflation. Specifically, it argues that blurring the distinction between the two crimes allows us to continue to misperceive child sex abuse as a stranger-danger issue and that when law enforcement statistics aggregate possession and child sex abuse, the public may be misled into believing that law enforcement is successfully battling child sex abuse. The Article concludes that the modern trend of increasing sentences for possession of child pornography ought to be reviewed, and it suggests several possible areas of reform.

∗ Associate Professor of Law, Sandra Day O'Connor College of Law, Arizona State University. J.D., Yale Law School. B.A., Columbia University. I want to thank Amy Adler, Bill Araiza, Stephanos Bibas, Don Braman, Michael Cahill, Mike Dimino, Dave Fagundes, Brian Galle, Adil Haque, Andy Hessick, Paul Horwitz, Rob Kar, Erik Knutsen, Zak Kramer, Dan Markel, Erin Murphy, Jeff Murphy, Richard Myers, Corey Rayburn Yung, Amelia Rinehart, Mary Sigler, Doug Sylvester, Lesley Wexler, and Ekow Yankah for their helpful comments on this project. Thanks also to the participants of the Arizona State Junior Law Faculty Retreat; the Junior Crim Prof Conference at George Washington Law School; the 2009 Law and Society Annual Conference's Sex, Kids, and Crime Panel; Prawfsfest! at Florida State University Law School; and the Rocky Mountain Junior Scholars Conference at BYU Law School. Beth DiFelice, Amy Coughenour, and Jennison Cox provided valuable research assistance.

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INTRODUCTION

Child pornography was first identified as a serious problem in the 1970s. Due to aggressive law enforcement, the widespread distribution of child pornography had essentially ceased by the late 1980s.[1] But the birth of the Internet and other technological advances, such as digital photography, led to a dramatic increase in the availability of child pornography and rendered obsolete past enforcement techniques for detecting child pornography.[2]

1. *See* IAN O'DONNELL & CLAIRE MILNER, CHILD PORNOGRAPHY: CRIME, COMPUTERS & SOCIETY 20 (2007); *Child Pornography*, DEPARTMENT OF JUSTICE, http://www.usdoj.gov/criminal/ceos/childporn.html (last visited Jan. 22, 2011) ("By the mid-1980's [sic], the trafficking of child pornography within the United States had been almost completely eradicated through a series of successful campaigns waged by law enforcement.").

2. O'DONNELL & MILNER, *supra* note 1, at 28. The full extent of the Internet child pornography problem is a matter of some dispute. *See, e.g.*, 154 CONG. REC. H10,241, H10,250 (daily ed. Sept. 27,

The legislative response to the modern increase in child pornography has been uniformly draconian. State and federal governments have drastically increased the criminal penalties for possession of child pornography. The rhetoric surrounding the increased sentences suggests that this new severity is tied to a perception that those who possess child pornography are indistinguishable from those who actually abuse children. This rhetoric takes several forms. Some argue that penalties for possession of child pornography should be increased because it is a crime that is equivalent to, or worse than, the act of sexually abusing a child. Others contend that possession of child pornography must be punished severely because possession creates an increased risk that an individual will sexually abuse children. And still others seem to treat prosecutions for possession of child pornography as a proxy for prosecuting those who sexually abuse children; in other words, because those who possess child pornography are assumed also to sexually abuse children, the punishment for child pornography possession ought to be calibrated to punish child sex abuse as opposed to merely possession of child pornography.

This Article questions the new severity in punishing possession of child pornography. It is critical of those who seek to blur the line between the possession of child pornography and child sex abuse, noting that such blurring is inconsistent with fundamental notions of fairness and justice, and it is unsupported by empirical evidence. Furthermore, the Article identifies independent concerns with such blurring. Focusing on child pornography allows us to ignore the messy and tragic reality of child sex abuse—namely, that the majority of these crimes are committed by those who know and care for the child they are abusing rather than by strangers. In addition to the fact that the child pornography discussion allows us to continue to misperceive child sex abuse as a stranger-danger issue, when

2008) (statement of Rep. Barton) (asserting that congressional investigations revealed that "three million images of child pornography were on the Internet"); Julian Sher & Benedict Carey, *Federal Study Stirs Debate on Child Pornography's Link to Molesting*, N.Y. TIMES, July 19, 2007, at A20 (reporting number of eight million images from the National Center for Missing and Exploited Children); *see also* O'DONNELL & MILNER, *supra* note 1, at 79 ("Attempts to tally the number of child pornography enthusiasts are as pointless as the guesstimates of the numbers of victims and images in circulation. The illegal nature of every aspect of this trade leaves few individuals willing to admit their involvement. Such is the revulsion which child pornography usually invokes it is a rare individual who would admit to even viewing this material."); KERRY SHELDON & DENNIS HOWITT, SEX OFFENDERS AND THE INTERNET 23 (2007) ("It is generally difficult to know the prevalence of child pornographic images including those circulating on the Internet and, in some cases, it is not clear how available statistics are obtained or even what they mean. . . . Reliable assessments of the amount of child pornography on the Internet are difficult. The Internet is too large and changes too quickly to sample meaningfully or reliably and it is difficult to know what an appropriate sampling frame from which to draw samples would be." (internal citation omitted)).

possession is conflated with actual child sex abuse, the public may be misled into believing that law enforcement is successfully detecting and prosecuting child sex abuse when that is not the case.

The Article proceeds in four parts. Part I maps the modern trend of increasing sentences for those convicted of possessing child pornography. Part II identifies how those increases are tied to rhetoric that blurs the line between possession of child pornography and child sex abuse, and it critically evaluates the reasoning in that rhetoric. Part III discusses how blurring the line between possession and child sex abuse perpetuates misperceptions regarding both the personal relationships involved in child sex abuse and the effectiveness of law enforcement in combating such abuse. Part IV offers some tentative legislative and judicial solutions to reform the sentencing of child pornography offenders.

I. THE MODERN TREND OF INCREASED SENTENCES

In contrast with the constitutional protections that ensure the right of individuals to possess images of adult pornography, states are permitted to criminalize the private possession of child pornography. Ordinarily, the First Amendment protects sexually explicit speech and images unless they are "obscene,"[3] and the private possession of pornographic images, even if obscene, is also protected.[4] But in *New York v. Ferber*,[5] the Supreme Court held that the distribution and sale of even nonobscene child pornography could be criminalized. And in *Osborne v. Ohio*,[6] the Court upheld criminal sanctions for the private possession of child pornography. The Court justified these departures from its First Amendment jurisprudence on the grounds that images of child pornography are the product of child sex abuse, that the state has an important interest in protecting the victims of child sex abuse, and that reducing demand for child pornography (by prosecuting possessors) could thus reduce the instances of child sex abuse.[7] Because *Ferber* and *Osborne* held that the First Amendment does not protect possession of child pornography, states are free to criminalize it. And because the Supreme Court has essentially abdicated judicial review of length of sentence claims under the Eighth Amendment,[8] states

3. *E.g.*, Miller v. California, 413 U.S. 15 (1973); *see also* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 929 (2001).

4. *See* Stanley v. Georgia, 394 U.S. 557 (1969).

5. 458 U.S. 747 (1982).

6. 495 U.S. 103 (1990).

7. *See id*. at 108–10; *Ferber*, 458 U.S. at 759–60, 761.

8. *See, e.g.*, Ewing v. California, 538 U.S. 11 (2003); *see also* Rachel E. Barkow, *The Court of*

can increase the penalties for possessing child pornography up to life in prison without running afoul of the Constitution.

Since *Osborne* was decided in 1990, legislatures have significantly increased the sentences for possession of child pornography. For example, in 1990, federal law punished the possession of child pornography by up to ten years of imprisonment.[9] In 1996, the maximum penalty was increased to fifteen years of imprisonment.[10] A mandatory minimum five-year sentence was added, and the statutory maximum sentence was raised from fifteen to twenty years in 2003.[11]

States have also significantly increased their penalties. All fifty states have specific provisions criminalizing the possession of child pornography, and thirty states have increased the penalties available for possession of child pornography since criminalizing it.[12] The pattern of

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Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity, 107 MICH. L. REV. 1145, 1156, 1160–61 (2009) (noting that "the Court has been steadfast in its refusal to police disproportionate sentences outside the capital context" and that the Court's modern length of sentence cases "make clear that 'proportionality has become virtually meaningless as a constitutional principle'" (quoting Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 695 (2005))).

9. *See* 18 U.S.C. § 2252(b) (1990).

10. *See* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121(5), 110 Stat. 3009-26, 3009-30, *invalidated by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002).

11. *See* PROTECT Act, Pub. L. No. 108-21, § 103(a)(1)(B)(i), 117 Stat. 650, 652 (2003) (codified as amended at 18 U.S.C. § 2252(b)(1)). The maximum penalty was increased from fifteen to twenty years for "receiving" child pornography. The legislation also increased the maximum penalty for possession from five to ten years. PROTECT Act § 103(a)(1)(C)(i). As discussed below, because receipt is a necessary component for possession, it is the twenty-year maximum penalty that represents the true exposure for offenders who possess child pornography. *See infra* note 38 and text accompanying note 174.

12. S. 53, 2005 Leg., 1st Spec. Sess. (Ala. 2005) (codified as amended at ALA. CODE §§ 13A-5-6(a)(5), 15-20-21(5) (2005)) (adding a special provision in 2005 imposing a ten-year mandatory minimum on any offender convicted of a Class B felony involving child pornography); S. 56, 24th Leg., 1st Reg. Sess. (Alaska 2005) (codified as amended at ALASKA STAT. § 12.55.125(h)(4) (2009)) (increasing maximum term of imprisonment from ten years to ninety-nine years); S. 1128, 2006 Leg., 2005–2006 Reg. Sess. (Cal. 2006) (codified as amended at CAL. PENAL CODE § 311.11(a) (West 2007)) (reclassifying possession from a misdemeanor to a felony); H.R. 06-1092, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006) (codified as amended at COLO. REV. STAT. § 18-6-403(5) (2009)) (reclassifying possession from a misdemeanor to a felony); S. 1458, 2007 Gen. Assemb., Jan. Reg. Sess. (Conn. 2007) (codified at CONN. GEN. STAT. § 53a-196a (2007)) (adding mandatory minimum sentences); H.R. 740, 139th Gen. Assemb., 2d Reg. Sess. (Del. 1998) (codified as amended at DEL. CODE ANN. tit. 11, § 1111 (2000)) (reclassifying possession from a misdemeanor to a felony); S. 1004, 20th Leg., 1st Reg. Sess. (Fla. 2007) (codified at FLA. STAT. ANN. § 775.0847 (West 2007)) (providing for higher penalties based on the number and content of the images possessed); H.R. 462, 2003 Gen. Assemb., Reg. Sess. (Ga. 2003) (codified at GA. CODE ANN. § 16-12-100 (2003)) (reclassifying possession from a misdemeanor to a felony); S. 1312, 59th Leg., 2d Reg. Sess. (Idaho 2006) (codified at IDAHO CODE ANN. § 18-1507A (2006)) (increasing maximum penalty from five to ten years' imprisonment); S. 697, 95th Gen. Assemb., Reg. Sess. (Ill. 2008) (codified as amended at 720 ILL. COMP. STAT. 5/11-20.3 (2010)) (creating a new offense of "aggravated child pornography," if the images possessed depict a child under the age of thirteen); H.R. 1010, 112th Gen. Assemb., 2d Reg.

increasing penalties appears to be getting stronger, as twenty-eight of those increases have occurred since 2000,[13] nineteen have occurred since

Sess. (Ind. 2002) (codified as amended at IND. CODE § 35-42-4-4 (2007)) (reclassifying possession from a misdemeanor to a felony); H.R. 327, 79th Gen. Assemb., Reg. Sess. (Iowa 2001) (codified as amended at IOWA CODE § 728.12 (2003)) (reclassifying possession from a misdemeanor to a felony); H.R. 3, 2006 Gen. Assemb., Reg. Sess. (Ky. 2006) (codified at KY. REV. STAT. ANN. § 531.335 (West 2006)) (reclassifying possession from a misdemeanor to a felony); H.R. 5296, 91st Leg., Reg. Sess. (Mich. 2002) (codified as amended at MICH. COMP. LAWS § 750.145c(4) (2004)) (reclassifying possession from a misdemeanor to a felony); S. 969, 82d Leg., Reg. Sess. (Minn. 2001) (codified as amended at MINN. STAT. § 617.247(4) (2006)) (increasing the maximum penalty from three to five years' imprisonment); H.R. 1058, S. 2864, 2005 Leg., Reg. Sess. (Miss. 2005) (codified at MISS. CODE ANN. § 97-5-35 (2005)) (increasing the statutory penalty range from two to twenty years' imprisonment to five to forty years' imprisonment); S. 714, 933, 899 & 758, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008) (codified as amended at MO. REV. STAT. § 573.037 (2009)) (reclassifying from a Class D felony to a Class C felony); H.R. 161, 54th Leg., Reg. Sess. (Mont. 1995) (codified as amended at MONT. CODE ANN. § 45-5-625(2)(c) (2009)) (increasing maximum penalty from six months to ten years' imprisonment); Leg. 943, 98th Leg., 2d Sess. (Neb. 2004) (codified as amended at NEB. REV. STAT. § 28-1463.05 (2009)) (reclassifying from a Class IV felony to a Class IIIA felony); S. 341, 73d Leg., Reg. Sess. (Nev. 2005) (codified at NEV. REV. STAT. § 200.730(2) (2005)) (raising the maximum penalty for subsequent offenses from ten years to life imprisonment); H.R. 933, S. 132, 2008 Gen. Assemb., 1st Sess. (N.C. 2008) (codified at N.C. GEN. STAT. § 14-190.17A (2008)) (reclassifying from a Class I felony to a Class H felony); H.R. 1357, 60th Legis. Assemb., Reg. Sess. (N.D. 2007) (codified at N.D. CENT. CODE § 12.1-27.2-04.1 (2007)) (reclassifying from a Class A misdemeanor to a Class C felony); S. 2, 121st Gen. Assemb., Reg. Sess. (Ohio 1995) (codified as amended at OHIO REV. CODE ANN. § 2907.323 (West 2008)) (reclassifying possession from a misdemeanor to a felony); S. 834, 185th Gen. Assemb., Reg. Sess. (Pa. 2002) (codified as amended at 18 PA. CONS. STAT. § 6312(d) (2009)) (adding provision providing for higher classification of subsequent offenses); H.R. 4451, 2004 Gen. Assemb., Reg. Sess. (S.C. 2004) (codified as amended at S.C. CODE ANN. § 16-15-410 (2008)) (increasing maximum penalty from five to ten years' imprisonment); S. 2102, 104th Gen. Assemb., Reg. Sess. (Tenn. 2005) (codified at TENN. CODE ANN. § 39-17-1003(d) (2005)) (reclassifying the offense from a Class E felony to a Class B, C, or D felony, depending on the number of images); H.R. 2335, 71st Leg., Reg. Sess. (Tex. 1989) (codified as amended at TEX. PENAL CODE ANN. § 12.34 (West 2009)) (reclassifying offense from a misdemeanor to a felony in the third degree); H.R. 60, 53d Leg., Gen. Sess. (Utah 2000) (codified as amended at UTAH CODE ANN. § 76-5a-3(3) (2009)) (adding provision that treats each image and each child depicted as a separate offense); H.D. 2457, S. 1153, 2003 Gen. Assemb., Reg. Sess. (Va. 2003) (codified as amended at VA. CODE ANN. § 18.2-374.1:1 (2009)) (reclassifying offense from a Class 1 misdemeanor to a Class 6 felony); S. 6172, 59th Leg., Reg. Sess. (Wash. 2006) (codified at WASH. REV. CODE § 9.68A.070 (2006)) (reclassifying offense from a Class C felony to a Class B felony); Assemb. 942, 2005 S. & Assemb., Biennial Sess. (Wis. 2006) (codified at WIS. STAT. § 948.12(3)(a) (2006)) (reclassifying offense from a Class I felony to a Class D felony); S. 104, 59th Leg., Gen. Sess. (Wyo. 2007) (codified at WYO. STAT. ANN. § 6-4-303(e) (2007)) (adding seven-year mandatory minimum sentence for subsequent offenses).

13. S. 53, 2005 Leg., 1st Spec. Sess. (Ala. 2005) (codified at ALA. CODE §§ 13A-5-6(a)(5), 15-20-21(5) (2005)); S. 56, 24th Leg., 1st Reg. Sess. (Alaska 2005) (codified as amended at ALASKA STAT. § 12.55.125(h)(4) (2009)); S. 1128, 2006 Leg., 2005–2006 Reg. Sess. (Cal. 2006) (codified as amended at CAL. PENAL CODE § 311.11(a) (West 2007)); H.R. 06-1092, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006) (codified as amended at COLO. REV. STAT. § 18-6-403(5) (2009)); S. 1458, 2007 Gen. Assemb., Jan. Reg. Sess. (Conn. 2007) (codified at CONN. GEN. STAT. § 53a-196a (2007)); S. 1004, 20th Leg., 1st Reg. Sess. (Fla. 2007) (codified at FLA. STAT. ANN. § 775.0847 (West 2007)); H.R. 462, 2003 Gen. Assemb., Reg. Sess. (Ga. 2003) (codified at GA. CODE ANN. § 16-12-100 (2003)); S. 1312, 59th Leg., 2d Reg. Sess. (Idaho 2006) (codified at IDAHO CODE ANN. § 18-1507A (2006)); S. 697, 95th Gen. Assemb., Reg. Sess. (Ill. 2008) (codified as amended at 720 ILL. COMP.

2005,[14] and four states have increased the penalties associated with possession of child pornography multiple times in the last twenty years.[15]

STAT. 5/11-20.3 (2010)); H.R. 1010, 112th Gen. Assemb., 2d Reg. Sess. (Ind. 2002) (codified as amended at IND. CODE § 35-42-4-4 (2007)); H.R. 327, 79th Gen. Assemb., Reg. Sess. (Iowa 2001) (codified as amended at IOWA CODE § 728.12 (2003)); H.R. 3, 2006 Gen. Assemb., Reg. Sess. (Ky. 2006) (codified at KY. REV. STAT. ANN. § 531.335 (West 2006)); H.R. 5296, 91st Leg., Reg. Sess. (Mich. 2002) (codified as amended at MICH. COMP. LAWS § 750.145c(4) (2004)); S. 969, 82d Leg., Reg. Sess. (Minn. 2001) (codified as amended at MINN. STAT. § 617.247(4) (2006)); H.R. 1058, S. 2864, 2005 Leg., Reg. Sess. (Miss. 2005) (codified at MISS. CODE ANN. § 97-5-35 (2005)); S. 714, 933, 899 & 758, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008) (codified as amended at MO. REV. STAT. § 573.037 (2009)); Leg. 943, 98th Leg., 2d Sess. (Neb. 2004) (codified as amended at NEB. REV. STAT. § 28-1463.05 (2009)); S. 341, 73d Leg., Reg. Sess. (Nev. 2005) (codified at NEV. REV. STAT. § 200.730(2) (2005)); H.R. 933, S. 132, 2008 Gen. Assemb., 1st Sess. (N.C. 2008) (codified at N.C. GEN. STAT. § 14-190.17A (2008)); H.R. 1357, 60th Legis. Assemb., Reg. Sess. (N.D. 2007) (codified at N.D. CENT. CODE § 12.1-27.2-04.1 (2007)); S. 834, 185th Gen. Assemb., Reg. Sess. (Pa. 2002) (codified as amended at 18 PA. CONS. STAT. § 6312(d) (2009)); H.R. 4451, 2004 Gen. Assemb., Reg. Sess. (S.C. 2004) (codified as amended at S.C. CODE ANN. § 16-15-410 (2008)); S. 2102, 104th Gen. Assemb., Reg. Sess. (Tenn. 2005) (codified at TENN. CODE ANN. § 39-17-1003(d) (2005)); H.R. 60, 53d Leg., Gen. Sess. (Utah 2000) (codified as amended at UTAH CODE ANN. § 76-5a-3(3) (2009)); H.D. 2457, S. 1153, 2003 Gen. Assemb., Reg. Sess. (Va. 2003) (codified as amended at VA. CODE ANN. § 18.2-374.1:1 (2009)); S. 6172, 59th Leg., Reg. Sess. (Wash. 2006) (codified at WASH. REV. CODE § 9.68A.070 (2006)); Assemb. 942, 2005 S. & Assemb., Biennial Sess. (Wis. 2006) (codified at WIS. STAT. § 948.12(3)(a) (2006)); S. 104, 59th Leg., Gen. Sess. (Wyo. 2007) (codified at WYO. STAT. ANN. § 6-4-303(e) (2007)).

14. S. 53, 2005 Leg., 1st Spec. Sess. (Ala. 2005) (codified at ALA. CODE §§ 13A-5-6(a)(5), 15-20-21(5) (2005)); S. 56, 24th Leg., 1st Reg. Sess. (Alaska 2005) (codified as amended at ALASKA STAT. §12.55.125(h)(4) (2009)); S. 1128, 2006 Leg., 2005–2006 Reg. Sess. (Cal. 2006) (codified as amended at CAL. PENAL CODE § 311.11(a) (West 2007)); H.R. 06-1092, 65th Gen. Assemb., 2d Reg. Sess. (Colo. 2006) (codified as amended at COLO. REV. STAT. § 18-6-403(5) (2009)); S. 1458, 2007 Gen. Assemb., Jan. Reg. Sess. (Conn. 2007) (codified at CONN. GEN. STAT. § 53a-196a (2007)); S. 1004, 20th Leg., 1st Reg. Sess. (Fla. 2007) (codified at FLA. STAT. ANN. § 775.0847 (West 2007)); S. 1312, 59th Leg., 2d Reg. Sess. (Idaho 2006) (codified at IDAHO CODE ANN. § 18-1507A (2006)); S. 697, 95th Gen. Assemb., Reg. Sess. (Ill. 2008) (codified as amended at 720 ILL. COMP. STAT. 5/11-20.3 (2010)); H.R. 3, 2006 Gen. Assemb., Reg. Sess. (Ky. 2006) (codified at KY. REV. STAT. ANN. § 531.335 (West 2006)); H.R. 1058, 2005 Leg., Reg. Sess. (Miss. 2005) (codified at MISS. CODE ANN. § 97-5-35 (2005)); S. 714, 933, 899 & 758, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008) (codified as amended at MO. REV. STAT. § 573.037 (2009)); S. 341, 73d Leg., Reg. Sess. (Nev. 2005) (codified at NEV. REV. STAT. § 200.730(2) (2005)); S.L. 2008-117, § 5; H.R. 933, S. 132, 2008 Gen. Assemb., 1st Sess. (N.C. 2008) (codified at N.C. GEN. STAT. § 14-190.17A (2008)); H.R. 1357, 60th Legis. Assemb., Reg. Sess. (N.D. 2007) (codified at N.D. CENT. CODE § 12.1-27.2-04.1 (2007)); S. 2102, 104th Gen. Assemb., Reg. Sess. (Tenn. 2005) (codified at TENN. CODE ANN. § 39-17-1003(d) (2005)); H.D. 2457, S. 1153, 2003 Gen. Assemb., Reg. Sess. (Va. 2003) (codified as amended at VA. CODE ANN. § 18.2-374.1:1 (2009)); S. 6172, 59th Leg., Reg. Sess. (Wash. 2006) (codified at WASH. REV. CODE § 9.68A.070 (2006)); Assemb. 942, 2005 S. & Assemb., Biennial Sess. (Wis. 2006) (codified at WIS. STAT. § 948.12(3)(a) (2006)); S. 104, 59th Leg., Gen. Sess. (Wyo. 2007) (codified at WYO. STAT. ANN. § 6-4-303(e) (2007)).

15. Connecticut increased its penalties in 2004 and again in 2007. Prior to 2004, Connecticut had only one possession of child pornography offense, which was classified as a Class D felony. *See* J. 5043, 2004 Gen. Assemb., Feb. Reg. Sess. (Conn. 2004). Now it distinguishes between three different types of possession offenders based on the number of images possessed. CONN. GEN. STAT. § 53a-196d (2007) (possessing fifty or more images of child pornography results in minimum five years' imprisonment); *Id.* § 53a-196e (possessing between twenty and forty-nine images of child pornography results in minimum two years' imprisonment); *Id.* § 53a-196f (possessing fewer than

Some of the sentencing increases have been particularly dramatic. For example, in 2003, Georgia reclassified possession of child pornography from a misdemeanor to a felony, which increased the sentence from no more than twelve months in prison to a minimum of five and a maximum of twenty years in prison.[16] Montana increased the maximum penalty for possessing child pornography from six months to ten years' imprisonment in 1995.[17] And in 2005, Nevada increased the maximum penalty for subsequent offenses of child pornography possession from ten years to life imprisonment.[18]

Current sentencing practices for possessors of child pornography appear quite severe when viewed in isolation. And they begin to look completely disproportionate when viewed in relation to sentences for sexual abuse of children. That is because the modern practices have resulted in some defendants who possess child pornography receiving longer sentences than defendants who sexually abuse children.[19] One

twenty images of child pornography results in minimum one year imprisonment). The mandatory minimum sentences for each of the three possession offenses were added in 2007. S. 1458, 2007 Gen. Assemb., Jan. Reg. Sess. (Conn. 2007). Missouri has twice increased the penalties for child pornography possession. It currently classifies possession of child pornography as a Class C felony. MO. REV. STAT. § 573.037 (2009). It was reclassified from a Class D felony to a Class C felony in 2008. *See* S. 714, 933, 899 & 758, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008). And prior to 2004, Missouri classified possession as a Class A misdemeanor. S. 757 & 602, 90th Gen. Assemb., 2d Reg. Sess. (Mo. 2000). Virginia has increased its penalties three separate times. It currently classifies possession of child pornography as a Class 6 felony for a first offense and a Class 5 felony for subsequent offenses. VA. CODE ANN. § 18.2-374.1:1 (2009). The heightened offense level for a subsequent offense was added in 2007. H.R. 2749, S. 1071, 2007 Gen. Assemb., Reg. Sess. (Va. 2007). Possession was reclassified from a Class 1 misdemeanor to a Class 6 felony in 2003. H.R. 2457, S. 1153, 2003 Gen. Assemb., Reg. Sess. (Va. 2003). The offense had been reclassified once before in 1999 from a Class 3 misdemeanor to a Class 1 misdemeanor. H.R. 1760, 1999 Gen. Assemb., Reg. Sess. (Va. 1999). Washington increased the penalties twice. It currently classifies possession of child pornography as a Class B felony. WASH. REV. CODE § 9.68A.070 (2006). The offense was reclassified from a Class C felony to a Class B felony in 2006. S. 6172, 59th Leg., Reg. Sess. (Wash. 2006). Prior to 1990, possession was classified as a misdemeanor. H.R. 2752, 51st Leg., Reg. Sess. (Wash. 1990).

16. H.R. 462, 2003 Gen. Assemb., Reg. Sess. (Ga. 2003) (codified at GA. CODE ANN. § 16-12-100 (2003)). Examples of other dramatic increases include Mississippi, which increased the statutory sentencing range for possession of child pornography from two to twenty years to five to forty years' imprisonment in 2005. H.B. 1058, S. 2864, 2005 Leg., Reg. Sess. (Miss. 2005) (codified at MISS. CODE ANN. § 97-5-35 (2005)).

17. H.B. 161, 54th Leg., Reg. Sess. (Mont. 1995) (codified as amended at MONT. CODE ANN. § 45-5-625(2)(c) (2009)).

18. S. 341, 73d Leg., Reg. Sess. (Nev. 2005) (codified at NEV. REV. STAT. § 200.730(2) (2005)).

19. *See* United States v. Dorvee, 616 F.3d 174, 184–88 (2d Cir. 2010). For example, a Virginia newspaper reported that two child pornography viewers are serving longer sentences—fifty years for one defendant and twenty-three for the other—than the defendant (the uncle of the victim in the photos) who created and distributed the images viewed. The uncle, who was "convicted of repeatedly raping [the victim], filming the attacks and selling the videos, is eligible for parole in 2011 after serving a minimum of 12 years." Tim McGlone, *Victim of child porn seeks damages from viewers*,

recent study of federal sentencing practices documents that a typical possessor of child pornography will receive a significantly longer sentence under the Federal Sentencing Guidelines than a defendant who engages in repeated sex with a twelve-year-old girl.[20] It is also a significantly longer sentence than the one imposed in a reported case from the Eighth Circuit where an offender paid to have a mother hold down her nine-year-old child while he raped the young girl twice a week for two years.[21]

The longer sentences for possession of child pornography than for instances of child sex abuse appear to be attributable not to conscious legislative design,[22] but rather to the piling on of various sentencing enhancements. For example, several states increase sentences based on the number of images a child pornography offender possesses. Alaska, Arizona, Florida, Tennessee, and Utah treat each image possessed as a separate criminal offense,[23] and Connecticut differentiates between various degrees of possession based on the number of images an offender possesses.[24] The federal sentencing scheme also provides for sentencing increases based on the number of images possessed.[25] Treating each image as a separate offense can result in extremely long sentences, especially because the Internet allows individuals to amass a significant number of

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VIRGINIAN-PILOT, Oct. 25, 2009, http://hamptonroads.com/2009/10/victim-child-porn-seeks-damages-viewers.

20. TROY STABENOW, FED. PUB. DEFENDER OFFICE, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES 26–29 (rev. ed. 2009), *available at* http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

21. United States v. Kane, 470 F.3d 1277, 1281–82 (8th Cir. 2006) (recounting co-defendant's sentence).

22. To the contrary, public opinion appears to reserve its desire for the most draconian sex abuse penalties for the sexual abuse of children. The public "seems to overwhelmingly favor the use of the death penalty for sex crimes against children. According to one poll, sixty-five percent of those surveyed supported the death penalty for child molesters." Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1138 (2004).

23. ALASKA STAT. § 11.61.127(c) (2007); ARIZ. REV. STAT. ANN. §§ 13-3551(11), 13-3553(A)(2) (2010); FLA. STAT. § 827.071(5) (2010); UTAH CODE ANN. § 76-5a-3(3) (West 2010). Tennessee provides that each image may be charged as a separate count. It also provides that if an individual possesses more than fifty images, then it is classified as a Class C felony, but if the individual possesses more than 100 images, then it is classified as a Class D felony. Possession is ordinarily a Class D felony. TENN. CODE ANN. § 39-17-1003(b), (d) (West 2010).

24. CONN. GEN. STAT. ANN. § 53a-196f (West 2007) (classifying possession of fewer than twenty images of child pornography as Class D felony punishable by minimum one year imprisonment); *Id.* § 53a-196e (classifying possession of between twenty and forty-nine images of child pornography as Class C felony punishable by minimum two years' imprisonment); *Id.* § 53a-196d (classifying possession of fifty or more images of child pornography as Class B felony punishable by minimum five years' imprisonment).

25. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (2009).

images with little effort.[26] In one instance, an Arizona defendant was sentenced to two hundred years' imprisonment for the possession of child pornography—a sentence that was the result of a statutory mandatory minimum sentence of ten years[27] in connection with a statutory mandate that requires the imposition of a consecutive sentence for each image possessed.[28] (The defendant was charged with possessing twenty images.)[29] That sentence is not only remarkably long in absolute terms, but it is also longer than the sentences imposed on several defendants who sexually abused children. The same Arizona state sentencing regime that sent a defendant to jail for two hundred years for possession of child pornography also imposed a fifteen-year sentence on another defendant who twice molested a six-year-old girl; imposed a twenty-two-month sentence on a priest who molested an altar boy; and imposed a *one-year* sentence on a man who kidnapped and sexually assaulted a fourteen-year-old girl who was selling candy door-to-door.[30]

In addition to enhancements based on the number of images possessed, the Federal Sentencing Guidelines identify a number of other enhancements that may increase the sentence of an individual convicted of possessing child pornography.[31] One of those enhancements is based on whether the defendant's conduct "involved the use of a computer."[32] A federal defendant's sentence may also be enhanced if the government can demonstrate by a preponderance of the evidence[33] that the offender

26. *See infra* note 192 and accompanying text.

27. ARIZ. REV. STAT. ANN. § 13-705(D) (2010) (possession of child pornography that depicts a minor under the age of fifteen is subject to a mandatory minimum sentence of ten years' imprisonment). The state provides the same penalties for possession of child pornography as it does for "molestation of a child, commercial sexual exploitation of a minor, . . . aggravated luring a minor for sexual exploitation, child abuse [and] kidnapping" of a child. *Id.*; State v. Berger, 134 P.3d 378 (Ariz. 2006).

28. ARIZ. REV. STAT. ANN. § 13-705(M) (2010) ("The sentence imposed on a person . . . shall be consecutive to any other sentence imposed on the person at any time . . . .").

29. *Berger*, 134 P.3d at 379.

30. Supplemental Brief for Appellant, State v. Berger, 134 P.3d 378 (Ariz. 2006) (No. CR-05-0101), 2006 WL 1002320 at *1–2.

31. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2009).

32. *Id.* § 2G2.2(b)(6). Because it was the advent of the Internet that led to a resurgence of child pornography, *see supra* notes 1–2 and accompanying text, it is perhaps unsurprising that this enhancement applies in the majority of federal cases, *see infra* note 188.

33. The Federal Sentencing Guidelines adjust a defendant's sentence based not only on the offense of conviction, but also based on "the actual conduct in which the defendant engaged regardless of the charges for which he was indicted or convicted". U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A(4) (2009). Factual findings about such "relevant conduct" are subject to a preponderance standard. *See* United States v. Watts, 519 U.S. 148, 156 (1997) ("The Guidelines state that it is 'appropriate' that facts relevant to sentencing be proved by a preponderance of the evidence, and we

engaged in the sexual abuse of a minor[34] or attempted to use the image to "groom" a minor to engage in sexual contact.[35]

In some jurisdictions, sentencing severity can be traced to statutory schemes that treat the possession of child pornography as equivalent to more culpable criminal conduct, such as the production or distribution of child pornography. Arizona, Kansas, Mississippi, Oklahoma, South Dakota, and Utah all punish the possession of child pornography as harshly as the production or manufacture of the images;[36] Wyoming does as well for repeat offenders.[37] Arkansas, Louisiana, and the federal government punish possession of child pornography as harshly as distribution.[38] Indeed, some sentencing increases for possession appear to

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have held that application of the preponderance standard at sentencing generally satisfies due process." (citation omitted)).

34. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(5).

35. *Id.* § 2G2.2(b)(3)(D), (E).

36. ARIZ. REV. STAT. ANN. § 13-3553 (2010); KAN. STAT. ANN. § 21-3516(c) (2007); MISS. CODE ANN. §§ 97-5-33, 97-5-35 (2006); OKLA. STAT. tit. 21, § 1021.2 (2002); S.D. CODIFIED LAWS § 22-24A-3 (2006); UTAH CODE ANN. § 76-5a-3 (West 2010). Notably, in 2002, Hawaii amended its statutory scheme to treat possession of child pornography less severely than distribution. *See* Laws 2002 Haw. Laws, ch. 200, § 1, 3 (codified at HAW. REV. STAT. § 707-752(4) (2002)) (revising statute that, prior to 2002, treated the possession of child pornography as identical to the dissemination of such images).

37. Wyoming treats subsequent child pornography possession offenses the same as subsequent convictions for manufacture or distribution of child pornography, though it distinguishes between possession and manufacture and distribution for first offenses. WYO. STAT. ANN. § 6-4-303(d), (e) (2009).

38. ARK. CODE. ANN. § 5-27-602 (2006); LA. REV. STAT. ANN. § 14:81.1(A)(2), (E)(3) (2004). The federal statutory scheme is somewhat complicated. 18 U.S.C. § 2252(a) (2006) prohibits four distinct categories of conduct: (1) transporting or shipping child pornography in interstate or foreign commerce; (2) receiving or distributing child pornography that has been mailed, shipped, or transported in interstate or foreign commerce; (3) selling, or possessing with intent to sell, child pornography that has been mailed or shipped in interstate or foreign commerce; and (4) knowingly possessing child pornography that has moved in interstate or foreign commerce. The statute appears to treat simple possession less harshly than other conduct, as it is punishable by a maximum sentence of ten years with no mandatory minimum, 18 U.S.C. § 2252(b)(2), while the other three categories are punishable by a minimum sentence of five years and a maximum sentence of twenty years, 18 U.S.C. § 2252(b)(1). But, in reality, most possessors of child pornography are subject to the five- to twenty-year sentence for "receiving" because most child pornography is found on the Internet and it "is generally necessary to receive pornography in order to possess it." United States v. Sudyka, No. 8:07CR383, 2008 WL 1766765, at *8 (D. Neb. Apr. 14, 2008); *see also* STABENOW, *supra* note 20, at 17, 27 (noting that "[t]he internet provides the typical means of obtaining child pornography" and quoting the U.S. Sentencing Commission as noting that "there appears to be little difference in the offense seriousness between typical receipt cases and typical possession cases [because] all material that is possessed must at some point have been received (unless it was produced, in which case the defendant would be sentenced under the more severe production guideline)" (citation omitted)). Presumably in recognition of this fact, the U.S. Sentencing Guidelines, which initially treated possession of child pornography as distinct from (and less culpable than) trafficking in child pornography, ultimately consolidated the two offenses into a single guideline. *See* U.S. SENTENCING COMM'N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: FISCAL YEAR 2008, at 37

have been driven by legislative intent to increase penalties for this more culpable conduct, and where the statute does not distinguish between them, the penalties for possession are increased without separate discussion.[39]

II. SCRUTINIZING THE ARGUMENTS IN FAVOR OF INCREASED SENTENCES

The modern trend of increasing sentences can be traced to a tendency to blur the distinction between the possession of child pornography and child sex abuse "contact offenses"—i.e., sexual offenses that involve physical contact.[40] Equating possession of child pornography with contact offenses arises in three particular arguments that are advanced for increasing the sentences associated with possession of child pornography. First, some have tried to justify the sentencing severity by arguing that possession of child pornography is equivalent to or worse than actual sex abuse of a child. Second, some assert that possessing and viewing child pornography increases an individual's risk of committing child sex abuse. Third, others assert that, because possession of child pornography is highly correlated with a history of contact offenses, punishing possessors of child pornography can serve as a proxy for sexual abuse. I refer to these last two arguments as arguments for preventative punishment and for proxy punishment, respectively.

This section identifies where these three arguments appear in the child pornography debate, then explains why each argument is problematic. As

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n.67 (2008), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2008/08_glinexgline.pdf [hereinafter U.S. SENTENCING COMM'N, USE OF GUIDELINES]; *see also* STABENOW, *supra* note 20, at 3–6, 19–21 (describing the relevant history). Further recognition of the essentially identical nature of possession and receipt charges can be found in recent circuit court opinions declaring that charges for both possession and receipt of the same images violate the Double Jeopardy Clause. *See* United States v. Schales, 546 F.3d 965, 977–78 (9th Cir. 2008); United States v. Miller, 527 F.3d 54, 71–72 (3d Cir. 2008).

39. *See, e.g.*, STABENOW, *supra* note 20, at 6–7 (recounting remarks by Senator Jesse Helms regarding sentencing issues for *possession* of child pornography, which Helms referred to as sentencing issues regarding "smut peddlers"—i.e., child pornography distributors); *see also* O'DONNELL & MILNER, *supra* note 1, at 23–26 (recounting how international efforts to criminalize child pornography were spurred by an incident where a Belgian man made pornographic videos and pictures of kidnapped children, but it is clear that the most horrible part of the story is the abuse, conditions of confinement, and death of his victims).

40. *See, e.g.*, Mark Hansen, *A Reluctant Rebellion*, A.B.A. J., June 2009, at 57 (claiming that the Federal Sentencing Guidelines for possession of child pornography "are predicated on the untested assumption that anyone who would access and view child porn is a potential child molester"). *But see* ALEXANDRA GELBER, U.S. DEP'T OF JUSTICE, RESPONSE TO "A RELUCTANT REBELLION" 8–9 (2009), *available at* http://www.usdoj.gov/criminal/ceos/ReluctantRebellionResponse.pdf (disputing that federal sentences for the possession of child pornography "seek to reach past or future molestation").

explained in more detail below, the "worse than abuse" argument and the proxy punishment argument have significant theoretical flaws, and there is insufficient data to support either the preventative punishment or proxy punishment arguments.

Of course, the public may support long sentences for possession of child pornography out of a sense of disgust or a desire to condemn those who look at pictures that sexualize children.[41] But the social consensus that viewing child pornography is a serious offense worthy of serious punishment does not mean that possession is indistinguishable from contact sex offenses against children, nor that the two offenses should receive equal punishment. To treat the two offenses as equivalent ignores proportionality concerns and, as discussed below in Part III, may have unintended consequences. What is more, the fact that possessors of child pornography are—at least in some cases—garnering longer sentences than those who sexually abuse children should be troubling to even the most passionate of anti–child pornography advocates.

A. Pornography as Abuse or Worse than Abuse

Some have contended that longer sentences for possessing child pornography are warranted because possession is equivalent to or worse than contact offenses. This contention does not withstand close evaluation because the harm associated with possession of child pornography is purely derivative of the harm associated with child sex abuse. Ultimately, the claim that child pornography is equivalent to or worse than child abuse appears to be simply an example of hyperbole used by interest groups and political actors to draw attention to the issue, rather than a serious assertion of principle.

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41. *See, e.g.*, O'DONNELL & MILNER, *supra* note 1, at 228 ("Child pornography legislation is important even if it leads to few arrests, because it demonstrates society's denunciation of the activity and acknowledges the experience of victims."). For more general discussion of the role of condemnation in criminal law, see Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 419–25 (1999) (discussing the importance of criminal law in expressing condemnation of disfavored groups or actions); Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1026 (2004) ("Criminal theory is replete with discussions describing criminal punishment as premised on the desire to punish bad people.").

1. Identifying the Argument

It is often said that child pornography is not simply a record of sexual abuse, but is itself a form of child sex abuse.[42] Indeed, several statutory schemes have classified possession of child pornography as sexual abuse.[43] Government actors have also characterized the possession of child pornography either as sexual abuse or as an offense that is as serious as sexual abuse.[44] In addition to those who equate the gravity of possessing child pornography with contact offenses, there are some who have suggested that child pornography is comparatively worse.[45] For example, the Supreme Court favorably quoted a commentator who stated that child pornography "poses an even greater threat to the child victim than does sexual abuse or prostitution."[46] And a Los Angeles Police detective gave a public statement "rating child pornography as worse than murder," which appeared in the *Chicago Tribune* and was cited in congressional hearings.[47] The equivalent-to-or-worse-than argument sometimes takes the form of victim statements suggesting that the existence of child pornography is worse than the abuse inherent in its creation. For example, a recent memorandum by the Department of Justice's Child Exploitation and Obscenity Section included a quotation from a child pornography victim stating: "I'm more upset about the pictures on the Internet than I am about what [the defendant] did to me physically."[48]

The claim that child pornography is equivalent to or worse than other instances of child sex abuse, if proven correct, would be a powerful

42. *See, e.g.*, YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 4 (2008) ("Child pornography involving real images of children is therefore a form of sexual abuse and exploitation . . . ."); Adler, *supra* note 3, at 938 n.80 ("The view that child pornography is sexual abuse, that it is in fact the core of sexual abuse, persists as the foundation of the approach taken by courts, legislators, politicians, and the media.").

43. *E.g.*, MONT. CODE. ANN. § 45-5-625(1)(e) (2009) (classifying the possession of child pornography as "sexual abuse of children"); 18 PA. CONS. STAT. ANN. § 6312(d) (West 2010) (same). Hawaii categorizes possession on child pornography as "promoting child abuse in the third degree," HAW. REV. STAT. § 707-752 (2007), and Oregon classifies possession of child pornography as "encouraging child abuse," OR. REV. STAT. §§ 163.686, 163.687 (2003).

44. ATT'Y GEN.'S COMM'N ON PORNOGRAPHY, FINAL REPORT 406 (1986) ("[C]hild pornography is child abuse."); 132 CONG. REC. S14,225 (daily ed. Sept. 29, 1986) (statement of Sen. Roth) ("[T]hose who advertise in order to receive or deal in child pornography and child prostitution are as guilty of child abuse as the actual child molester . . . .").

45. *See, e.g.*, WILLIAM A. STANMEYER, THE SEDUCTION OF SOCIETY: PORNOGRAPHY AND ITS IMPACT ON AMERICAN LIFE 88 (1984) ("Child pornography is the worst form of child abuse.").

46. New York v. Ferber, 458 U.S. 747, 759 (quoting David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

47. Tina M. Beranbaum et al., *Child Pornography in the Late 1970s*, *in* CHILD PORNOGRAPHY AND SEX RINGS 9 & n.11 (Ann W. Burgess ed., 1984) (recounting the statement).

48. GELBER, *supra* note 40, at 3.

argument in favor of the recent trend of increased sentence lengths. That is because the gravity of a crime is a widely accepted criterion for determining the allocation of criminal justice resources.[49] For example, if two crimes were committed simultaneously—the first a murder and the second a theft of property worth less than $1,000—and if there were limited resources, then we would expect law enforcement to spend more resources investigating the more serious crime (the murder), and we would expect a judge to impose a longer sentence for the more serious crime.[50]

2. Problems With the Argument

The equivalent-to-or-worse-than argument also fails any sustained evaluation of relative harms. The principal harm associated with possession of child pornography is the child sex abuse involved in the creation of the pornographic images.[51] The Supreme Court has explained that the First Amendment interest of child pornography possessors can be overcome only because private possession of child pornography may create a market for the creation of such images.[52] This strongly suggests

49. Both utilitarians and retributivists are likely to find the distribution of criminal justice resources according to crime seriousness to be uncontroversial. Utilitarians are concerned with reducing crime rates. Any sophisticated utilitarian account of crime control makes cost-benefit decisions about whom to incarcerate for longer periods of time. And with the possible exception of those who subscribe to rehabilitation, those decisions are informed by the seriousness of various crimes. For example, someone who subscribes to a deterrence rationale for punishment would set penalties for murder higher than larceny, because it is more important to avoid the harm associated with murder. Similarly, someone who subscribes to incapacitation (at least selective incapacitation) would care about incapacitating those offenders who are more likely to commit serious or violent crimes than less serious or nonviolent crimes. And retributivists believe that the amount of punishment for a particular crime ought to be proportional to the gravity of the crime, which is assessed based on the blameworthiness of the individual offender and the harm caused by the offense.

50. *Cf.* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 186 (1968) (noting that seriousness of a felony is positively correlated with higher probability of conviction and longer sentences).

51. While some commentators have noted that current child pornography laws appear to include images that were created without any child sex abuse (a development that is troubling for First Amendment reasons), *see* Adler, *supra* note 3, at 941–42, this Article will assume for argument's sake that all child pornography was created by sexually abusing a child.

52. *See supra* text accompanying notes 3–7. The Court provided the following analysis in *Ashcroft v. Free Speech Coalition*:

> The Government . . . argues that the [prohibition of possession of virtual child pornography] is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused. The Government, of course, may punish adults who provide unsuitable materials to children, . . . and it may enforce criminal penalties for unlawful solicitation. The precedents establish, however, that speech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it. . . .

that, as a constitutional matter, the harm of possessing child pornography is lesser than and derivative of the harm associated with the child sex abuse inherent in the images' creation. Indeed, much of the rhetoric regarding the harmfulness of possessing child pornography consists essentially of second-order arguments about the harm of child sex abuse—i.e., punishment is necessary either to stop the production of the pornographic materials[53] or it is necessary to prevent the possessors of child pornography (who are assumed to be sexually attracted to children) from sexually assaulting children later in time.[54]

Some have argued that child pornography causes additional harms after an image is created, but those harms are also derivative of child sex abuse. One harm, according to commentators who rely on concepts from tort law, is an additional and separate privacy or reputation harm to the child victim every time that someone views the image.[55] Another harm others have identified is that child sex offenders can use the images to "groom" or seduce children into engaging in sexual acts.[56] These arguments suggest that there are sound reasons to prohibit the possession of child

> . . . The Government cannot ban speech fit for adults simply because it may fall into the hands of children. The evil in question depends upon the actor's unlawful conduct, conduct defined as criminal quite apart from any link to the speech in question. This establishes that the speech ban is not narrowly drawn. The objective is to prohibit illegal conduct, but this restriction goes well beyond that interest by restricting the speech available to law-abiding adults.
>
> The Government submits further that virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct. This rationale cannot sustain the provision in question. The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. The government "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." . . . First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.

535 U.S. 234, 251–53 (2002) (quoting Stanley v. Georgia, 394 U.S. 557, 566 (1969)).

53. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 108–10 (1990); New York v. Ferber, 458 U.S. 747, 759–60, 761 (1982); Cheryl Hanna & Pamela Vesilind, *Preview of* United States v. Stevens*: Animal Law, Obscenity, and the Limits of Government Censorship*, 4 CHARLESTON L. REV. 59, 66 (2009) (quoting government contention that "outlawing the possession and distribution of child pornography decreases actual child exploitation and abuse.").

54. *See infra* Part II.B.1.

55. *E.g.*, Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 862 (2008) (arguing that "the possessor causes actual harm because re-publication inflicts shame and humiliation upon the child depicted"); *see also* Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121-1(7), 110 Stat. 3009-26 (1996), *invalidated by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (noting congressional finding that "child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come").

56. *Osborne*, 495 U.S. at 111; AKDENIZ, *supra* note 42, at 4–5.

pornography, but they do not demonstrate that possession of child pornography is equivalent to or worse than child sex abuse. To the contrary, both of these harms are derivative of the harm of abuse rather than the images themselves. This is because the privacy or reputation of a child is not damaged by viewing *any* image of that child—viewing an image of a child eating an ice cream cone or watching television would not have such an effect. Rather, the privacy of the child is implicated only because a pornographic image is an image of sexual abuse. Likewise, the harm associated with using pornographic images to groom or seduce another child is the harm of the future sexual abuse of *that* child, not the child in the image.

Many discuss the need to increase sentences for possession as a way to decrease child sex abuse, which also suggests that possession of child pornography is not as serious a crime as child sex abuse. If possession of child pornography were truly viewed as equivalent to or worse than child sex abuse, then we would not expect to see the discussion of child pornography framed in terms of whether it contributes to or amplifies the harm associated with child sex abuse.[57] Rather, we would expect to see possession of pornography most often discussed as independently harmful.[58]

Indeed, the idea that pornography is equivalent to or worse than abuse does not withstand a simple thought experiment. Imagine, for example, being given the choice between suffering a sexual assault or having a convincing but fraudulent pornographic image of oneself circulated (i.e., an image created through digital manipulation and thus not a product of sexual abuse). It is difficult to believe that many people would choose the victimization associated with sexual abuse over the victimization associated with the fraudulent pornographic image.

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57. For examples of such discussions, see United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) ("The consumers of child pornography therefore victimize the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects."); State v. Berger, 134 P.3d 378, 387 (Ariz. 2006) ("Production of the images Berger possessed required the abuse of children, and Berger's consumption of such material cannot be disassociated from that abuse for purposes of the Eighth Amendment proportionality analysis.").

58. The independent harms that are most often discussed—the violation of the children's "rights of privacy and human dignity" when images are viewed, *see* Rogers, *supra* note 55, at 854, and the harm of possessors abusing future children, *see* 149 CONG. REC. S2573, S2583–84 (daily ed. Feb. 24, 2003) (statement of Sen. Hatch)—are, as discussed in the previous paragraph, ultimately derivative of the harm of abuse.

To the extent that one might argue that it is the publicity of a shameful act that makes the victimization of pornography so terrible,[59] it is worth noting a troubling implication of this argument—that is, the perpetuation of secrecy associated with child sex abuse. Child sex abuse victims are often subject to repeated abuse at the hands of their abusers. The abuse continues because offenders are able to manipulate their victims into keeping the abuse secret,[60] oftentimes through telling the victim that there will be bad consequences for the victim if anyone finds out about the abuse.[61] The equivalent-to-or-worse-than argument taps into this pernicious culture of secrecy by perpetuating the idea that allowing others to see pictures of the abuse—i.e., revealing the secret of the abuse—is as bad as or worse than the abuse itself.[62] Anti–child pornography advocates may use the equivalent-to-or-worse-than rhetoric "to raise consciousness" about child pornography, and they "may have the best of intentions."[63] However, by characterizing the loss of secrecy as a harm, they are perpetuating, albeit indirectly, a culture of secrecy that allows child sex abuse to continue undetected.

B. Preventative Punishment

On its face, the preventative punishment argument appears to be the most defensible reason for increasing child pornography sentences. That is because punishing behavior in order to avoid the risk of future crime is a well-established feature of modern criminal law. However, as noted below, there is little empirical evidence demonstrating that significantly

59. *E.g.*, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26 (1996), *invalidated by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (characterizing one harm of the creation of child pornography as a "reputational" or "privacy" interest, because the "images . . . can haunt the minor for years to come").

60. *See, e.g.*, CARLA VAN DAM, THE SOCIALLY SKILLED CHILD MOLESTER: DIFFERENTIATING THE GUILTY FROM THE FALSELY ACCUSED 84 (2006) (noting that secrecy of child sex abuse "allows it to flourish"); Amy Hammel-Zabin, *The Mind of a Child Molester*, PSYCHOL. TODAY, July 1, 2003, http://www.psychologytoday.com/articles/200306/the-mind-child-molester (noting that secrecy is "a critical weapon both to entice and ensnare" victims of child sex abuse).

61. "Abused children are often told not to disclose [the sex abuse] to anyone . . . . Secrecy is usually reinforced by violence, threats of violence or punishment. Sometimes we find a mixture of threats and bribery where the secondary gain of bribes and of special treatment maintains the secrecy, which is nonetheless basically founded on threats." TILMAN FURNISS, THE MULTI-PROFESSIONAL HANDBOOK OF CHILD SEXUAL ABUSE 24 (1991).

62. Corey Rayburn Yung has made a related point with respect to the modern discussion of rape being a fate worse than death—i.e., that "the rhetoric comparing death to rape contributes to a cultural norm built upon Victorian artifacts that elevates wom[e]n's chastity to the very essence of their identity." Rayburn, *supra* note 22, at 1154.

63. *Id.* at 1147–48 (making this point in the context of rape).

increasing sentences for possession of child pornography will lead to an appreciable decrease in child sex abuse. In any event, even if punishing possession with longer sentences might lead to some decrease in contact offenses against children, it would not suggest that possession of child pornography should be punished more harshly than contact offenses.

1. Identifying the Argument

Possessing child pornography is thought to increase an individual's risk of sexually abusing a child, and thus longer sentences are necessary to incapacitate these individuals and eliminate any opportunity to commit a contact offense.[64] The risk that possession of child pornography is thought to create is generally described in two ways: First, viewing the pornographic images "inflames" the possessor and thus leads him to physically abuse a child.[65] According to this argument, if individuals do not possess images in the first instance, then they will not commit a subsequent contact offense. Second, pedophiles use pornographic images to "groom" children—i.e., convince them that it is acceptable to engage in sexual acts with adults.[66] If pedophiles do not have access to pornographic images of children, so the argument goes, then they are less likely to succeed in their future attempts to convince minors to engage in sexual contact with them.

There are a number of examples of government actors expressing the idea that child pornography possessors present a higher risk of sexually abusing a child.[67] Indeed, Congress cited both the notion that child

64. "[I]n recent years, a near consensus has emerged that children are placed at risk [of child sex abuse] simply as a consequence of an individual being in possession of child pornography." Suzanne Ost, *Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society*, 29 J.L. & SOC'Y 436, 437 (2002).

65. *See, e.g.*, AKDENIZ, *supra* note 42, at 11 (quoting the Explanatory Memorandum of the Council of Europe's Cybercrime Convention 2001); STANMEYER, *supra* note 45, at 81.

66. *See, e.g.*, Osborne v. Ohio, 495 U.S. 103, 111 (1990); AKDENIZ, *supra* note 42, at 4–5.

67. 1978 Ariz. Sess. Laws 674–677 (finding that child pornography is "frequently utilized to lure other children into sexual conduct" and that "it further develops the climate encouraging the sexual exploitation of other children"); 149 CONG. REC. H9735 (daily ed. Oct. 20, 2003) (statement of Rep. Osborne) ("Roughly 80 to 90 percent of pedophiles and rapists report using pornography, oft times before they commit an event. So, some people say, well, what is the big deal? Pornography is harmless. It does not really have any victim. Yet, if you think about it, we spend billions of dollars in this country on commercials, and if those commercials did not change behavior, if what you see and what you hear and what you read does not change your behavior, then we are spending billions of dollars unnecessarily. So, obviously, the pornography industry does have a tremendous impact on behavior . . . ."); 149 CONG. REC. S2573, S2583–84 (daily ed. Feb. 24, 2003) (statement of Sen. Hatch) ("Congress has long recognized that child pornography produces three distinct and lasting harms to our children. First, child pornography whets the appetites of pedophiles and prompts them to

pornography incites viewers to sexually abuse children and the notion that these images can be used to "groom" children when it criminalized the possession of virtual child pornography in the Child Pornography Prevention Act of 1996.[68] The National Center for Missing & Exploited Children, which receives government funding and operates a congressionally funded tip line for child sex exploitation,[69] recently published a report on possession of child pornography that concluded: "Even if some of them never go on to sexually victimize a child, it is reasonable to view and treat arrested [child pornography] possessors as at high risk for victimizing children."[70]

There are many examples of preventative punishment in the modern criminal justice system. Certain behavior is often criminalized, not because the behavior itself is thought to be harmful, but rather because it is thought to create a significant risk of other harmful behavior.[71] Think, for example, about the federal law prohibiting individuals who previously have been convicted of a felony from possessing a firearm.[72] That prohibition and the convictions that arise from it are most often justified on the theory that a prior felony conviction indicates a greater likelihood that an individual will use a firearm to harm another.[73] Another highly

act out their perverse sexual fantasies on real children. Second, child pornography is a tool used by pedophiles to break down the inhibitions of children. Third, child pornography creates an immeasurable and indelible harm on the children who are abused to manufacture it."); GELBER, *supra* note 40, at 5–6 (disputing claim that possessors of child pornography "do[] not, and will not, pose a physical threat to a child"); U.S. SENTENCING COMM'N, REPORT TO CONGRESS: SEX OFFENSES AGAINST CHILDREN, at i (1996), *available at* http://www.ussc.gov/r_congress/SCAC.HTM [hereinafter USSC 1996 REPORT TO CONGRESS] ("[A] significant portion of child pornography offenders . . . show the greatest risk of victimizing children . . . ."); Hansen, *supra* note 40, at 59 (interviewing an Assistant U.S. Attorney who insists that "some child porn offenders *will* go on to molest a child").

68. *See, e.g.*, Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121-1(3)–(4), 110 Stat. 3009-26 (1996), *invalidated by* Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (including congressional findings that (a) "child pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity," and (b) "child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites").

69. *See* 42 U.S.C. § 5773(b) (2006).

70. JANIS WOLAK ET AL., NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, CHILD-PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 34 (2005), *available at* http://www.missingkids.com/en_US/publications/NC144.pdf.

71. Classic examples of such crimes include the inchoate crimes of attempt, conspiracy, and solicitation. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 160–61 (2008).

72. 18 U.S.C. § 922(g)(1) (2006).

73. *See, e.g.*, James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands:*

visible example of preventative punishment is the crime of drunk driving. It is a criminal offense to operate a motor vehicle if your blood alcohol content is above a certain level.[74] Driving under the influence is forbidden not because there is anything inherently wrong with driving while intoxicated, but rather because people are more likely to crash and cause harm to themselves and others if they drive drunk. Getting drunk drivers off the streets and deterring individuals from driving while intoxicated are done in the name of avoiding the safety risk that drunk drivers pose.[75]

2. Problems With the Argument

Although increasing sentences in order to account for future risk of harm is a well-established feature of the modern criminal justice system, there are a number of theoretical and empirical problems with justifying the modern trend of increased sentences for child pornography possession as preventative punishment. Preventative punishment may either be justified under retributive theory or as a utilitarian crime-control measure.[76] Under the retributive model, preventative punishment is subject to several limiting principles. Under the utilitarian model, preventative punishment must pass empirical muster. The modern trend of increased punishment for child pornography possession satisfies neither the limiting principles of retributivism nor the empirical challenges of utilitarianism.

Many retributivists have expressed discomfort with the practice of punishing behavior because of the risk it poses to others.[77] Retributivism is based on the concept that punishment is justified only where there is both harm and blameworthiness.[78] Preventative punishment seeks to punish based on the risk of harm, as opposed to harm that has already occurred.

The Brady Law and the Limits of Regulation, 86 J. CRIM. L. & CRIMINOLOGY 93, 93–94 (1995). The restriction could also be justified as a loss of civil rights associated with conviction—akin to felon disenfranchisement.

74. *See generally Driving while intoxicated or under the influence of alcohol*, 7A AM. JUR. 2D *Automobiles* § 356 (2009).

75. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 449 (1990).

76. There are two overarching theories of punishment—retributivism and utilitarianism. Retributivists seek to punish individuals for their criminal acts because, having committed those acts, the defendant deserves punishment. Utilitarians, in contrast, seek to punish in order to bring about future reductions in crime. *See generally* Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561, 563 (2006).

77. *See, e.g.*, R.A. Duff, *Criminalizing Endangerment*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 43, 48 (Stuart P. Green & R.A. Duff eds., 2005); *see also* Robert Weisberg, *Tragedy, Skepticism, Empirics, and the MPCS*, 61 FLA. L. REV. 797, 808 n.71 (2009) (collecting sources).

78. *See* Andrew Ashworth, *Desert*, *in* PRINCIPLED SENTENCINGS: READINGS ON THEORY AND POLICY 143 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

This has led some commentators to reject the validity of preventative punishment.[79] But other retributivists have sought to permit preventative punishment in some limited form. For example, some have argued that any preventative punishment—that is, punishment imposed to minimize risky behavior—must be limited by how serious the harm to others is and how likely that harm is to occur.[80] In other words, the harm risked must be serious and the probability of the harm occurring must be relatively high in order to justify criminal sanctions.[81] Other limitations include limiting preventative punishment to methods that "actually decrease the likelihood that the ultimate harm will occur"[82] and limiting preventative punishment in a manner that ensures that those who never actually present a risk of the ultimate harm are not subject to criminal sanctions.[83] Interestingly, whether preventative punishment satisfies these limiting principles poses an empirical question, requiring data on whether those who possess child pornography have a high probability of committing a future contact offense and whether limiting access to child pornography will actually decrease the number of individuals who engage in contact offenses.

Preventative punishment is most often justified on utilitarian crime-control grounds. But whether preventative punishment sensibly reduces crime rates is also an empirical question that can be answered only with data showing that lengthening sentences for those who possess child pornography will have an appreciable effect on the crime rates for child

79. *See, e.g.*, R.A. DUFF, CRIMINAL ATTEMPTS 366 (1996) (distinguishing liability for attempt and crimes of endangerment and arguing that endangerment should not be criminalized because we should only be "criminally liable for our actions, insofar as they are culpably related to some criminal harm").

80. Packer framed the issue as a question of "gravity and remoteness of harm." HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 266 (1968). He believed that it was necessary to limit convictions for risk of harm in order to preserve some form of the harm principle and that the harm principle was "a way to make sure that a given form of conduct is not being subjected to the criminal sanction purely or even primarily because it is thought to be immoral." *Id.* at 266–67.

81. HUSAK, *supra* note 71, at 161. Husak states that "a theory of criminalization should preclude offenses of risk prevention unless they are designed to reduce a substantial risk." *Id.* at 161–62. He notes that this condition not only requires that preventative crimes be aimed at promoting "a *substantial* state interest," *id.* at 161, but also that "the proscribed conduct must prevent a substantial risk that a harm will occur," *id.* at 162 n.162.

82. HUSAK, *supra* note 71, at 162. At first glance, it may seem as though the prevention requirement is duplicative of the limitation based on how likely that harm is to occur. But while the likelihood of harm is designed to assess the risk that a particular individual poses, the prevention requirement seems designed to ensure that the particular prevention method will actually decrease that risk. For example, in the context of felon-in-possession laws, the likelihood of harm question would tell us the recidivism risk that previously convicted felons pose, while the prevention requirement would require those supporting felon-in-possession laws to demonstrate that felons who have no access to firearms will commit fewer crimes than those who do have such access.

83. *Id.* at 168–70.

sex abuse. That is because any sophisticated sentencing policy predicated on the theory of incapacitation must be able to reduce crime without significantly increasing the overall number of persons incarcerated. This concept, which is commonly referred to as "selective incapacitation," attempts to identify those offenders who are more likely to recidivate and those who are less likely to recidivate, and then adjusts sentence lengths according to likelihood of recidivism.[84] Of course, putting any individual in prison will keep him or her from committing a future crime. Thus, in order to demonstrate a benefit to offset the costs of incarceration, one must demonstrate a significant likelihood that the individual would have committed a crime had he or she not been incarcerated.

The utilitarian argument rests on the assumption that those who view child pornography want to engage in sexual conduct with children and that possessing the images makes it more likely that they will engage in contact offenses. But there are significant reasons to doubt this assumption. There is anecdotal evidence that some child pornography possessors, although they want to view pornographic images of children, actively seek adult sexual partners.[85] And the empirical literature is unable to validate the assumption that there is a causal connection between possession of child pornography and child sex abuse.[86]

As other commentators have noted, the "quantity and quality of the research" into the relationship between child pornography possession and child sex abuse "leave a great deal to be desired."[87] Several studies purport to provide information about a connection between child pornography

84. *See* James Q. Wilson, *Selective Incapacitation*, *in* PRINCIPLED SENTENCINGS: READINGS ON THEORY AND POLICY 148, 152 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1992); Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 512 (1982).

85. *See, e.g.*, SHELDON & HOWITT, *supra* note 2, at 112 (describing one Internet offender in their study who looked at child pornography as "a form of 'foreplay' prior to sexual intercourse with his adult partner"); United States v. Whited, 539 F.3d 693, 696 (7th Cir. 2008) (describing defendant's sharing of child pornography with another adult and their plan to arrange a sexual encounter between the two of them).

86. An article published in 2005 noted that, at that time, there were "no published data on the future offending of child pornography offenders." Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE 201, 201 (2005); *see also* Dean D. Knudsen, *Child Abuse and Pornography: Is There a Relationship?*, 3 J. FAM. VIOLENCE 253, 261 (1988) ("The degree to which child sexual abuse is related to the availability of child pornography is extremely difficult to establish."). Even if there were older social science studies documenting a relationship between consumption of child pornography and contact offenses, it is not clear whether those studies would continue to be relevant to modern offenders, as child pornography is now more widely available via the Internet than it was in the pre–Internet era.

87. Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 790 (2007).

possession and child sex abuse. But many of those studies only examine whether there is a *correlation* between viewing child pornography and child sex abuse—for example, by asking defendants convicted of child sex abuse whether they have ever viewed child pornography.[88] Correlation does not prove causation. Those studies that were better designed to capture a causal connection—for example, by asking sex offenders whether they looked at pornographic images immediately before engaging in illegal sexual activity—often failed to distinguish between child pornography and other "deviant" pornography (e.g., violent pornography involving adults).[89]

There are also sampling problems with the various studies. Most studies of child pornography possession and child sex abuse are limited to those individuals who have been convicted of possession of child pornography or other sex crimes. As other commentators have noted, there is reason to believe that studies of all child pornography users, including those who have not come into contact with the criminal justice system, could potentially yield different results.[90]

Ultimately, the available empirical evidence simply does not support the preventative punishment model.[91] As Malamuth and Huppin noted,

88. As Malamuth and Huppin noted: "There have been a few relevant studies with non-pedophiles or non-child molesters, but these have examined only a very small subset of the relevant issues. More common are studies with pedophiles and child molesters that survey their usage of child pornography." *Id.*

89. *See id.* at 800; Ost, *supra* note 64, at 450; *see also* Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAVIOR 341 (2008) (finding that viewing "deviant" pornography increased future sexual aggression for all viewers but failing to distinguish between child pornography and other "deviant" pornography, e.g., violent pornography).

90. WOLAK ET AL., *supra* note 70, at 31; Hansen, *supra* note 40, at 57; Seto & Eke, *supra* note 86, at 209; *see also* O'DONNELL & MILNER, *supra* note 1, at 80 (noting that "[s]tudies involving child pornography offenders are limited to those who have been caught, are in custody or receiving treatment, and are willing to participate" and thus the data from those studies "are at best representative of a very small minority of this group of offenders").

91. Malamuth & Huppin, *supra* note 87, at 776, 820 (surveying the scientific literature in an "attempt to determine whether the evidentiary record is sufficient to establish a legally cognizable link between the use of various types of pornography and child molestation" and ultimately concluding that "evidence does not support the proposition that there is a strong connection between being a child pornography offender and committing sexual molestation"); Seto & Eke, *supra* note 86, at 208 ("contradict[ing] the assumption that all pornography offenders are at very high risk to commit contact sexual offenses involving children"—those possessors of child pornography who also had committed sexual abuse (i.e., a "contact offense") were more likely to reoffend, while those who had only been convicted of possession were significantly less likely to commit a subsequent act of sexual abuse); Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281, 1305 (2010) ("On the critical question of whether possession of child pornography will lead an offender to 'cross over' to contact offenses, many studies have found no causal connection between the two."). Other studies provide evidence that

while individuals who have previously been convicted of contact offenses may pose a recidivism risk if exposed to child pornography, "studies show little demonstrable risk for other individuals (including child-pornography offenders without a history of contact sexual offending) to commit future molestation pursuant to pornography consumption."[92]

In addition to the lack of affirmative support for a causal connection, the case against preventative punishment is also supported by a few controversial studies that suggest that access to pornography actually *reduces* contact offenses.[93] One study—which was based on an anonymous Internet survey—found that the vast majority of respondents who had viewed "boy erotica" reported that viewing this form of child pornography "redirected their sexual energies away from actual sexual contacts with boys."[94] The respondents from that survey also overwhelmingly reported that viewing child pornography did not increase their tendency to seek out children for sexual conduct.[95] Of course, this survey data is of limited empirical value because the respondents were self selected, their responses were anonymous, and the veracity of their answers cannot be verified. It is, nonetheless, of some value because it captures information from those who possess images of child pornography but have not yet come in contact with the criminal justice system.[96]

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tends to undercut the causation assumption, such as the studies finding that when child sex offenders are "inflamed" into committing sex crimes against children, they viewed adult pornography, not child pornography. *See* Kingston et al., *supra* note 89, at 347 (finding that those child sex abusers who did view pornographic images prior to committing contact offenses viewed nonchild pornography); David L. Wheeler, *The Relationship Between Pornography Usage and Child Molesting*, *in* 57(8-A) DISSERTATION ABSTRACTS INT'L SERIES A: HUMAN. & SOC. SCI. 3691 (1997), *described in* Malamuth & Huppin, *supra* note 87, at 797 (finding that child molesters tended to view pornography more often than non-child molesters, but that the most common type of images viewed by the molesters "involved nudity or consenting sexual activities between adults" rather than child pornography).

92. Malamuth & Huppin, *supra* note 87, at 827.

93. *See* Berl Kutchinsky, *The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience*, 29 J. SOC. ISSUES 163 (1973) (noting a decrease in the number of child molestations over time in Copenhagen, Denmark, as pornography became more widely available). A study about sexual fantasies noted that contact offenders appeared to have fewer sexual fantasies than pornography possessors and tentatively suggested that "Internet offenders [possessors of child pornography] may have less need to contact offend since they can generate fantasy more easily." Kerry Sheldon & Dennis Howitt, *Sexual Fantasy in Paedophile Offenders: Can Any Model Explain Satisfactorily New Findings From a Study of Internet and Contact Sexual Offenders?*, 13 LEGAL & CRIMINOLOGICAL PSYCHOLOGY 137, 153 (2008).

94. "[Forty-nine percent] reported that this was the case 'invariably,' 25% 'usually,' 10% 'frequently,' 8% 'occasionally,' 3% 'rarely,' and 5% 'never.'" Malamuth & Huppin, *supra* note 87, at 800–01 (describing David L. Riegel, *Letter to the Editor, Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica*, 33 ARCHIVES SEXUAL BEHAV. 321 (2004)).

95. *Id.*

96. As noted above, researchers have encountered sampling problems in attempting to study this population. *See supra* note 90.

As a general matter, whether viewing *any* sexually explicit materials encourages individuals to engage in sexually aggressive behavior has long been a contested issue.[97] For some time, the public debate surrounding nonchild pornography included assertions from some antipornography advocates that viewing pornography—which is often filled with degrading images of women—caused men to treat women poorly.[98] Other advocates made more specific claims about violent pornography causing men to rape or otherwise physically abuse women.[99] These claims were disputed and refuted by a number of prominent commentators.[100] Not only does adult pornography not appear to cause violence against women, but there also "may be an inverse relationship between exposure to sexually explicit expression and actual violence."[101] As one commentator noted, the increasing availability of pornography on the Internet has made young men "ultimately less libidinous."[102] While some undoubtedly persist in their claims about the bad effects of pornography,[103] the modern view of nonchild pornography is more nuanced and tolerant.[104]

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97. For some studies that have purported to identify a relationship between exposure to sexual images and aggression, see Mike Allen et al., *A Meta-Analysis Summarizing the Effects of Pornography II: Aggression After Exposure*, 22 HUM. COMM. RES. 258 (1995); Mike Allen et al., *Exposure to Pornography and Acceptance of Rape Myths*, 45 J. COMM. 5, 19 (1995) (reporting that "exposure to pornography, at least in experimental settings, increases the acceptance of rape myths"). Such studies have been criticized as failing to predict actual human behavior. *See, e.g.*, AGGRESSION: THEORETICAL AND EMPIRICAL REVIEWS 31 (Russell G. Green & Edward I. Donnerstein eds., 1983); EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS 72 (1987); Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1665 (2005); William K. Layman, *Violent Pornography and the Obscenity Doctrine: The Road Not Taken*, 75 GEO. L.J. 1475, 1491 (1987); Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1182 (1993); *see also* Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 136 n.203 (2007) (noting this disagreement).

98. *E.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 171–74 (1987).

99. *E.g.*, ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 24–25 (1981) (claiming that pornography encourages men to be sexually violent and that women are the principal victims of this violence).

100. *See, e.g.*, Ronald Dworkin, *Women and Pornography*, 40 N.Y. REV. BOOKS 36 (Oct. 21, 1993) (reviewing CATHARINE A. MACKINNON, ONLY WORDS (1993)); Strossen, *supra* note 97, at 1176–85.

101. Strossen, *supra* note 97, at 1185.

102. Naomi Wolf, *The Porn Myth*, N.Y. MAG., Oct. 20, 2003, at 36, *available at* http://nymag.com/nymetro/news/trends/n_9437/.

103. *E.g.*, Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why* Miller *Should Survive* Lawrence, 15 GEO. MASON L. REV. 611, 613 (2008) (arguing that "one may reasonably conclude that pornography consumption has negative impacts").

104. The modern tolerance of adult pornography may, at least in part, be attributable to our ability to observe that the dramatic increase in availability has not led to the ill effects that pornography's critics foretold. Despite tremendously easy access to pornography since the advent of the Internet,

There is one recent study that purports to demonstrate a link between individuals who possess child pornography and those who sexually abuse children, but it does not satisfy the retributive-limited preventative punishment model. A 2009 article claims that child pornography possessors are merely sexual abusers of children whose contact offenses have gone undetected. It reports that "the vast majority of the participants" in the study "report that they committed acts of hands-on abuse *prior* to seeking child pornography via the Internet."[105] If child pornography offenders are seeking out pornography only *after* sexually abusing children, then increasing the punishment for possessing child pornography—indeed, even making child pornography fully unavailable—will not protect children from sexual abuse.[106]

Finally, even if future social science data were to demonstrate a causal relationship between possession of child pornography and future contact offenses, it would support lengthy sentences for possession, but it would not support punishing those convicted of possession more severely than those convicted of child sex abuse. From a retributive standpoint, such practices raise serious proportionality concerns, as they would be akin to punishing a felon in possession of a firearm more harshly than a defendant who commits armed robbery or punishing drunk driving more harshly than vehicular homicide. These practices might also raise odd deterrence problems because a rational actor deciding between whether to collect child pornography or sexually abuse children would have an incentive to choose the latter.[107] And in order for such practices to be justified from an

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rates of sexual violence have not seen corresponding increases. To the contrary, incidents of rape have declined since the early 1990s and have remained stable in recent years. *See Violent Crime Trends*, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm (last updated on Jan. 22, 2011). The modern tolerance of adult pornography may also be attributable to a commonsense understanding that people may find certain images sexually exciting, and yet not actually want to engage in similar behavior. For example, a happily married person might watch a pornographic movie featuring casual extramarital sex and find that movie exciting without any desire to cheat on his or her spouse. There may be any number of explanations for this phenomenon—perhaps tied to repression or the complex role of fantasy—but the idea that people may be excited by a pornographic movie and yet never wish to recreate the situation from the movie in their own lives seems uncontroversial.

105. Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 189 (2009).

106. Of course, one could argue that if such offenders are incarcerated for viewing child pornography, although their imprisonment may not help their initial victims, they may be prevented from committing any future offenses. But such an argument is really one about *proxy* punishment (rather than preventative punishment), and as discussed in the subsequent section, there are serious flaws with the proxy punishment model.

107. *Cf.* Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171,

incapacitation perspective, those who possess child pornography would have to pose a greater risk of future contact offenses than those who have already committed contact offenses, which seems unlikely.[108]

C. Proxy Punishment

The proxy punishment argument is quite difficult to defend. It is not a well-accepted justification for punishment, probably because punishing someone for conduct that has not been proven raises serious due process concerns. At the very least, the premise underlying the proxy punishment argument—that all possessors of child pornography have also committed a past contact offense—requires strong empirical support, and that support does not exist.

1. Identifying the Argument

While the preventative punishment argument justifies lengthening child pornography possession sentences on the ground that it reduces the risk of future instances of child sex abuse, the proxy punishment argument justifies the longer sentences on the theory that such sentences penalize past undetected instances of child sex abuse. As a general matter, proxy punishment is imposed when three conditions are met: (a) the "real" (i.e., more serious) crime is too difficult to prosecute, (b) the "proxy" (i.e., less serious) crime is easier to prosecute, and (c) those who are committing the "proxy" crime have also committed the "real" crime.[109] In the child pornography context, punishment is increased for possessing child pornography because convictions for child sex abuse are more difficult to obtain than child pornography convictions[110] and because those who

1173–80 (2004) (describing how adjustments in punishment levels for a particular crime may lead to substitution effects).

108. *See* Malamuth & Huppin, *supra* note 87, at 820 (noting that "evidence does not support the proposition that there is a strong connection between being a child pornography offender and committing sexual molestation"; however, "if a person has committed a child sex offense, then the use of pornography may constitute an additional risk factor for re-offending").

109. Others have defined proxy crimes in a slightly different fashion, defining the proxy behavior as ordinarily not blameworthy or criminal. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 912 (2004) (defining "proxy crimes" as "offenses that are not blameworthy in themselves, but that stand in for more culpable activities"); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 17 (2006) (characterizing "presence at home" when subject to an order of protection as a "proxy" for domestic violence, and noting that presence in a home "is not generally criminal"). That definition does not work in the context of child pornography, as there is widespread agreement that viewing child pornography is blameworthy. O'DONNELL & MILNER, *supra* note 1, at 153 ("Today, few would question the value of outlawing child pornography.").

110. *See* MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FEDERAL

possess child pornography are assumed to have also sexually abused children.

There are a number of reasons that child sex abuse cases are more difficult to prosecute than possession of child pornography cases. First, child sex abuse is, as a general matter, difficult to detect[111]—often because it is a crime that ordinarily occurs in private spaces[112] and also because offenders threaten their victims into silence.[113] In contrast, law enforcement can detect those who possess child pornography by tracing IP addresses of those who visit pornographic sites or by engaging in sting operations.[114] Second, once child sex abuse is detected, there are evidentiary problems associated with pursuing many child sex abuse cases. Prosecutors are often faced with a lack of physical evidence, problems with the credibility of child witnesses, or the unwillingness of the victim's family to have their child suffer through the trauma of a trial.[115] Similar issues rarely arise in possession of child pornography cases because, once law enforcement obtains a warrant and seizes an offender's computer, the prosecution essentially has all the evidence it needs to obtain a conviction and need not worry about victim credibility or about a victim's unwillingness to testify.[116]

PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 5 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf [hereinafter FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION] (2006 conviction rate for child pornography was 95%; 2006 conviction rate for child sex abuse was 86%); *see also* WOLAK ET AL., *supra* note 70, at 29 (noting that "conviction rates may be higher for Internet-related [child pornography] possession cases than for conventional child-sexual-victimization cases").

111. *See* HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 11 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf [hereinafter SEXUAL ASSAULT OF YOUNG CHILDREN] (reporting a 27% arrest rate); TIM TATE, CHILD PORNOGRAPHY: AN INVESTIGATION 109–10 (1990) (suggesting that only 1% of all child sex abusers are "caught and sentenced").

112. *See* SEXUAL ASSAULT OF YOUNG CHILDREN, *supra* note 111, at 6 ("Most (70%) of the sexual assaults reported to law enforcement occurred in the residence of the victim, the offender, or the residence of another individual.").

113. *See, e.g.*, FURNISS, *supra* note 61, at 24, 39.

114. *Cf.* WOLAK ET AL., *supra* note 70, at 13 (reporting that 43% of U.S. child pornography possession cases in 2000 "originated with investigations by law enforcement").

115. For example, in 2006, federal prosecutors declined to prosecute more than half of the child sex abuse cases that were referred to them, as opposed to only a 38% declination rate for child pornography referrals, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION, *supra* note 110, at tbl.2, and the reasons given for declining prosecution were more likely to be concerns about weak evidence in child sex abuse cases than in child pornography cases, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION, *supra* note 110, at 3 ("More than half of sex abuse declinations were due to weak evidence. In comparison, weak evidence was stated as the reason for 24% of declinations for child pornography and 20% of declinations for sex transportation.").

116. *See* Dan Herbeck, *Child Porn Suspect Faces Risk with Trial*, BUFFALO NEWS, Dec. 6, 2009,

There are a number of examples where government officials tacitly acknowledge that child pornography laws are being used as a proxy for punishing child sex abusers.[117] They often appear in the guise of statements that possessors of child pornography also have a history of contact offenses[118] or statements noting how difficult it is to detect or prosecute child sex abuse cases.[119] Such statements, when made in support of longer sentences for possession of child pornography, indicate that lawmakers are using pornography prosecutions as an alternative to sex abuse prosecutions. If possessors were being punished only for viewing these images, such statements would be irrelevant. Other public officials are more direct, making statements that refer to possessors of child pornography as "predators" or in other terms that suggest contact offenses.[120]

2. Problems With the Argument

Unlike preventative punishment, which is common in the modern criminal justice system, there are few other examples of proxy punishment

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at A1 (reporting high levels of plea bargains for child pornography possession and noting that the few defendants who proceed to trial are almost always convicted).

117. *See, e.g.*, AKDENIZ, *supra* note 42, at 109 (identifying the importance of "prosecutions against child pornographers who are frequently child molesters" (quoting statement of Rep. Lamar S. Smith)); GELBER, *supra* note 40, at 6–7 (recounting statistical and anecdotal evidence to support idea "that consumers of child pornography may also be child contact offenders" and disputing that a possession offender's lack of criminal history is exculpatory because "the silent and secret nature of sex crime in general (particularly with a vulnerable population such as children) protect defendants from detection by law enforcement"); TATE, *supra* note 111, at 102 (recounting the views of an FBI agent and an Assistant U.S. Attorney that possessors of child pornography "are men interested in having sex with children—men who are willing if given the right opportunity to have sex with children"); Sher & Carey, *supra* note 2 (noting that, in response to reports of a study which found a high rate of unreported contact offenses by those convicted of possessing child pornography, "[s]ome prosecutors say they could use the study to argue for stiffer sentences").

118. *See, e.g.*, USSC 1996 REPORT TO CONGRESS, *supra* note 67, at i ("[A] significant portion of child pornography offenders have a criminal history that involves the sexual abuse or exploitation of children . . . .").

119. *See, e.g.*, Arizona State Senate, Minutes of Judiciary Committee (Mar. 29, 1983) (on file with author) (including testimony by a prosecutor explaining that she encounters problems in convicting child molesters, and thus the legislature should pass legislation to criminalize the possession child pornography).

120. *See, e.g.*, 154 CONG. REC. H10,241, H10,248–49 (daily ed. Sept. 27, 2008) (statement of Rep. Schultz) (asserting that "to prevent predators from hurting other children" it is necessary to "go back through the Internet and get them" and recounting statistics on child pornography); 154 CONG. REC. E2087 (daily ed. Sept. 27, 2008) (statement of Rep. Biggert) (characterizing those "who use the Internet to transmit or access child pornography" as "predators"); *see also* 152 CONG. REC. H5705, H5724–25 (daily ed. July 25, 2006) (statement of Rep. Pence) (asserting that "child pornography is the fuel that fires the wicked hearts of child predators").

in criminal law.[121] There are, of course, instances where prosecutors seek a conviction for a lesser crime when the evidence in a particular case does not allow them to successfully prosecute a defendant for a greater crime—a practice that is sometimes referred to as "pretextual prosecution."[122] The seminal example was the Department of Justice's decision to prosecute Al Capone for tax evasion rather than for his many violent crimes.[123] But these pretextual prosecutions are different in kind from proxy punishment.[124] Pretextual *prosecutions* involve prosecutors seeking convictions for lesser crimes that—while perhaps not uniformly

121. It has been difficult to identify other instances of proxy punishment. Possession of burglary tools seems like a promising candidate—it criminalizes the possession of certain tools and instruments, and one could presume that this prohibition is designed to help law enforcement who cannot demonstrate beyond a reasonable doubt that a particular individual actually committed a burglary. However, statutes criminalizing the possession of burglary tools require prosecutors to prove an intention to use the tools to commit a burglary. *See, e.g.*, CAL. PENAL CODE § 466 (West 1999); MASS. GEN. LAWS. ANN. ch. 266, § 49 (West 2000) (similar); N.J. STAT. ANN. § 2C:39-4(a)–(d) (West 2005); 8 PA. CONS. STAT. ANN. § 907(b) (West 2006). The generally accepted justification for these laws is to "enabl[e] enforcement authorities to act before the prospective burglar has had the opportunity to gather his tools, weapons, and plans and strike in secret." Annotation, *Validity, Construction, and Application of Statutes Relating to Burglars' Tools*, 33 A.L.R.3D 798, § 2(a) (1970). In other words, such statutes are designed to permit police to arrest suspected burglars before ordinary attempt doctrine would permit liability. Thus, it appears that these statutes are designed, not as proxy crimes, but instead as preventive crimes. Another candidate for possible proxy crimes is possession of narcotics with the intent to distribute. But it appears that such statutes simply serve to increase sentences for those individuals who possess significant amounts of controlled substances, and the "intent to distribute" language may thus ultimately be irrelevant. *Compare* 21 U.S.C. § 841(a) (2006) (making it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" and specifying the sentencing ranges available based on certain minimum amounts of various controlled substances), *with* 21 U.S.C. § 844(a) (2006) (making it "unlawful for any person knowingly or intentionally to possess a controlled substance" containing no minimum amounts and assigning shorter sentencing ranges than § 841). The best example of proxy punishment in modern criminal law appears to be prohibitions regarding the possession and sale of drug paraphernalia. Some states do not require the prosecutor to demonstrate that the distributor or the recipient intended to use the illegal objects to ingest illegal drugs. *See, e.g.*, State v. Holway, 644 N.W.2d 624 (S.D. 2002); Morrison v. Commonwealth, 557 S.E.2d 724 (Va. Ct. App. 2002). But the commonsense understanding regarding drug paraphernalia prohibitions is that they are used to punish those involved in drug consumption or sale. *See, e.g.*, Kenneth E. Johnson, *The Constitutionality of Drug Paraphernalia Laws*, 81 COLUM. L. REV. 581, 582 n.6 (1981) (noting that "in many cases, observation of illegal drug paraphernalia provided police officers with probable cause to arrest the possessor, consequently justifying an 'incidental' search of the suspect's person," which "would often uncover illegal drugs"); *see generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 516–19 (2001) (identifying drug paraphernalia laws and noting that these laws (and others) are designed to make it easier for law enforcement "to enforce the original crime, but more cheaply, by enforcing the substitutes").

122. *See generally* Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135 (2004); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

123. *See* Richman & Stuntz, *supra* note 122, at 583–84.

124. *See* Suk, *supra* note 109, at 19–20 (distinguishing between proxy crimes and pretextual prosecutions).

enforced[125]—are not always associated with the greater crime that is difficult to prove.

Proxy *punishment*, in contrast, is a more systematic decision by legislatures to criminalize and to pursue convictions for conduct that is easier to prove than the conduct which the legislature ultimately aims to prohibit. The systematic nature of proxy punishment, as compared to pretextual prosecutions, results in the easier-to-prove crime becoming inextricably associated with the crime that is difficult to prove.[126] So, for example, a newspaper report that an individual had been convicted for the possession of child pornography would lead many readers to conclude that the individual had also sexually abused a child.[127] This association of child pornography possession with child sex abuse may affect not only public perception but also legislative response. If legislators perceive that only those individuals who already have abused a child are being convicted for possessing child pornography, then they might adjust the criminal sanctions associated with child pornography to reflect the harm attributable to child sex abuse. In contrast, legislatures would not adjust the penalties associated with tax evasion to account for the other harms caused by organized crime, because there is no shared understanding that tax evasion is always connected with organized crime activities, pretextual prosecution of mobsters for tax offenses notwithstanding.

The major flaw with proxy punishment should be immediately apparent. Even if some—or many—of those who possess child pornography also abuse children, we ought not punish all possessors for such abuse without actually proving that they have committed a contact offense. To do otherwise would run directly counter to notions of due process and fairness in the criminal justice system.[128] It would permit the criminal punishment of individuals without any of the constitutional protections afforded to criminal defendants, such as the right to a jury trial, the presumption of innocence, and the requirement of proof beyond a reasonable doubt.

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125. Richman & Stuntz, *supra* note 122, at 589–90.

126. *See* Suk, *supra* note 109, at 20 (noting that "whereas pretextual conduct is unrelated to its target crime," a proxy crime "is not considered to be unrelated to the target crime," but rather is "tightly linked" to the difficult to prove crime "in that where the former is found, the latter is thought to follow").

127. In contrast, although prosecutors may sometimes use the crime of tax evasion to convict gangsters like Al Capone, a newspaper report that an individual had been convicted of tax evasion would not lead readers to conclude that the individual was also guilty of mob-related activities.

128. *Cf.* MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 783–84 (1997) (characterizing the "proxying function" as "an evasion of our normal requirements of proof beyond a reasonable doubt").

The pernicious character of proxy punishment becomes clear when we consider an example outside of the child pornography context. Imagine that social science data can definitively prove that all males under the age of twenty-five in a particular geographic area have committed at least one violent crime, but the state is unable to provide proof of individual wrongdoing. We would not permit the state to punish those men unless the state could provide evidence that each individual had committed a particular crime. If we change these hypothetical situations so that a large percentage (rather than all) of a population committed a crime, then the outcome seems even more outrageous, as some people who had not committed a crime would be punished in order to get at the large percentage of those who did.

Put in a context other than child sex abuse, the arguments for this type of proxy punishment—that is, the "we didn't catch you, but we know you probably did it" variety—seem entirely unpersuasive. They are little more than bad parodies of utilitarian arguments about public safety.[129]

But even if we were to ignore the due process concerns associated with the proxy punishment argument, the empirical support for the proxy punishment model simply does not exist. A recent study by the National Center for Missing & Exploited Children, for example, reported that in eighty-four percent of child pornography possession cases, "investigators did not detect concurrent child sexual victimization or attempts at child victimization."[130] Although some social science data appear more supportive of the proxy crime model,[131] that data is drawn from

129. Indeed, the argument looks more like preventative detention than punishment, and preventative detention is a concept that has been subject to significant criticism. *See* Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1100–03 (2010) (discussing political upheavals in the 1970s surrounding proposals for open preventive detention and concluding that the modern criminal justice system does not openly admit to seeking preventive detention ends).

130. WOLAK ET AL., *supra* note 70, at 17.

131. One study of 155 pornography offenders in a federal prison from 2002 to 2005 documented a dramatic increase in the self reporting by offenders as to whether they had also sexually abused a child. *See* Bourke & Hernandez, *supra* note 105. At the time of sentencing, 115 subjects had no documented contact offenses, but at the end of an intensive treatment program, only twenty-four maintained that they had not also committed contact offenses. *Id.* at 187. The authors had nine of the twenty-four offenders who denied contact offenses submit to a polygraph test, and seven of the nine failed. *Id.* Even assuming that polygraph evidence is completely reliable, this study still suggests that there is not a perfect correlation between those convicted of possessing child pornography and those who have committed contact offenses. Notably, this study has been characterized as "controversial," and one commentator has noted that "[t]he study was withdrawn before peer review because of questions about the authenticity of the prisoner responses." Hansen, *supra* note 40, at 59. As the *New York Times* reported, the authors "submitted the paper to The Journal of Family Violence, a widely read peer-reviewed publication in the field, and it was accepted. But in a letter obtained by The Times,

individuals who have been convicted of child pornography or contact offenses and who volunteered to participate in social science studies.[132] To support the proxy punishment model, it would be necessary to prove that *all* individuals who possess child pornography also sexually abuse children. This seems unlikely to occur because, at the very least, it is difficult to identify everyone who views child pornography. Given the sentencing exposure for such behavior, social scientists are limited to studying those individuals who have already been convicted.[133]

In any event, even if empirical evidence supporting the proxy punishment argument did exist, it would not support imposing longer sentences on those who possess child pornography than on those defendants who have actually been convicted of sexually abusing a child. To impose longer sentences on those who have not yet been convicted of a contact offense—but are suspected to have committed that crime—than on those who actually have been convicted of that crime would stand the concept of due process on its head and render the procedural protections associated with criminal convictions essentially meaningless.

III. UNINTENDED CONSEQUENCES OF EQUATING CHILD PORNOGRAPHY WITH SEX ABUSE

As should be clear from the previous section, the crime-control assumptions underlying the preventative punishment argument and the proxy punishment argument are not supported by empirical evidence. In addition to the lack of support for the assertion that increasing sentences for child pornography offenders will reduce child sex abuse, there are independent reasons that counsel against blurring the distinction between possession of child pornography and child sex abuse. Specifically, characterizing sentencing decisions for possession of child pornography as combating child sex abuse may promote misperceptions about who

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Judi Garrett, an official of the Bureau of Prisons, requested that the editors of the journal withdraw the study, because it did not meet 'agency approval.'" Sher & Carey, *supra* note 2. The *Times* further reported that "[t]he findings, based on offenders serving prison time who volunteered for the study, do not necessarily apply to the large and diverse group of adults who have at some point downloaded child pornography, and whose behavior is far too variable to be captured by a single survey." *Id.* The study has since been published. Bourke & Hernandez, *supra* note 105.

132. *See* Bourke & Hernandez, *supra* note 105, at 185. Thus, as noted above, there are concerns that the study participants are not a representative sample of child pornography possessors. *See supra* note 90.

133. Indeed, the only study of nonconvicted offenders—the anonymous Internet study discussed in Part II.B.2—indicates that many individuals who possess child pornography do not commit contact offenses. *See supra* notes 90–92.

commits child sex abuse and misperceptions about the effectiveness of current policing and prosecution efforts directed at that abuse. These misperceptions may, in turn, negatively affect society's ability to prevent and punish child sex abuse.

A. Misperceiving Child Sex Abuse as a Stranger Crime

One of the most pervasive misperceptions about child sex abuse is that it is a crime perpetrated by strangers.[134] People generally tend to equate fear of violent crime with fear of strangers.[135] This holds true for sex crimes against children.[136] Children are repeatedly told that they should not talk to strangers,[137] and some of the most well-publicized cases of child sex abuse were committed by strangers.[138] But child sex abuse does not conform to this common stereotype about violent crimes. The vast majority of child molestation offenses are committed by non-strangers. Offenses by strangers account for only seven percent of all cases of child sex abuse.[139] The sex abuse inherent in the creation of child pornography appears to follow this same pattern of misperception. There is (or has been) a misperception that the victims of child pornography are either runaways or kidnapped for sex,[140] but, in reality, the children are usually

134. *See* Corey Rayburn Yung, *The Emerging Criminal War Against Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 453–54 (2010) (discussing the "stranger danger" myth).

135. *See* Robert J. Sampson, *Personal Violence By Strangers: An Extension and Test of the Opportunity Model of Predatory Victimization*, 78 J. CRIM. L. & CRIMINOLOGY 327, 328 (1987) ("[I]t is the possibility of attack by strangers that seems to engender the most intense feelings of vulnerability and fear. . . . [T]he general public tends to 'equate strange with dangerous'. . . ." (quoting C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 8 (1978))); *see also* Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 346–47 (2007) (noting the conventional wisdom "that crimes between strangers are more serious than crimes between those who already know each other" and noting that "many of the arguments in support of treating stranger violence more seriously are based on specific assumptions unique to strangers").

136. "The public, limited by its general lack of knowledge about sex offenses, has miscalculated the risk to its children from strangers. As a result, the public has misdirected the bulk of its fear toward strangers." Amber Leigh Bagley, *"An Era of Human Zoning": Banishing Sex Offenders From Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347, 1377–78 (2008).

137. *E.g.*, *Safety Around Strangers*, COALITION FOR CHILDREN, http://www.safechild.org/strangers.htm (last visited Jan. 23, 2011).

138. *See* Bagley, *supra* note 136, at 1378.

139. Hessick, *supra* note 135, at 356–57. Approximately 34% of child molestation offenders were family members and 59% were acquaintances. *Id.* at 357. For more detailed information by victim gender and age, see SEXUAL ASSAULT OF YOUNG CHILDREN, *supra* note 111, at 10 tbl.7.

140. *E.g.*, 149 CONG. REC. H2405, H2432 (daily ed. Mar. 27, 2003) (statement of Rep. Sensenbrenner) (asserting that "children are abducted and sold into the sex industry for both pornography and for prostitution"); *see also* TATE, *supra* note 111, at 20 (noting the misperception

seduced into posing for these pictures or videos by someone they knew.[141]

Despite the fact that strangers are rarely the instigators of child sex abuse, the public discussion about child sex abuse is framed almost entirely in terms of protecting children from strangers. The public and political drive behind the enactment of Megan's Law provides an excellent example of this phenomenon.[142] The proponents of sex offender registration laws recounted stories of young children who were sexually assaulted and killed by strangers. A small number of legislators noted that most child sex abuse occurs within the family and by other non-strangers and further noted that the offender registration would do nothing to prevent those offenses.[143] Yet sex offender registration laws were widely adopted across the country without any modification to account for the sexual abuse of non-strangers.

People do not want to think that children are sexually abused at the hands of those who are supposed to protect them. Nor do people want to admit that they or their children may be at risk from friends and family.[144] But the unfortunate reality is that child sex abuse is often a messy intrafamilial problem. And when prosecutors try to bring cases of child sex abuse against, for example, a child's relative or a friend of the family, they will sometimes find that the family members side with the offender, rather than with the victim.[145]

"that the victims of child pornography—especially the very young—are either runaways or kidnapped for sex").

141. "In some cases their own parents took the pictures or made them available for others to take the pictures." TATE, *supra* note 111, at 20; *see also* O'DONNELL & MILNER, *supra* note 1, at 53 (recounting specific incidents of parents abusing their own children and distributing images recording the abuse); U.S. SENTENCING COMM'N, USE OF GUIDELINES, *supra* note 38, at 36 (reporting that 52.3% of federal defendants convicted of producing child pornography in 2008 had their sentences increased because they were a parent, relative, or legal guardian of the minor depicted or the minor was otherwise in the custody, care, or supervisory control of the defendant); Duncan T. Brown, *Pornography After the Fall of the CPPA: Strategies for Prosecutors*, 15 NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE UPDATE, no. 4 (2002) ("Because creating child pornography requires a level of trust between the victim and the pornographer, often the victims are physically or, through coercion or secrecy, emotionally close to the defendant.").

142. For an excellent account of the legislative debate surrounding Megan's Law, see Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

143. *Id.* at 344.

144. *Cf.* Hessick, *supra* note 135, at 345 & n.7 (noting that, despite the higher rate of nonstranger violence, social science evidence indicates that people believe they are significantly more likely to be shot or badly hurt by a stranger than hit by their spouse or partner).

145. *See, e.g.*, NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 94 (3d ed. 2004) (noting that in intrafamily sex abuse cases, the nonoffending parent "may protect the child, pressure the child not to talk about the abuse, or persuade the child to recant the disclosure so the perpetrator does not face the criminal justice system"); *see also* FURNISS, *supra* note 61, at 37 (discussing reasons why a nonabusing parent may not want to seek assistance).

Those who possess child pornography do not present such problems. They often possess pictures of children they have never met. And when we engage in preventative or proxy punishment, we can do so without asking who took the pictures of the children or which children are at risk. Because pornography convictions do not require an acknowledgement of the ugliness associated with non-stranger sex abuse, society may prefer to punish those who possess child pornography over those who abuse children. Punishing pornography (as opposed to contact offenses) allows us to persist in our misconception that children are at risk of sex abuse from a stranger looking at pictures on a computer rather than from the children's own circles of family and friends.

The misperception that child sex abuse is ordinarily committed by strangers may have negative effects on the prevention and punishment of child sex abuse.[146] It may lead policy makers to focus their efforts on measures aimed at reducing the number of contact offenses by strangers—measures like Megan's Law—rather than on contact offenses by non-strangers. But such measures have not significantly reduced rates of child sex abuse.[147] Indeed, a recent study of sex offense rates in New Jersey after the implementation of Megan's Law suggests that the legislation has reduced neither the number of re-arrests for sex offenses nor the proportion of child molestation or incest as compared to other sex offenses. Nor has it demonstrably reduced the number of victims.[148] "Researchers studying the impact of registration and notification laws in other states have found similar results."[149] And even if policies aimed at stranger offenses were successful, because strangers make up such a small percentage of child sex offenses, reducing the rate of contact offenses by

146. *See* Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 685 (2008) (arguing that "modeling sexual offender statutes on the stereotypical sexual predator may have a perverse effect of reducing the effectiveness of the criminal law in some significant number of cases" because, *inter alia*, "[m]ost abusers are not strangers to their victims").

147. *See* Kari Melkonian, Comment, *Michigan's Sex Offender Registration Act: Does it Make Communities Safer? The Implications of the Inclusion of a Broad Range of Offenders, a Review of Statutory Amendments and Thoughts on Future Changes*, 84 U. DET. MERCY L. REV. 355, 371 (2007) ("[I]t seems that efforts like Megan's Law and Michigan's SORA have been misdirected and do little to address the real problems, which are (1) sexual assault by family members or acquaintances, not strangers, and (2) repeat offenders.").

148. KRISTEN M. ZGOBA & KAREN BACHAR, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, SEX OFFENDER REGISTRATION AND NOTIFICATION: LIMITED EFFECTS IN NEW JERSEY (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/225402.pdf. Although sex offense rates in New Jersey decreased after the passage of Megan's Law, sex offense rates in New Jersey have been on a consistent downward trend since 1985, and the "greatest rate of decline for sex offending occurred prior to 1994 [before the passage and implementation of Megan's Law] and the least rate of decline occurred after 1995." *Id.* at 1.

149. *Id.*

strangers is likely to have a smaller effect on the overall number of child sex abuse crimes than a measure aimed at intrafamily or other non-stranger offenders.

The stranger-danger misperception may also keep parents from taking the most effective preventative measures to protect their children.[150] Imagine the mother who thinks her children are at risk only (or primarily) from strangers. She might keep a close eye on her children when they are at a park, but never ask her child why he or she does not want to visit a certain relative. She would have successfully protected her children from strangers because that is where she perceived the risk, but she would not have noticed a possible warning sign of non-stranger abuse.[151]

B. Misperceptions About Law Enforcement Statistics

In addition to perpetuating misperceptions about who engages in child sex abuse, the modern discussion surrounding child pornography also creates misperceptions about law enforcement's detection and prosecution of child sex abuse cases. Specifically, current reporting methods present child pornography prosecutions in a format that may mislead the public into overestimating law enforcement's success combating child sex abuse. Child sex abuse is an underdetected, and thus underprosecuted, crime. If the public believes that law enforcement is effectively prosecuting child sex abuse, then there may be no political pressure on law enforcement to develop more effective techniques to detect and prevent child sex abuse.

Use of the term "child sexual exploitation" may contribute to these misperceptions. That term encompasses a wide range of activities, from the possession of child pornography to the sexual molestation of children.[152] When arrest and prosecution statistics are reported using the

150. "Encouraging society to focus on stranger danger without also addressing the significant risks to children from family members and friends will keep parents from fully understanding the risks to their children. . . . [F]amily members and friends may find they have increased access to children in restricted, less-supervised areas. The false sense of security . . . could lead to increased risks to children." Bagley, *supra* note 136, at 1380; *cf.* O'DONNELL & MILNER, *supra* note 1, at 216 ("Parents are regularly warned about the increasing dangers of predatory paedophiles and could be forgiven for believing that their children are at significant risk of abduction or online seduction. Yet, the majority of child sexual abuse incidents involve acquaintances or family members and the Internet plays no part.").

151. *See* Kathy Smedley, *Signs of Sexual Abuse*, PROTECTKIDS.COM, http://www.protectkids.com/abuse/abusesigns.htm (last visited Jan. 23, 2011) (noting that "[i]ndicating a sudden reluctance to be alone with a certain person" is a "possible . . . behavioral indicator[] of child sexual abuse").

152. *E.g.*, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION, *supra* note 110, at 1 (defining "[f]ederal child sex exploitation offenses" to include "child pornography, sex transportation, and sex abuse"); *FAQ: Child Sexual Exploitation*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN,

term "exploitation," it obscures whether the offenses at issue are contact offenses or noncontact offenses, such as the possession of child pornography. This can be seen in Department of Justice press releases touting the high number of arrests by the federal Internet Crimes Against Children task force program.[153] Local law enforcement have engaged in similar reporting tactics.[154] Potential for misperception is compounded when reports refer to those arrested as "predators" or "pedophiles," as those terms connote that the individual arrested poses an immediate risk to children.[155]

If these reporting methods mislead the public into believing that the arrest and prosecution rates associated with child pornography possession are instead associated with child sex abuse, then it may reduce political pressure for law enforcement to successfully detect and prosecute contact offenses. This is especially troubling because the number of child pornography offenses appears to be much lower than other sex offenses involving children.[156] Moreover, because child sex abuse cases are so much more difficult to detect and to prosecute than child pornography

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http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2815 (last visited Jan. 23, 2011) (defining term as including "Possession, Manufacture, and Distribution of Child Pornography; Enticement of Children for Sexual Acts; Child Prostitution; Child Sex Tourism; Child Sexual Molestation"). There appears to be a movement within the child advocacy community to use the term "child sexual exploitation" as a substitute for "child pornography" because the latter term is thought to insufficiently "describe the true nature and extent of sexually exploitive images of child victims." WOLAK ET AL., *supra* note 70, at vii n.1.

153. *See, e.g.*, DEP'T OF JUSTICE, FACT SHEET SUPPORTING STATE AND LOCAL LAW ENFORCEMENT ACCOMPLISHMENTS 2001–2008 (2008), *available at* http://www.ojp.usdoj.gov/newsroom/pressreleases/2008/psc08-993.htm (describing the Internet Crimes Against Children (ICAC) task force program, which "supports law enforcement's efforts to prevent, investigate, and stop computer-facilitated child sexual exploitation" and discussing arrest rates); DEP'T OF JUSTICE, FACT SHEET: PROJECT SAFE CHILDHOOD (2008), *available at* http://www.ojp.usdoj.gov/newsroom/pressreleases/2008/doj08845.htm (describing arrest rates and funding amounts for the ICAC program in efforts to stop "sexual crimes against children").

154. *E.g.*, Dan Miller, *Child Exploitation Units Apprehend Online Predators*, COUNTY NEWS (Wash., D.C.), Feb. 14, 2005, at 2, *available at* http://www.naco.org/newsroom/countynews/archives/documents/2005/cnews-feb14-05.pdf.

155. *See, e.g.*, Deborah J. Daniels, Remarks at the Conference on Child and Family Maltreatment (Jan. 28, 2004) (transcript available at http://www.ojp.usdoj.gov/archives/speeches/2004/confonchildabuse.htm) (reporting arrest rates for "Internet-based child sexual exploitation" and noting that every "such arrest means that untold numbers of innocent children will be protected from abuse" at the hands of "pedophiles"); *see also* Miller, *supra* note 154 (describing a person who sends child pornography as a "predator").

156. *See* DAVID FINKELHOR & RICHARD ORMROD, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN 6 (2004), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/204911.pdf ("Crimes involving pornography and juvenile victims . . . are relatively infrequent . . . . [T]he estimated 2,900 incidents in 2000 are dwarfed by reports of overall sex crimes against juveniles, which can be roughly estimated at 269,000 for the same period.").

cases,[157] police and prosecutors may have an incentive to devote more resources to pornography cases than to contact offense cases.[158]

Effectively preventing contact offenses, especially contact offenses involving offenders who have preexisting relationships with their victims, will require law enforcement to look outside conventional crime-prevention measures. Because most contact offenses occur in private places,[159] popular crime-control measures, such as putting more police on the streets, are unlikely to deter offenders.[160] Unlike the child pornography context, where police can use proactive methods such as sting operations, law enforcement relies on reports of sexual abuse for detection.[161] And because contact offenders prey on the shame or fear of their victims,[162] reports of abuse are infrequent.[163]

This is not to say that contact offenses are too difficult to prevent or to detect; rather, it suggests that different techniques may be necessary. For example, to increase detection, law enforcement could coordinate with schools and social workers to ensure that those children who fit the risk profile for child sex abuse are closely monitored.[164] Increasing the prosecution level and profile of non-stranger contact offenses could help to deter future offenses.[165] And, perhaps most importantly, increasing the

157. *See supra* notes 110–15 and accompanying text; *see also* Ost, *supra* note 64, at 460.

158. *Cf.* William H. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1799, 1819–24 (1998) (explaining that the cost of different enforcement strategies and scarce resources is a factor that results in law enforcement targeting of the street-level crack trade instead of more upscale drug markets).

159. *See* SEXUAL ASSAULT OF YOUNG CHILDREN, *supra* note 111, at 6 ("Most (70%) of the sexual assaults reported to law enforcement occurred in the residence of the victim, the offender, or the residence of another individual.").

160. *See* Hessick, *supra* note 135, at 405–06.

161. *See id.* at 351 n.23 ("Because most violent crimes occur outside the view of law enforcement, an arrest can be made only if a crime is reported to the police.").

162. *See, e.g.*, FURNISS, *supra* note 61, at 46.

163. *See* Catherine Rylyk, Note, *Lest We Regress to the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters*, 16 WM. & MARY BILL RTS. J. 1305, 1305 n.5 (2008) (noting that "child molestation remains one of the most underreported crimes" and that one study reported that less than eleven percent of all incidents are ever disclosed).

164. There is evidence that child sex abuse is correlated with a number of other factors, including poverty. *See* Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83, 91 n.43 (2001) (noting that "the risk factors that contribute to the incidence of child sexual abuse of children . . . include poverty, unemployment, familial stresses, and violence"); Victor I. Vieth, *In My Neighbor's House: A Proposal to Address Child Abuse in Rural America*, 22 HAMLINE L. REV. 143, 143 (1998) (discussing the connection between child abuse and drug, alcohol, poverty, mental illness, and other social dilemmas in rural America); *see also* O'DONNELL & MILNER, *supra* note 1, at 226 (noting that "child poverty, discrimination, early school leaving and marginalisation . . . diminish children's life chances and render them vulnerable to a myriad of harms, including sexual abuse").

165. *See* Hessick, *supra* note 135, at 407.

availability of secure, low-cost child care would help ensure that parents do not leave their children in the care of those who may sexually assault them.[166]

If the public mistakenly believes that law enforcement is successfully combating child sex abuse, such changes may never occur. And because the misperceptions perpetuated by the modern approach to child pornography offenses may result in less attention and fewer resources being devoted to contact sex offenses against children, it raises the question whether those who are concerned about child sex abuse should support lengthier sentences for possession of child pornography.

IV. TENTATIVE SUGGESTIONS FOR REFORM

As this Article has explained, the recent trend in sentencing severity for possession of child pornography is at least partially attributable to arguments that blur the distinction between possessing child pornography and child sex abuse. But some of the legislation designed to increase sentences for possessing child pornography has resulted in situations where some individuals convicted of possession receive sentences that are longer than the sentences of those individuals convicted of child sex abuse. This section proposes several tentative reforms aimed at curbing the recent sentencing excesses.

It is worth noting that the tentative suggestions offered below are aimed only at avoiding the most disproportionate sentences for those who possess child pornography and are specifically designed to ensure that child pornography possessors do not, in practice, end up serving longer sentences than those who sexually abuse children.[167] These reforms are not

166. A recent story involving the sexual abuse of two small children by the babysitter that their single mom had hired to watch them while she worked weekends provides a sad example. The mother tried to do her own research into the babysitter's past on the Internet, but her search did not turn up his felony record or the fact that he had been incarcerated for more than six years. Kandra Wells, *Molester's Sentence Leads to Cries of Injustice*, MCALESTER NEWS-CAPITAL (S.E. Okla.), June 13, 2009, *available at* http://www.mcalesternews.com/homepage/local_story_164191511.html?keyword=leadpicturestory.

167. One might argue that my objections to the modern trend of increasing sentences for the possession of child pornography could be solved if legislatures simply increased the available sentences for child sex abuse, rather than eliminating some of the statutory features that currently result in longer sentences for possessors of child pornography. *See, e.g.*, Hansen, *supra* note 40, at 59 (interviewing an Assistant U.S. Attorney who "concedes that the typical [federal] penalties for child porn offenses tend to be more severe than those for contact offenses," but stating that "the solution is to increase the penalties for contact offenses, not to lower the penalties for child porn crimes"). I would not consider that a satisfactory solution, as I also believe that many child pornography sentences are too severe in absolute terms.

designed to dramatically lower all sentences for possession of child pornography, both because the possession of child pornography is a serious offense worthy of punishment, and because this is an attempt to suggest reforms with at least a modest chance of success.

Finally, it is important to note the lack of an accepted framework in the broader discussion about how to assess the severity of criminal sentences. The political atmosphere surrounding criminal justice ensures that legislators and other political actors speak almost exclusively in terms of why sentences should be increased.[168] The Supreme Court's decision to essentially eliminate judicial review of length of sentence claims under the Eighth Amendment[169] means that the judiciary—which is not subject to such political pressure—will not develop a framework for how to evaluate sentence lengths. And the academic literature, although replete with general discussions about proportionality in sentencing, has not filled the gap.[170] The more general problem about how questions of sentencing severity ought to be publicly discussed and resolved is beyond the scope of this Article. Instead, these suggestions for reform are specifically designed to correct only the most egregiously severe sentencing practices in the child pornography context.

A. Legislative Reforms

One simple legislative reform is to treat those who possess child pornography differently from those who create it. Several jurisdictions impose identical sanctions for those who create these images and those who possess them.[171] This punishment scheme neglects the important truth that the creation of child pornography is a much more serious crime than the possession of child pornography, as the creation involves the sexual abuse of a child.[172] This simple reform would help avoid legislatures incidentally increasing the sentences for possession of child sex abuse when intending to increase sentences for those who are abusing children.[173]

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168. *See, e.g.*, Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1980–82 (2006); Stuntz, *supra* note 121, at 529–33.

169. *See supra* note 8 and accompanying text.

170. *See* Rayburn, *supra* note 22, at 1123 (noting that "arguments over the length of sentences are not the usual function of academic work").

171. *See supra* notes 36–38 and accompanying text.

172. *See generally supra* Part II.A.2.

173. *See supra* note 39.

A second reform would require legislatures to recognize that the Internet has complicated the traditional distinctions between possession, receipt, and distribution upon which many statutory schemes are built. For example, while federal law purports to treat possession of child pornography less severely than distribution or receipt, the way in which the Internet operates necessarily means that an individual who possesses an image from the Internet also received it.[174] Thus, it makes little sense to punish receipt more severely than mere possession. What is more, in jurisdictions where legislatures distinguish between receipt and possession, defendants who obtained images via the Internet may receive the higher sentences associated with receipt in situations that legislators might have understood as simple possession.

Distribution may also be less removed from possession and receipt in the Internet era. Before the advent of the Internet, an individual who distributed child pornography would have engaged in a series of deliberate acts, including physically copying the image,[175] expending effort to identify interested recipients (such as taking out advertisements in pornographic magazines or otherwise actively attempting to meet others interested in acquiring child pornography), and physically mailing or otherwise transferring a package to the intended recipient.[176] In the Internet era, an individual who possesses pornographic images on his or her computer and who visits a file-sharing site in order to obtain additional images may be classified as having "distributed" images to countless individuals,[177] even though there was no affirmative action on his or her part.[178] These observations are not meant to minimize the harm associated with aiding the further circulation of child pornography, but rather to illustrate that distribution in the Internet age may be incidental to receipt. Many offenders in the Internet age simply do not resemble the image of the professional marketer and dealer conjured up by the term "distribute."

Third, legislatures should examine whether the Internet has changed the blameworthiness or the risk profile of those who possess child

174. *See* 18 U.S.C. § 2252 (2006). Of course, even in the non–Internet context, it is difficult to imagine circumstances where the government would have sufficient evidence to prove possession and not receipt.

175. This action would have required a significant effort in the days before easy access to technology such as digital scanners and CD burners. Pre–Internet distribution faced additional hurdles, including the deterioration of quality after more than a few copies. *See* O'DONNELL & MILNER, *supra* note 1, at 20, 88–89.

176. *See* SHELDON & HOWITT, *supra* note 2, at 38; TATE, *supra* note 111, at 242.

177. *See, e.g.*, United States v. Dyer, 589 F.3d 520 (1st Cir. 2009).

178. *See* SHELDON & HOWITT, *supra* note 2, at 38.

pornography. While legislatures have undoubtedly increased sentences for possession of child pornography in direct response to the dramatic increase in availability,[179] the ease of availability may also suggest that the individuals who access child pornography via computer may not be as blameworthy and may not pose the assumed risk to actual children as pre–Internet offenders. Because child pornography was so limited and difficult to obtain prior to the advent of the Internet,[180] pre–Internet possessors of child pornography had to expend significant effort in order to obtain images, and so presumably only those individuals with a serious interest in viewing children in sexual situations would undertake the effort and the risk necessary to obtain such images.[181] Since the advent of the Internet, such images are far easier to obtain.[182] Indeed, it appears that, while using the Internet, some possessors of child pornography initially view the images purely out of curiosity—and that some even stumble across links to the images accidentally.[183]

Whether these individuals ultimately pose less of a risk of abusing a child than pre–Internet possessors is an empirical question that has yet to be answered. But current child pornography prosecutions suggest that at least some of these individuals do not collect images only of children[184] and are using the images to engage in sexual relationships with other adults.[185] Such information casts doubt on the traditional account that "'[c]hild pornography exists primarily for the consumption of paedophiles, and there is good cause to believe that if there were no paedophiles there would be little or no demand for child pornography.'"[186] If individuals who are collecting child pornography are also collecting adult pornography or are using the images to arrange sexual encounters with other adults, then it is possible that these individuals view child pornography because they find it sexually exciting, but they are not

179. *See, e.g.*, GELBER, *supra* note 40, at 15 (noting that at the same time the average sentence for possession of child pornography was rising, so too was the number of offenses).

180. *See supra* notes 175–78 and accompanying text.

181. Indeed, pre–Internet social science data suggests that child sex abusers traditionally obtained access to child pornography after already beginning to sexually abuse children. *See supra* text accompanying note 105.

182. *See* United States v. Ontiveros, No. 07-CR-333, 2008 WL 2937539, at *5–6 (E.D. Wis. July 24, 2008).

183. O'DONNELL & MILNER, *supra* note 1, at 54–55.

184. *E.g.*, *Id.* at 58 (describing an individual who possessed 495,000 images of child pornography in a personal electronic collection of 20 million total pornographic images).

185. *E.g.*, United States v. Whited, 539 F.3d 693, 696 (7th Cir. 2008) (describing defendant's sharing of child pornography with another adult and their plan to arrange a sexual encounter between the two of them).

186. TATE, *supra* note 111, at 23 (attributing this statement to Scotland Yard).

interested in engaging in sexual acts with children.[187] If legislatures determine that the Internet decreases the blameworthiness or risk profile of those who possess child pornography, then they should not only consider general reductions to the sentencing range for possession, but also consider abandoning computer-related enhancements, such as the Federal Sentencing Guideline that increases sentences for those defendants whose conduct "involved the use of a computer."[188]

As a fourth reform, legislatures should consider placing limits on how much a sentence may be increased based on the number of images an individual possesses.[189] At present, Arizona seems to have the most problematic system, which increases a defendant's sentence by an additional mandatory consecutive ten-year term for each image.[190] But other jurisdictions also provide significant sentencing increases for possessing multiple images.[191] As O'Donnell and Milner have explained:

> [T]he massive storage capacity of the average personal computer presents challenges in terms of assessing risk. Prior to the Internet, a large child pornography collection would have been indicative of an enthusiast of long-standing, somebody who devoted much time, effort and money to amassing his collection. But the Internet allows an individual to download a huge amount of material in a very short space of time. In other words, a collection of 5,000 images possibly reflects the quality of an individual's Internet connection rather than the effort they expended to painstakingly build a collection.[192]

The ease of downloading images on the Internet may not only render the number of images an individual possesses a poor indicator of risk and blameworthiness, but also may result in sentences for mere possession that

187. *See* Ost, *supra* note 64, at 449 ("Certainly, it is possible that individuals use child pornography for sexual stimulation, yet have no inclination to actually go out and commit child abuse.").

188. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (2009). The vast majority of federal defendants are subject to this enhancement. *See* U.S. SENTENCING COMM'N, USE OF GUIDELINES, *supra* note 38, at 37 (reporting that 96.5% of federal defendants received this enhancement in 2008). The Commission itself has expressed concern about the appropriateness of the enhancement. *See* Ian N. Friedman & Kristina W. Supler, *Child Pornography Sentencing: The Road Here and the Road Ahead*, 21 FED. SENT'G REP. 83, 84 (2008) (quoting U.S. SENTENCING COMM'N, REPORT TO CONGRESS: SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES (1996)).

189. For a critique of the number-of-images enhancement under the Federal Sentencing Guidelines, see Friedman & Supler, *supra* note 188.

190. *See supra* notes 27–29 and accompanying text.

191. *See supra* notes 23–25.

192. O'DONNELL & MILNER, *supra* note 1, at 57–58.

are far longer than originally anticipated. It is difficult to believe, for example, that the Arizona state legislature intended for possessors of child pornography to spend decades longer in jail than those who sexually abuse children, yet that has occurred.[193] Such absurd results could be avoided by placing absolute limits on the sentence that an individual can serve for the possession of child pornography.[194]

Finally, legislatures that are considering any of the above reforms could choose to supplement any decrease in sentences for possessing child pornography with strict monitoring of those who have been convicted of possession. Such monitoring could help to identify any possessors of child pornography who genuinely pose a risk of sexually abusing a child, and could either help avoid that risk or lead to the prosecution and conviction of those individuals who actually abuse a child. Monitoring could include both close observation of the offender, perhaps including polygraph examinations,[195] and interviews with those who have contact with the offender, in order to detect any suspicious behavior or inappropriate contact with children. This monitoring may also provide political cover for those legislators concerned about the possibility that their proposal to decrease sentences for child pornography possession could later be characterized as "soft on crime."[196]

B. Judicial Solutions

Reform need not be limited to legislatures. As Part I amply demonstrates, most legislatures have elected to increase the penalties associated with possession of child pornography. This is presumably because child pornography and child sex abuse are politically disfavored offenses; there are powerful interest groups that favor increasing these sentences and few interest groups willing to oppose them. Thus, legislative reforms aimed at decreasing sentences for possession of child pornography are likely to occur slowly, if at all.[197]

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193. *See supra* text accompanying note 30.

194. Indeed, the Second Circuit may have recently accomplished just that in the federal system by interpreting 18 U.S.C. § 2252 as prohibiting multiple counts of conviction for possession for a defendant with a single collection. *See* United States v. Polouizzi, 564 F.3d 142, 155 (2d Cir. 2009); *see also* State v. Sutherby, 204 P.3d 916, 919–921 (Wash. 2009) (similar).

195. *See generally* Angela Kebric, *Polygraph Testing in Sex Offender Treatment: A Constitutional and Essential Tool for Effective Treatment*, 41 ARIZ. ST. L.J. 429 (2009).

196. It is a well-accepted fact that "appearing soft on crime is politically dangerous." Barkow & O'Neill, *supra* note 168, at 1982.

197. *See id.* at 1980–82 (noting that there are many powerful groups who favor harsher sentencing laws, and those who support more lenient sentences do not tend to possess much political power).

The judiciary can offset some of the legislative excesses identified above. Several judges have publicly announced their dissatisfaction with the severity of child pornography sentences,[198] and some recent federal appellate decisions may result in systematically lower sentences for offenders. The Second Circuit, for example, recently construed a federal statute as prohibiting multiple possession counts of conviction for a defendant with a single collection.[199] An opinion from the First Circuit recently stated that the Federal Sentencing Guidelines for child pornography are "harsher than necessary,"[200] clearly signaling to district court judges that it will affirm lower sentences for future child pornography defendants. And other circuit courts have noted that receipt and possession are identical offenses under the federal statute and have forbidden prosecutors from bringing both charges against an offender for the same images.[201]

Sentencing judges are also able to mitigate the effects of harsh sentencing policies in individual cases. For example, in the federal system, sentences for possession of child pornography have steadily increased, in part because of various directives by Congress to the U.S. Sentencing Commission to make sentencing ranges for sex offenses more severe.[202] Recent Supreme Court decisions about a defendant's Sixth Amendment rights at sentencing permit federal district court judges to impose sentences that are lower than the range specified in the Federal Sentencing Guidelines.[203] District courts appear to have the most leeway to sentence below the Guideline range when there are case-specific facts or characteristics of the particular defendant that the district court can identify as warranting a less severe sentence.[204] The Federal Sentencing Guidelines are meant to apply to "typical offenders."[205] There is ample

198. *See, e.g.*, Dan Herbeck, *Sentencing Guidelines May Undergo Revision*, BUFFALO NEWS, Dec. 6, 2009, at A2; Lynne Marek, *Sentences for Possession of Child Porn May Be Too High, Judges Say*, NAT'L L.J., Sept. 10, 2009, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433693658.

199. *See Polouizzi*, 564 F.3d at 155.

200. United States v. Stone, 575 F.3d 83, 97 (1st Cir. 2009).

201. *See* United States v. Schales, 546 F.3d 965, 977–78 (9th Cir. 2008); United States v. Miller, 527 F.3d 54, 71–72 (3d Cir. 2008).

202. *See* United States v. Huffstatler, 561 F.3d 694, 696–97 (7th Cir. 2009) (quoting U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 72–73 (2004)); *see also* STABENOW, *supra* note 20, at 15.

203. *E.g.*, United States v. Booker, 543 U.S. 220 (2005).

204. *See* Gall v. United States, 128 S. Ct. 586, 596–98 (2007); *see also* United States v. Simmons, 568 F.3d 564, 569 (5th Cir. 2009) (noting that a non–Guidelines sentence imposed because of "the special conditions of a particular offender" is not subject to "closer review").

205. *Cf.* Koon v. United States, 518 U.S. 81, 98 (1996) (noting that a trial court is permitted to

legislative history that Congress (erroneously) assumed that a "typical" child pornography possessor is largely indistinguishable from an offender who has already sexually abused a child or who poses a substantial risk of doing so.[206] Thus, one could argue that only those possessors of child pornography who have committed a contact offense or who pose a significant risk of committing one in the future should receive the full sentence for possession under the Federal Guidelines. Offenders who appear not to pose such a risk ought to be sentenced to a term of imprisonment that is below the advisory guideline range.

When individualizing sentences, judges often have the ability to maintain a distinction between possession of child pornography and child sex abuse. They should, as a matter of course, impose shorter sentences on those offenders who have no prior contact convictions or arrests and whose presentence interviews with probation officers reveal no other signs of risk. A number of courts across the country appear to be engaging in exactly this sort of risk assessment and imposing lower sentences on those pornography offenders whom the courts conclude pose no risk of contact offending.[207]

CONCLUSION

Those who support the modern trend of increased sentences by conflating possession of child pornography with child sex abuse would likely dismiss many of the arguments in this Article. The lack of empirical support for a link between possession of child pornography and child sex abuse does not, in their view, suggest that lengthening sentences for

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sentence outside of the Guideline range when "certain aspects of the case [are] . . . unusual enough for it to fall outside the heartland of cases").

206. *See supra* notes 44, 67, 68, 118, 120.

207. *See, e.g.*, United States v. Cruikshank, 667 F. Supp. 2d 697 (S.D. W. Va. 2009); United States v. Beiermann, 599 F. Supp. 2d 1087, 1110 (N.D. Iowa 2009); United States v. Grober, 595 F. Supp. 2d 382, 404 (D.N.J. 2008); United States v. Johnson, 588 F. Supp. 2d 997, 1004–05 (S.D. Iowa 2008); United States v. Hanson, 561 F. Supp. 2d 1004, 1011–12 (E.D. Wis. 2008); United States v. Grinbergs, No. 8:05CR232, 2008 WL 4191145, at *9 (D. Neb. Sept. 8, 2008); United States v. Ontiveros, No. 07-CR-333, 2008 WL 2937539, at *5 (E.D. Wis. July 24, 2008); *see also* Amir Efrati, *Judges Trim Jail Time for Child Porn*, WALL ST. J., Jan. 19, 2010, at A2 (describing cases); Hansen, *supra* note 40 (same). Perhaps even more noteworthy is a recent Second Circuit decision vacating a lengthy sentence for possession of child pornography: the district court had premised the lengthy sentence on a conclusion that the defendant was a "pedophile," a conclusion that the appellate court found to be unsubstantiated. United States v. Dorvee, 616 F.3d 174, 183–84 (2d Cir. 2010). *Cf.* United States v. Olhovsky, 562 F.3d 530 (3d Cir. 2009) (reversing sentence where district court had based its sentencing in child pornography case, at least in part, on whether defendant posed a future risk of pedophilia, but had failed to subpoena psychologist who had treated defendant and who would have testified favorably about defendant's response to treatment).

possession is improper; rather, they see it as an obligation of those who would have shorter sentences to demonstrate that there is no link.[208] Because the crime of child sex abuse is so terrible, and because longer sentences might promote public safety, those who support the modern trend have a very appealing and emotionally powerful argument in favor of modern sentencing severity.[209]

These broad claims of public safety and the horror of child sex abuse are dangerous tools in the public discussion about sentencing severity. Some dark moments in U.S. history—such as the Japanese internment camps,[210] McCarthyism,[211] and the recent torture of terror suspects[212]—can be traced to arguments that also relied on claims of public safety threats. We are now imprisoning individuals who possess child pornography for up to two hundred years on the theory that they pose a risk of committing contact offenses. Those who want to impose sentences well above what is imposed for serious violent crimes, including second-degree murder and kidnapping, should bear the political burden of demonstrating that there is a verifiable risk before we equate possession of child pornography with child sex abuse. Equating the possession of images with contact offenses not only raises concerns about proportionality and due process, but such conflation can also lead to misperceptions about who commits contact offenses and about the effectiveness of law enforcement in detecting and

208. *See, e.g.*, GELBER, *supra* note 40, at 6 (arguing that one cannot claim those who possess child pornography pose no threat of physical harm to children because "there is no published research on the odds that viewers of child porn will actually assault a child" and noting that the "lack of definitive information does not stop . . . countless defendants from repeatedly making the self-serving argument that they are not a threat to children"). Complicating this matter is the fact that the Supreme Court in *Osborne* appears to have assumed that this empirical support exists. Osborne v. Ohio, 495 U.S. 103, 111 n.7 (1990). Whether there is a relationship between possession of child pornography and child sex abuse is undoubtedly a legislative (rather than adjudicative) fact. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–03 (1942). However, if Supreme Court dicta about such a relationship appeared in the decision that permits states to criminalize the personal possession of child pornography, then it seems all the less likely that legislators, who are politically accountable, are likely to revisit such an unpopular issue.

209. Indeed, in making that argument, supporters will often devote significant time and energy describing the horrible sex acts portrayed in various images found in the collections of those convicted for possessing child pornography. *See, e.g.*, GELBER, *supra* note 40, at 1–2; WOLAK ET AL., *supra* note 70, at 27. After listening to descriptions of such images, it is difficult to attempt to engage in a reasoned discussion about whether criminal penalties have become too high without sounding rather heartless.

210. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 217–20 (1944).

211. *See, e.g.*, Dennis v. United States, 341 U.S. 494 (1951); Max Rosenn, *Presumed Guilty*, 56 U. PITT. L. REV. 535, 537 (1995).

212. *See, e.g.*, Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45; David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1436–40 (2005).

prosecuting contact offenses. Those misperceptions may, in turn, adversely affect the rates of child sex abuse offenses.

I do not underestimate the disgust that possessors of child pornography inspire, nor the political forces allied against them. I do not suggest that legislatures legalize the possession of child pornography. Nor do I advocate a return to the days when the offense was classified as a misdemeanor and punished only with nominal sentences. Nonetheless, the modern trend in sentencing for child pornography possession has reached a point that seems absurd. The modest reforms I suggest in Part IV would help to curb the worst excesses of the modern trend. And, most importantly, they would help to maintain the distinction between possession of child pornography and child sex abuse.