INTRODUCTION

Child sexual exploitation is a master narrative of contemporary culture.1 In recent years, media outlets have highlighted heinous acts of strangers kidnapping and molesting children. This attention helped usher in a moral panic about sexual predators threatening the nation's...
children. Concerns about “stranger danger” and the threat of the sexual predator present contrasting repercussions. On the positive side, policymakers have formally addressed the issue by strengthening laws to combat child sexual exploitation and by equipping law enforcement agencies with the tools to pursue individuals who sexually transgress against children. The contrasting negative side is the potential for net-widening, whereby low-risk individuals and relatively harmless behaviors are unnecessarily included within a punitive regime. The net-widening policy of concern here is the wholesale inclusion of child pornography offenses as a genre within the child sexual exploitation initiative. Such a policy represents a deontological perspective that judges all sexual images of children as immoral and therefore deems anyone who views such images as a criminal, who deserves strict punishment regardless of the consequences of his actions. It is likely that the discomfort that adults in modern society have about the combination of youth and sex has prevented open and realistic discussion on various aspects of what is a more complicated and diverse topic than has been assumed. For example, hypothetical variations in terms of normative and risk-relevant issues include:

- the viewer who is an eighteen-year-old male, thirty-year-old female, or a fifty-year-old male;
- the child is age six, eleven, or seventeen;
- and the picture is morphed to appear sexually explicit, is of a naked child alone, or is of a child being sadistically penetrated by an adult.²

The public and government officials have embraced the politics of fear regarding child sexual abuse. A U.S. legislator’s recent statement in a congressional hearing is indicative: “The sexual exploitation of our children is a criminal problem; it is a social problem; it is a human rights problem.”³ Hence, during the last decade, federal authorities spearheaded collaborations with international and state agencies to employ holistic initiatives to combat child sexual exploitation.⁴ Substantial resources are now focused on investigating, prosecuting, and punishing offenders

² See infra notes 271–78 and accompanying text exploring these issues.
who commit sex crimes against children. The recent implementation of such initiatives is largely due to a commonly espoused fear that the sexual abuse of children by strangers is on the rise. More specifically, the perception is based on the view that modern society has bred a new form of sexual predator, usually conceptualized as a stranger who anonymously seeks out children as potential sexual abuse victims. For example, a congressman implored his colleagues at a recent hearing to continue federal efforts targeting sexual crimes against children by asserting that there exists practically “an epidemic of young children being kidnapped by sex offenders.” The stereotypical image of the modern sexual predator is one who is also preoccupied with child pornography. Various commentators argue that the material whets predators’ sexual appetites and is useful in grooming children for sexual liaisons. Others highlight the market theory, in which child pornography consumers increase the demand for production, leading to the sexual exploitation of more children.

The proliferation of the Internet plays a significant role in the belief that methods of child sexual exploitation are evolving and expanding and that the use of child pornography is at its core. The Internet offers what has been called the “triple A engine” of anonymity, availability, and affordability that is fueling addictive behavior involving cybersex.

As a consequence, voluminous collections of child pornography are trafficked online. As the longtime leader of the National Center for

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5 Id. at 1 (“Because the sexual abuse and exploitation of children strikes at the very foundation of our society, it will take our entire society to combat this affront to the public welfare.”).

6 One congresswoman has described the distribution of child pornography as “a problem that has gotten completely out of control[,]” which has led to the stalking and abduction of millions of children by sexual predators. 153 CONG. REC. H13585 (daily ed. Nov. 13, 2007) (statement of Rep. Wasserman Schultz).


9 Neutze et al., supra note 1, at 213.

10 See, e.g., United States v. Colbert, 605 F.3d 573, 578 (8th Cir. 2010) (“Child pornography is in many cases simply an electronic record of child molestation. Computers and internet connections have been characterized elsewhere as tools of the trade for those who sexually prey on children.”).

11 Al Cooper, Sexuality and the Internet: Surfing into the New Millennium, 1 CYBERPSYCHOLOGY & BEHAV. 187 (1998).

12 JANIS WOLAK ET AL., CRIMES AGAINST CHILDREN RESEARCH CTR., TRENDS IN ARRESTS OF “ONLINE PREDATORS” 1 (2009), available at http://unh.edu/ccrc/pdf/CV194.pdf (“Publicity about ‘online predators’ . . . has raised considerable alarm about the extent to which Internet use may be putting children and adolescents at risk of sexual abuse and exploitation . . . . Media
Missing and Exploited Children recently explained: “Anyone can be exposed to child pornography online very, very easily . . . we’re growing sexual abusers. They’re growing. They’re being cultivated and nurtured and watered and fed on the Internet.”¹³ Similarly, Congressman Lamar Smith refers to the Internet as a “virtual playground for sex predators and pedophiles.”¹⁴ The U.S. Department of Justice (DOJ) evidently concurs, warning that Internet-facilitated sexual crimes against children pose a national crime problem; one that the agency asserts is rapidly expanding.¹⁵

This Article provides theoretical, empirical, and practical critiques of the child pornography crusade and concludes that the movement is overinclusive. Proponents of the crusade ignore contextual and personal considerations that suggest that not all individuals who view such materials are dangerous and that all acts that technically constitute pornography do not necessarily pose the same harm or risk to children. This Article will proceed in the following manner. Part I summarizes the legal and policy initiatives driving the child pornography crusade. Part II summarizes policy-makers’ journey, incorporating child pornography into the broader effort of combating child sexual exploitation. Legislatures expanded the reach of child pornography laws and adopted a strictly punitive position while law enforcement officials centered initiatives on pursuing child pornography offenders. Notably, the focus on child pornography and on imposing increasingly harsh consequences on offenders who violate child pornography laws is not limited to those who produce child pornography or who otherwise coerce or entice juveniles into performing sexually explicit acts. Moral entrepreneurs have ensured that strict enforcement and punitive measures are extended to distributors as well as to more passive possessors. Indeed, authorities often discuss possession and distribution of child pornography in the same breath as production and solicitation offenses, which involve direct sexual contact with minors.¹⁶ Policy-makers have undertaken a

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¹⁴ Data Retention as a Tool for Investigating Internet Child Pornography and Other Internet Crimes: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 112th Cong. 4–5 (2011) (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary, proclaiming that the Internet has given predators free reign for “nearly effortless trafficking of child pornography,” leading to the loss of children’s innocence as well as their lives).


relatively undifferentiated, moralistic approach in which child pornography offenses are universally perceived as heinous and violators condemned as child abusers.17

Interested observers offer another explanation for the policy. Lawmakers and law enforcers often conflate child pornography consumption with contact sex offending against children such that child pornography offenses are generically used as a proxy to incapacitate undetected child molesters.18 The reason for this conflation is the widespread, ostensibly “common sense” belief that child pornography offending is strongly correlated with hands-on offenses against children.19 In support of this position, numerous legislators and criminal justice officials in recent years have cited social science evidence that purports to provide empirically objective support for interrelationships among child pornography consumption, pedophilia, and child molestation. This Article addresses this conflation issue in Part III by critically analyzing some of the most commonly cited studies. This endeavor is important to various constituencies. If the empirical evidence cited so often is significantly flawed or incorrectly interpreted, then efforts and resources that target and severely punish child pornography consumers may be misplaced.

More practical considerations are also considered in Part IV to explain why a deontological approach provides a misguided policy. To illustrate, national statistics indicate that the fear of sexual predators is overhyped. As this Article will further explore, the current situation is exemplary of the net-widening consequence whereby the expansion of formal criminal justice responses ensnares far more people, such as youth engaging in “sexting,” with greater punishment than is necessary.
to protect the public from those who would commit contact sexual offenses against children.20

I. LEGAL INITIATIVES IN THE CHILD PORNOGRAPHY CRUSADE

The trajectory that led to current policies regarding child pornography is marked by media hype and the occurrence of similar interests aligning between politicians and law enforcement officials. As child pornography is the most visible type of child sexual exploitation offense, it seems to have adopted the status of a signal crime,21 acting as an alarm to society that children are in danger. Thus, federal and state legislatures have enacted numerous laws expanding the reach of child pornography laws and enhancing punitive consequences. Armed with both legal authority and strong political endorsements, law enforcement agencies have orchestrated expansive international, national, and local collaborations to enforce laws and pursue offenders. This Part summarizes the legislative and law enforcement initiatives driving the child pornography crusade.

A. Child Pornography Laws

It is clear that recent efforts aimed at combating child sexual exploitation have focused specifically on child pornography. At the federal level, Congress has enacted multiple pieces of legislation over time that have expanded the reach of child pornography laws and increased the role of incapacitation for violators. The federal effort essentially began with the passage of the Protection of Children Against Sexual Exploitation Act of 1977, which outlawed the commercial production of obscene visual images involving minors, who were then defined as persons under the age of sixteen.22 The Child Protection Act of 1984 made three significant changes to federal child pornography laws: it removed the obscenity requirement such that production and distribution of a por-

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20 See, e.g., Kimberly J. Mitchell et al., Growth and Change in Undercover Online Child Exploitation Investigations, 2000–2006, 20 POLICING & SOC’Y 416, 429 (2010) (“Overall, Internet offenders, and particularly those caught in undercover ‘sting’ operations, are not generally as impulsive, aggressive or violent as non-Internet sex offenders or those who are known to have physically victimised children and youth. Furthermore, the widening net created by expanding undercover operations and resources appears to be pulling in greater numbers of less hardened and younger offenders.” (citation omitted)).


nographic image of a minor is illegal even if it does not rise to the higher standard of obscenity; it eliminated the commercial element requirement; and it raised the age of a minor to eighteen.23 A few years later the Child Protection and Obscenity Enforcement Act of 1988 extended child pornography laws to the use of a computer to transport, distribute, or receive the illegal material.24 Simple possession was likewise criminalized in the Crime Control Act of 1990.25

Congress then seemed to refocus child pornography legislation with its morally repugnant tone from the harm that children actually suffer to concentrating on offenders and their actions. In the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Congress created the crime of pandering material in a manner that reflects the belief, or that is intended to cause another to believe, that it contains child pornography.26 This Act, therefore, criminalizes attempts to trade material that does not involve any actual children as long as a party to the transaction believes or asserts that it does.27 Recently, the PROTECT Our Children Act of 2008 proscribed the production or distribution of a pornographic image that was adapted from a picture of an identifiable minor.28 In other words, it is a criminal offense to take an otherwise innocent, even fully clad, picture of a juvenile and morph it to appear sexually explicit. As the federal government’s own Citizen’s Guide to child pornography laws warns, a visual depiction constitutes child pornography even if it does not include a child engaging in sexual activity; it is enough if a naked picture is “sufficiently sexually suggestive.”29 Lawmakers have not tired of this issue. In 2011, legislation further extending the reach of punishing child

23 Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. §§ 2251–2253 (2006)). A depiction of a sexual activity is obscene if, taken as a whole, it appeals to the prurient interest of the average person, is patently offensive, and contains no serious literary, artistic, political, or scientific value. Miller v. California, 413 U.S. 15, 24 (1973). Currently, the federal definition of pornography involving children is tied to “sexually explicit conduct,” which means “(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C. §§ 2256(2)(A), 2256(8) (2006).


pornography offenders was pending before the 112th Session of Congress.30

Federal prison sentences for child pornography offenders have been extended as well.31 Congress established in 2003, for example, mandatory minimum sentences of five years for receipt and distribution offenses, with a maximum of twenty years.32 For offenders convicted of possession, receipt, or distribution of child pornography (i.e., excluding production cases), the mean sentence has risen in a relatively steady fashion from approximately twenty-one months in 1997 to ninety-two months in 2008.33 Federal sentencing statistics for fiscal year 2010 indicate the continued severity of sentencing for child pornography offenses and offer a comparative perspective to other serious crimes. The mean sentence in 2010 for nonproduction child pornography offenders approached a ten-year term—specifically, 118 months.34 Interestingly, this is longer than the mean sentence of 108.6 months issued by federal judges in 2010 for contact sexual abuse crimes.35 The mean sentence for child pornography offenders (nonproduction) was also greater than most serious crimes, including manslaughter, robbery, arson, and drug


35 Id. For this analysis, the sourcebook indicates that sexual-abuse offenses included those involving the crimes of sexual abuse of a minor, transportation of minor for sex, sexual abuse of a ward, criminal sexual abuse, and abusive sexual contact, but excluded child pornography offenses. Id. app. A, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Appendix_A.pdf.
trafficking. Murder and kidnapping were the only types of offenses that exceeded mean and median sentences in comparison to child pornography offenses.

Child pornography law violators are treated similarly to hands-on sexual abuse perpetrators in receiving harsh treatment in bail proceedings. In the federal system, child pornography offenses are specifically included in the category of “crimes of violence” for purposes of pretrial release decisions. Unlike the default authorizing pretrial release, most child pornography charges are included in the list of offenses for which defendants are expected to be detained until trial. This operates through a statute-based rebuttable presumption that, for these types of charges, there is no condition or combination of conditions of release that would reasonably assure the safety of the community from the accused. Other crimes on the list for limited pretrial release include sexual trafficking of children, terroristic offenses, drug trafficking, and other capital offenses. In addition, if the judge determines that pretrial release is appropriate in the individual case, federal law provides another rebuttable presumption for defendants charged with receipt and distribution of child pornography crimes that specific release conditions are necessary for public safety. The mandatory release conditions include electronic monitoring; restrictions on personal associations and travel; curfews; and limitations on possessing dangerous weapons—all of which also apply to those who are charged with kidnapping, sexual trafficking of children by force, and aggravated sexual abuse.

Violators of child pornography laws, even mere possessors, are likewise eligible, as are contact sex offenders, for certain civil-based re-

36 Id.
37 Id. Further, except for kidnapping, child pornography offenders were most likely to receive a prison sentence; and 98.6% of nonproduction child pornography offenders were given a prison term as a part of their sentences. This percentage slightly exceeded the likelihood of a prison sentence for those convicted of offenses involving murder, sexual abuse, robbery, arson, and drug trafficking. Id. tbl.12, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table12.pdf.
39 Id. § 3142(e)(3)(E).
42 Id. § 3142(c)(1)(B) (“In any case that involves a minor victim under section 1201 [kidnapping], 1591 [sexual trafficking], and 2241 [aggravated sexual abuse] . . . of this title . . . any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).’’).
strictions. These include indefinite sexual predator civil commitment\textsuperscript{43} and sex offender registration requirements.\textsuperscript{44} Together with lengthy sentences and presumptions of danger for bail decisions, the current policies confirm the legislature’s shifting focus from the suffering of actual children to the depravity and recidivism risk of offenders.

Each state has enacted child pornography crimes as well. State laws often grade the severity of the more passive types of child pornography offending similarly to crimes involving production or enticing. For example, several states’ statutory framework expressly labels possession of child pornography as criminal sexual exploitation of children.\textsuperscript{45} More specific examples help illustrate this perspective. Florida assigns the same degree of felony, which carries a fifteen-year sentence, to the possession of three or more representations of sexual conduct by a child as it does for employing a child to engage in a sexual performance.\textsuperscript{46} In Montana, a possible 100-year sentence applies to the duplication of a recording of a child engaging in simulated sexual conduct, the same sentence permitted for procuring a child under age sixteen for the purpose of child pornography production.\textsuperscript{47} Similarly, in Arizona, possession of a visual depiction of a child under age fifteen engaging in sexual conduct is a class two felony, carrying a ten-year minimum sentence, a punishment which also applies to filming a minor in exploitative exhibition.\textsuperscript{48}

Consistent with continuing congressional interest, state authorities remain active in prioritizing efforts to combat child pornography. Recent pronouncements include bills to expand child pornography crimes in Illinois,\textsuperscript{49} Oregon,\textsuperscript{50} and Alaska.\textsuperscript{51}

\textsuperscript{43} Two recent cases refer to defendants with child pornography possession convictions who have been civilly committed. See United States v. Comstock, 627 F.3d 513 (4th Cir. 2010); United States v. Bolander, No. 01-CR-2864-L, 2010 WL 5342202, at *1 (S.D. Cal. Dec. 21, 2010).


\textsuperscript{45} IDAHO CODE ANN. § 18-1507 (West 2011); IND. CODE ANN. § 35-42-4-4 (West 2011); KAN. STAT. ANN. § 21-3516 (West 2011); N.M. STAT. ANN. § 30-6A-3 (West 2011).

\textsuperscript{46} FLA. STAT. ANN. § 827.071 (West 2011).

\textsuperscript{47} MONT. CODE ANN. § 45-5-625 (West 2011).

\textsuperscript{48} See ARIZ. REV. STAT. § 13-3553 (2011); see also id. § 13-705. In addition, Mississippi law provides for a five to forty-year sentence for the receipt of a drawing of a child engaged in sexually explicit conduct, the same sentencing as for producing child pornography by causing a child to engage in sexually explicit conduct through film. See MISS. CODE ANN. §§ 97-5-33, 97-5-35 (West 2011).

B. **Law Enforcement Initiatives in the Child Pornography Crusade**

In addition to strengthening child pornography laws, the United States devotes significant resources to locating and prosecuting those involved in the child pornography market. The Internet Crimes Against Children (ICAC) task force is a national network of state and local law enforcement units investigating online child sexual exploitation, including cyber enticement and child pornography cases.\(^{52}\) It is comprised of sixty-one coordinated task forces with over 2000 federal, state, and local law enforcement and prosecution agencies. ICAC arrests rose 150% between 2006 and 2010, with approximately 5300 arrests for child pornography–related offenses in 2010.\(^{53}\)

Each of the major law enforcement institutions of the federal government operates programs to combat child exploitation, and each has an emphasis on child pornography. The DOJ leads the most comprehensive initiative. In 2007, the DOJ announced that a priority goal of the agency was to combat child pornography, which was listed alongside priorities to combat terrorism, illegal drugs, and public corruption.\(^{54}\) Congress formalized the justice agency’s strategic role in this regard.

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\(^{50}\) H.B. 2463, 76th Legis. Assemb., Reg. Sess. (Or. 2011) (requiring computer technicians to report detection of child pornography on computers and imposing a maximum punishment of one year in prison, a $6250 fine, or both for failure to do so). In early 2011, the Attorney General of Oregon announced that it was his top legislative priority to change the state’s child pornography statute in view of a state supreme court decision interpreting the state’s law, which required proof that a defendant not only viewed child pornography online, but also intended to download it. Press Release, Or. Dep’t of Justice, Albany Man Sentenced to Prison in Child Pornography Case (Feb. 18, 2011), available at http://www.doj.state.or.us/releases/2011/rel021811.shtml.


\(^{52}\) See Program Summary: Internet Crimes Against Children Task Force Program, U.S. DEP’T OF JUSTICE, supra note 52.


Pursuant to the PROTECT Our Children Act of 2008, Congress tasked the DOJ with formulating and implementing a plan to combat child exploitation across the nation. The DOJ produced its initial strategy document in 2010, describing a holistic initiative, leveraging assets across the federal government in a coordinated manner and enlisting the assistance of numerous stakeholders, including federal agencies, investigators, and prosecutors, as well as academics, educators, social-service providers, and nongovernmental organizations (the “National Strategy”). Notably, child pornography is listed as a type of child sexual exploitation at the heart of the National Strategy’s focus.

Within the DOJ, the Federal Bureau of Investigation (FBI) and the U.S. Marshals Service, among other federal agencies, maintain investigative roles in the international effort to combat child sexual exploitation. High-ranking politicians intend to hold the agencies accountable. For example, in a public statement on March 16, 2011, the chairman of the House Judiciary Committee, Lamar Smith, called on the director of the FBI at a recent Oversight Committee hearing to address key threats to national security, those being terrorism and child pornography. With respect to the latter, Representative Smith expressed the need to control the fast-growing crime since pedophiles can access “this disturbing material with near impunity.” Responding before the Committee about the FBI’s institutional importance to the security of the country, the FBI’s director confirmed that online child pornography continued to be a priority enforcement effort for the Bureau.

The FBI has long been involved in a multiagency Innocent Images National Initiative, which combats the proliferation of child pornography and other child sexual exploitation crimes facilitated by the Internet.
From 1996 to 2007, the number of cases opened by the Initiative grew 2062%. In fiscal year 2007, over eighty percent of the Initiative’s investigations involved child pornography crimes, almost half of which were nonproduction cases. The FBI’s director estimates that the agency has a current caseload of 6000 child pornography investigations. For its part, the Marshals Service is mandated by Congress to locate and apprehend those who fail to comply with federal and state sex offender registry requirements. Marshals arrested over 11,000 sex offenders in 2010.

Other federal agencies are also involved in the National Strategy. The Department of Homeland Security charges its principal investigative agency, Immigration and Customs Enforcement (ICE), with a priority of investigating child sexual exploitation through an effort called “Operation Predator.” An ICE director notes the “vast majority” of the investigations are online child pornography cases, while only a subset involves active physical abuse. In 2010, ICE agents made over 900 child pornography arrests. INTERPOL Washington systematizes international alerts concerning child exploitation information and tracks sex offenders across borders. In addition, it assists in the National Strategy by coordinating with other agencies in investigating child sexual abuse images circulating on the Internet.

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65 See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE FEDERAL BUREAU OF INVESTIGATION’S EFFORTS TO COMBAT CRIMES AGAINST CHILDREN (2009), available at http://www.justice.gov/oig/reports/FBI/a0908/chapter2.htm#VI (combining figures for groups and enterprises, producers, and possessors). The other category recognized was online enticers of children for sexual encounters. Id.

66 Mueller, supra note 62, at 89 (indicating also that for fiscal years 2009 and 2010 the initiative made more than 2000 arrests and obtained 2500 convictions).

67 NATIONAL STRATEGY, supra note 4, at 46.


69 See FACT SHEET: OPERATION PREDATOR, supra note 16.


71 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 53, at 55.

72 See NATIONAL STRATEGY, supra note 4, at 5.

73 The United States Postal Inspection Service has its own division that investigates the transmission of child pornography materials through the mail. See U.S. Postal Inspectors Protect Children, U.S. POSTAL INSPECTION SERV., https://postalinspectors.uspis.gov/investigations/MailFraud/fraudschemes/ce/CE.aspx (last visited Mar. 24, 2012) (boasting that it “was the first federal law enforcement agency to aggressively identify, target, and arrest those who produce and traffic in child pornography”).
Additional investigation and prosecution statistics confirm the focus on the more passive child pornography offenses in the nation’s battle against child sexual exploitation. For example, the Urban Institute tracked federal data on child sexual exploitation offenses from 1998 to 2005. The number of cases that U.S. Attorneys investigated and concluded doubled over the time period studied. It is of interest that the vast majority concerned nonproduction child pornography offenses. In fact, in the latest review year, there were almost three times as many non-production child pornography cases than all other child sexual crimes combined (including sexual abuse, prostitution, trafficking, etc.). The Urban Institute also reports that of the federal cases actually filed by U.S. Attorneys in 2005 for child sexual exploitation offenses, almost three-quarters were for nonproduction child pornography charges. Recent statistics on federal sentencing show a similar disproportionate concentration on cases without direct child contact. In 2010, the number of defendants sentenced for nonproduction child pornography crimes was nearly five times the number of defendants sentenced for child sexual abuse offenses.

The United States is not alone in embracing child pornography investigations as a criminal justice priority. In 2009, the G8 superpowers—comprised of the world’s top industrialized nations, including the United States—held the Global Symposium for Examining the Relationship Between Online and Offline Offenses and Preventing the Sexual Exploitation of Children. The symposium featured the empirical research analyzed in Part III below. In any event, based in part on the empirical presentations, the G8 ministers issued a public statement after the sym-

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75 Id. at 5.
76 Id. In 2008 and in the first six months of 2009, ICAC had investigated 53,160 child sexual exploitation offenses. Of these offenses, 33,938 involved possession or distribution of child pornography. See NATIONAL STRATEGY, supra note 4, at 17.
77 KEVONNE SMALL ET AL., URBAN INST., AN ANALYSIS OF FEDERALLY PROSECUTED CSEC CASES SINCE THE PASSAGE OF THE VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, at 21 (2008), available at https://www.ncjrs.gov/pdffiles1/ojjdp/grants/222023.pdf; see also William Adams et al., supra note 74; see also KEVONNE SMALL ET AL., supra note 77, at 26 (providing more detail underlying these statistical results).
78 U.S. SENTENCING COMM’N, supra note 34.
80 ANDREW G. OOSTERBAAN & ANITHA IBRAHIM, CHILD EXPLOITATION & OBSCENITY SECTION, U.S. DEP’T OF JUSTICE, REPORT TO LEPSG ON THE “GLOBAL SYMPOSIUM FOR EXAMINING THE RELATIONSHIP BETWEEN ONLINE AND OFFLINE OFFENSES AND PREVENTING THE SEXUAL EXPLOITATION OF CHILDREN” 4 (2009), available at http://www.iprc.unc.edu/G8/FinalReport.pdf (“The purpose of the symposium was to provide an opportunity for [] experts to share their individual findings and develop international consensus on the risks to children associated with child pornography and effective approaches to combating child pornography offenses.”).
posium, which warned that every country needed to immediately bolster its effort to combat child sexual exploitation. Specifically, the statement advocated the pursuit of Internet child pornography offenders who, the prestigious group asserted, pose a new threat to children worldwide.81

Thus, it is well established that criminal justice efforts and resources are currently employed against child sexual exploitation as a genre of crime. Assisted by moral entrepreneurship, campaigns against child sexual exploitation have concentrated specifically on child pornography offenses. Yet the campaigns have not limited their focus to producers who are directly involved with sexual contact offending against live children.82 Similarly, they are not limited to those who distribute offensive materials. Reflecting the policy refocus to offenders, individuals who receive or possess child pornography are being targeted as well, whether or not there is any evidence they had direct contact with child victims. Thus, in contrast to the original concentration on harm to actual children, the policy appears to be based largely on the immorality and perceived risk of consumers. As will be further explored in this Article, the primary explanation for the refocus is that officials often conflate child pornography with pedophilia or child molestation. In other words, several interconnected presumptions are made. These include:

1. Child pornography offenders are undetected child molesters.83
2. Child pornography offenders are pedophiles.84
3. Child molesters are pedophiles.85

81 G-8 Justice & Home Affairs Ministers, Ministers’ Declaration: The Risk to Children Posed by Child Pornography Offenders 1–2 (May 30, 2009), http://www.g8italia2009.it/static/G8_Allegato/Ministerxs_declaration_on_child_pornography.0.pdf (“While we recognize that all forms of child sexual exploitation require our concerted efforts, we also acknowledge that exploitation through child pornography raises new concerns and challenges, as well as poses new risks to children, particularly as a result of the use of new technologies, such as the Internet, to commit these offences [sic].”).

82 As distinguished from sexual-contact images that do not involve assaulting real children. See supra notes 26–29 and accompanying text.

83 See Dallas, supra note 8, at 52. Illinois passed legislation in April 2011 to lengthen sentences for possession of child pornography, with the Attorney General’s press release asserting that “[t]here is a direct correlation between individuals who possess, download and trade graphic images of child pornography and those who molest children.” See Press Release, supra note 49.


Commentators often rely on these presumptions to demonstrate the correlation between child pornography offenses and child molestation. As a commentator aptly observed, child pornography "laws are broad in scope to ensnare as many pedophiles and potential child predators as possible." The next Part challenges these presumed correlations.

II. A CRITICAL ANALYSIS OF EMPIRICAL STUDIES

The media energized the public's fear of a modern version of the sexual predator—one whom the Internet enables by providing multiple avenues for the sexual exploitation of children. As outlined in the prior Part, policy-makers and law enforcement officials responded to the public's fear of the sexual predator, embracing the cause by implementing laws that have expanded the scope of child sexual exploitation crimes and initiatives that focus on pursuing and punishing offenders. Folding child pornography offenses entirely into child exploitation initiatives and applying a strict approach is a common theme at the international, federal, and state levels. This all-encompassing approach, which is moralistic and risk averse in nature, certainly has many proponents in the child pornography crusade. And they are eager to find a priori associations between child pornography consumption, pedophilia, and contact offending. As a congressman reflected:

It is imperative to make the linkage between pornography, online exploitation, and all other forms of sexual exploitation of children in order to have a holistic approach to combat domestic sex trafficking. The Internet has become a marketplace for the trafficking of children for sex and thus we must regulate its content in an effort to end the online marketing of our children.

Similarly, several federal courts have ruled, seemingly as a matter of law, that there is no categorical distinction between child pornography possession and direct sexual contact against a child that would justify disparate treatment in terms of risk.

Kimpel, supra note 84, at 310.
88 In Our Own Backyard, supra note 3, at 50 (statement of Sen. Sam Brownback, S. Comm. on the Judiciary).
89 See, e.g., United States v. Colbert, 605 F.3d 573, 578 (8th Cir. 2010); United States v. Houston, 754 F. Supp. 2d 1059, 1062–63 (D.S.D. 2010) (recognizing that the Eighth Circuit does not accept a distinction between possession of child pornography and sexual exploitation, but stating that this lack of distinction will not always create "probable cause for a search for child pornography"); United States v. Lebowitz, 647 F. Supp. 2d 1336, 1354 (N.D. Ga. 2009). The Second and Sixth Circuits disagree. Compare United States v. Falso, 544 F.3d 110, 123 (2d
But some officials are not convinced. While sentencing a child pornography defendant, a federal judge recently expressed his “hope that Congress or the [U.S. Sentencing] Commission will address the undifferentiated treatment of the dissimilar group of sex offenders.”

Other judges communicate a desire that empirical research could better assist them in understanding the criminogenic risks that various types of child pornography offenders likely present. Federal District Judge Jack Weinstein providently warns: “Projections of future criminality based on general research should be encouraged . . . in deciding on specific sentences. Yet, misuse of the data . . . can be dangerous.” It is timely, then, to challenge the current criminal justice policy, with its relatively uniform approach, considering the vast resources being spent on the cause and on the intrusion upon liberty and privacy interests of individuals ensnared in the child pornography crusade. As demonstrated, the uniformity of the current approach relies in some measure upon the purported empirical connection among child pornography consumption, pedophilia, and child molestation.

This Part provides a critical analysis of salient research studies that are repeatedly cited as objective evidence supporting the position that child pornography consumers are high-risk offenders. In the overall debate about the efficacy of encompassing child pornography offenses within the seemingly deontological approach and its strict, punitive tone, two empirical efforts in particular resonate with politicians, judges and lawyers, law enforcement personnel, and other interested parties. The official report from the G8 superpowers’ 2009 symposium on child sexual exploitation demonstrates the international consensus that has
equated child pornography possessors with pedophiles and child molesters. Many have, rather uncritically, accepted these studies as providing empirical support for correlations between child pornography and child molestation, for one, and between child pornography and pedophilia, for another. First, commentators often refer to research conducted at the federal prison located in Butner, North Carolina as proving the correlation between child pornography offending and child molestation. Conducted within an intensive, residential sex offender treatment program, researchers found that the vast majority of those imprisoned for a child pornography offense admitted to also having previously committed one or more contact sexual offenses against children. A second study of interest purports to establish the second correlation. Based on phallometric testing of a subsample of child pornography offenders, researchers found that most of them sexually responded to pedophilic stimuli in ways that were positive indicators of pedophilia. The critical analysis offered here provides a contextualized examination of the studies’ methodology and results, and expounds upon their potential limitations. As further addressed below, misinterpretations and overgeneralization of the studies are commonplace.

A. The Butner Federal Prison Studies

The research at the Butner Federal Prison comprises two related studies, with the initial results publicized in the year 2000 and a follow-up study released nine years later (collectively, the “Butner Studies”). A single researcher, who was also the director of the treatment program,
was the sole author of the first study. Another program specialist joined him in publishing and reporting the latter study. In any event, the initial results were presented at a conference in 2000 for sex offender treatment clinicians (the “2000 Butner Study”). The study’s sample consisted of offenders admitted into the Butner residential sexual offender treatment program. Researchers sought to elicit information on contact sex offenses previously committed by the participants. Program participants were assigned to one of the following three groups based on their conviction offense(s): (a) child pornography or traveling across state lines to sexually abuse a child (the child porn–travel group); (b) contact sex offenses, involving either a child or adult; or (c) other, nonsexual offenses (the other group, which included such crimes as bank robbery, mail fraud, and drug trafficking). Data on prior contact offenses included those already known by authorities plus those that were previously unknown but which were self-reported during the course of the treatment program.

The 2000 Butner Study reported that of the sixty-two offenders placed in the first group (child porn–travel), thirty-six had no known contact offenses. Twenty-one of those thirty-six offenders admitted to having at least one contact victim that was previously unknown. The number of prior contact offenses also rose significantly through self-report. While there were fifty-five previously known contact sex offenses in the child porn–travel group, after self-reports during treatment, the total number of prior contact offenses rose to 1434. The end result averaged 30.5 victims per offender with contact victims. Consequently, the study’s author concluded that seventy-six percent of Internet sexual offenders (i.e., the child porn–travel group) were also sexual contact offenders. He also opined that the results indicated that many Internet sexual offenders “can be equally predatory and dangerous as extra-familial molesters.”

97 HERNANDEZ, supra note 95, at 1.
98 See id. at 2.
99 Id. at 3.
100 Id. at 2.
101 Id. at 5.
102 Id. at 4.
103 Id. at 5. Comparatively, the contact sex offender group (n=24), admitted to an average of 9.6 contact victims and the other group (n=4) averaged 15.5 contact victims. Id.
105 HERNANDEZ, supra note 95, at 6.
The follow-up Butner findings were published in 2009 (the “2009 Butner Study”). This report audited 155 prisoners in the treatment program over a three-year period. The criteria for the sample changed, and was composed of offenders with nonproduction, child pornography convictions who had a six-month tenure in the treatment program. The 2009 Butner Study results were generally consistent with the 2000 report. The more recent results indicated that while twenty-six percent of the child pornography offenders had previously known contact sex offenses, at the end of treatment eighty-five percent of offenders were known to have or admitted to having committed at least one contact sexual offense. The researchers reported that, for the group as a whole, there were 1777 victims, with an average of 13.56 victims per offender. In sum:

Our findings suggest that online criminal investigations, while targeting so-called “Internet sex offenders,” likely have resulted in the apprehension of concomitant child molesters. In fact, if it had not been for their online criminality, these offenders may not otherwise have come to the attention of law enforcement.

They further maintained that the results “challenge[] the often-repeated assertion that child pornography offenders are ‘only’ involved with ‘pictures[]’” and suggest that the Internet has not created a new type of sex offender, but merely permits child molesters to engage in a new type of offending, which involves child pornography.

1. Popularity and Ideology

The foregoing statements certainly offer fodder for the idea that a child pornography charge could validly serve as a proxy for child molestation. A news reporter reiterated that the Butner Studies provide

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106 See Bourke & Hernandez, supra note 95.
107 Id. at 186. The study used a single, combined category without providing information on the type of child pornography offenses involved. However, the category was described as those whose instant offense involved child abuse images, such as possession, distribution, or receipt of child pornography. Id.
108 Id. at 187.
109 Id. at 189.
110 Id. at 188.
111 Id. at 190; see also Milton J. Valencia, US Judges Balk at Rigid Child Porn Sentences, BOS. GLOBE, Feb. 12, 2012, at 1 (referring to the Department of Justice’s highlighting of the 2009 study results) (“I’m very cautious when I hear people use the term child pornography offender with this underlying assumption that they haven’t done anything else.” (quoting Michael Bourke, psychologist who conducted the study)).
112 The researcher reportedly knew that the 2000 Butner Study and its results “ha[d] been widely circulated and . . . widely relied on in criminal-justice circles.” Joseph S. Fulda, Internet
strong evidence that “shatters the myth” that child pornography viewers are merely viewing images, and instead confirms that these viewers are in fact contact offenders. Commentators have observed that the research confirms that child pornography viewing is “arguably tantamount to child abuse” and that child pornography consumers would molest children whenever the “opportunity arose.” The reported results are also described in such powerful terms as providing “disturbing new evidence” and indicating “a current cause for concern” that child pornography consumers pose a risk to children.

Various proponents endorse the Butner Studies as providing empirical support for the uniform strategy in the child pornography crusade. The DOJ’s National Strategy refers to these studies numerous times, using them as bases to focus attention on pursuing child pornography offenders and to make this mission a core emphasis in the country’s child sexual exploitation strategy. Professionals addressing a recent meeting of the international Interpol Specialist Group on Crimes against Children cited the 2009 Butner Study as showing that online child pornography trading was indicative of pathological paraphilic tendencies posing a grave danger to children. Lawmakers and criminal justice officials frequently cite the Butner Studies in congressional hearings to justify further strengthening child pornography laws and increasing sentences against violators. In congressional testimony in


116 McBath, supra note 40, at 68.


118 NATIONAL STRATEGY, supra note 4, at 19 (citing the studies that affirm a “strong” and “significant” correlation between child pornography offenses and contact sex offenses against children).


2003, Senator Orrin Hatch cited the 2000 Butner Study as proof that child pornography offenders are sexual predators who deserve tougher penalties rather than the lenient sentences some judges were handing down.\(^{121}\) When queried by a member of the House Subcommittee on Crime, Terrorism, and Homeland Security as to whether there existed any proof of a correlation between child pornography offending and child molestation, an FBI official with the Crimes Against Children Unit confidently cited the earlier Butner Study as supporting his response of “a resounding and alarming—yes.”\(^{122}\) Similarly, an official with the Innocent Justice Foundation, a nonprofit organization that assists law enforcement in investigating child sexual abuse, stated that the 2009 Butner Study proved a “1-to-1 correlation between viewing child pornography and being a hands-on child molester,” meaning that criminal investigation efforts to prosecute child pornography consumers is “the only way we have to stop an epidemic of sexual abuse of American children.”\(^{123}\)

Law enforcement officials point to the Butner Studies to substantiate the theory that combating child pornography generally is necessary in the broader strategy of combating child sexual exploitation.\(^{124}\) A

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\(^{121}\) 149 CONG. REC. 5126 (daily ed. Apr. 10, 2003) (statement of Sen. Orrin Hatch); see also S. REP. NO. 112-96, at 33 n.6 (2011) (providing the minority views of Senators John Cornyn and Jon Kyl, who argued that federal judges are handing down sentences for child pornography offenders that are too lenient, and who cited the 2009 Butner Study as supporting the high risk that child pornography possessors are also contact offenders of children).

\(^{122}\) See Threats Against the Protection of Children: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary, 107th Cong. (May 1, 2002) (testimony of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, Fed. Bureau of Investigation, U.S. Dep’t of Justice), available at 2002 WL 844877. The unit chief’s testimony endorsing the Butner Studies has been influential with others. See United States v. Falso, 544 F.3d 110, 123 n.18 (2d Cir. 2008); United States v. Brand, 467 F.3d 179, 198 n.17 (2d Cir. 2006); Benjamin A. Mains, Virtual Child Pornography, Pandering, and the First Amendment: How Developments in Technology and Shifting First Amendment Jurisprudence Have Affected the Criminalization of Child Pornography, 37 HASTINGS CONST. L.Q. 809, 813 n.31 (2010).


\(^{124}\) See NATIONAL STRATEGY, supra note 4, at D-13 (referring to a threat assessment by the National Drug Intelligence Center in which thirty-six percent of prosecutors, investigators, and experts in child sex exploitation cited the Butner Studies as showing a correlation between child pornography and contact offenses and a corresponding need to lengthen sentences); see also Tim Vanderpool, Defending the Innocent: Child-Pornography Arrests and Prosecutions Are on the Rise—and Perhaps, on Occasion, Going Too Far, TUCSON WKLY., May 19, 2011, available at http://www.tucsonweekly.com/tucson/defending-the-innocent/Content?oid=2832889 (noting that every officer and agent interviewed had cited to the Butner Study to support the recent increase in child pornography prosecution); Ben Finley, Sentences for Child Porn Stir Debate, COURIER TIMES (Bucks County) (Feb. 6, 2011, update 5:00 AM), http://www.phillyburbs.com/news/local/courier_times_news/sentences-for-child-porn-stir-debate/article_429cafc5-cb66-5cb-bafo-afc3cb0626e.html (reporting that law enforcement officials cited the 2009 Butner Study to counter arguments that child pornography is not itself a risk factor for a hands-on sex offense); Jamie Satterfield, Local, National and Global Efforts Track Sex Offenders Who Prey on Children: Hunting Predators, KNOXNEWS.COM (May 18, 2008, 12:00 AM), http://www.
high-ranking administrator with the U.S. Marshals Service, the federal agency responsible for tracking and apprehending non-compliant and fugitive sex offenders, also strongly promoted the research and the utility of the information in testimony before a congressional hearing in 2011. In particular, the director of the Marshals Service touted the 2009 Butner Study as “noteworthy” in proving that people often “inaccurately conclude” that child pornography possessors are only viewers and not contact offenders. The official insinuated that the research was an essential part of the agency’s intelligence base: “Armed with this knowledge, the Marshals Service is better able to investigate these individuals, identify all the crimes which may have been committed, and ensure justice is served.” Law enforcement personnel have also testified that the research indicates that incapacitation is necessary for certain defendants.

The studies are enormously popular with prosecutors. Defense counsel in one case, for example, complained when the prosecution incorporated in its materials the Butner research results,

knoxnews.com/news/2008/may/18/hunting-predators/ (reporting the statewide supervisor of the Internet Crimes Against Children Task Force as referencing the study as showing that child pornographers “are acting on their desires and victimizing children”).


E.g., ALEXANDRA GELBER, CHILD EXPLOITATION & OBSCENITY SECTION, U.S. DEP’T OF JUSTICE, RESPONSE TO “A RELUCTANT REBELLION” 6 (2009), available at http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf (citing it as support that statistical evidence that child pornography consumers may also be child molesters); Troy Stabenow, A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines, 24 FED. SENT’G REP. 108 (2011) (“Prosecutors often cite the Butner Redux article authored by Bourke and Hernandez to support the proposition that child pornography possession is a nearly perfect proxy for past child molestation. From this proposition, the prosecutor then makes the argument, either explicitly or by implication, that a defendant charged with possession of child pornography ‘is statistically more likely than not to have actually committed [a past] act of [hands-on] child abuse’ and therefore deserves the most severe punishment available.” (alterations in original)); Tim McGlone, As Child Porn Activity Grows, Efforts to Trap Offenders Do, Too, VIRGINIAN-PILOT (Jan. 16, 2011), http://hamptonroads.com/2011/01/child-porn-activity-grows-efforts-_trap-offenders-do-too (indicating that prosecutors use the study to urge stiff prison sentences
which the government regularly throws out in these kinds of cases to support its assertion that defendants who possess child pornography are highly likely to perpetrate a contact sex offense in the future and probably committed such offenses in the past even if there is no documentation of such crimes.129

In another case, the prosecution argued that a defendant’s lack of a prior child molestation record should not be given substantial weight given that the research showed that the defendant himself was “statistically more likely than not to have actually committed [a past] act of [hands-on] child abuse.”130 There are other concrete examples of prosecutors expressly using the Butner Studies to support the incapacitation of child pornography consumers and protection of children.131 Prosecutors point to the research as demonstrating a causal132 or correlative link to child molestation.


129 Appellant’s Opening Brief, United States v. King, 378 F. App’x. 748 (9th Cir. 2010) (No. 09-50063), 2009 WL 6599074, at *34.

130 United States v. Johnson, 588 F. Supp. 2d 997, 1005 (S.D. Iowa 2008) (internal quotation marks omitted). The court rejected the prosecution’s suggestions: “The inference that the Government asks the Court to draw is distasteful and prohibited by law. Uncharged criminal conduct may generally only be considered in sentencing if proved by a preponderance of the evidence.” Id. In a similar vein, a district judge in another case was clearly offended by the prosecution’s use of the Butner research:

I found ironic the government’s argument that defendant had to be imprisoned because he may act (or perhaps already had acted) “on his impulses” (Govt.’s Sentencing Memorandum at 9), but that I could not consider that defendant had not committed a “more serious crime.” The government cannot have it both ways. The notion that a child pornography defendant has or will commit a contact offense is always lurking in the background in these cases. But courts should not assume that a defendant has or will commit additional crimes without a reliable basis.


132 See, e.g., United States v. Apodaca, 641 F.3d 1077, 1087 (9th Cir. 2011) (Fletcher, J., concurring). The prosecutor argued that the study was relevant since “[t]he district court was certainly not required simply to accept defendant’s self-serving claims that he does not have a sexual interest in children and would not pose a danger to the community once released from
The Butner Studies likewise resonate with judges in finding that child pornography consumers pose a danger to children. In a 2010 case, a federal judge recited that the 2009 Butner Study’s conclusion “challenges the often-repeated assertion that child pornography offenders are ‘only’ involved with ‘pictures.’” Policy commentators highlight the research, too, as demonstrating that child pornography consumers are dangerous. One commentator in particular asserted that sentencing judges who criticize sentencing guidelines as being too harsh are mistaken considering that the Butner research shows child pornography viewers pose a real danger to children.

Nevertheless, despite the popularity of the Butner Studies, they are often described in terms of misrepresented statistics, over-generalized results, and significant methodological limitations.

2. Problematic Interpretations

Observers repeatedly describe the Butner Studies’ results as erroneous. The 2000 Butner Study is commonly described as showing that seventy-six percent of online offenders had also engaged in contact sexual offenses against children. Similarly, the eighty-five percent post-treatment statistic from the 2009 follow-up is often described as being...
the percentage of child pornographers admitting to contact sexual offenses involving children. The problem is that both studies combined juvenile and adult victims into a single group. Thus, the numbers do not solely relate to children, but to any victim, regardless of age. Of course, sexual abuse against anyone is reprehensible, but because laws generally consider sexual offending against juveniles as significantly more severe, and therefore deserving of more punitive sentencing consequences, the distinction is relevant.

The operationalization (i.e., the researcher’s definition for the study) of the variable regarding contact sex offenses is troublesome as well. The researchers combined into a single category “any type of sexual assault or molestation of an adult or child” for the variable in the 2000 study and “any fondling of the genitals or breasts over clothing, as well as skin-to-skin contact” in the 2009 study. Thus, while readers may assume that the offenses involved some type of sexual penetration, many were likely of a less serious nature. It also seems possible that the contact offenses reported were not coercive or violent, but involved instances such as nonviolent statutory rape, consensual touching, or prostitution offenses. Several sex offender treatment counselors who have worked with Butner program participants note that the studies’ definition was “so ‘elastic’ that it covered incidents—such as a college freshman dating a high school junior—that the average person might...
not think of as sex offenses.” 142 In a public statement around the time of
the 2009 Butner Study was published, one of the Butner Study research-
ers admitted that a previously unreported analysis, using a subset (n=42)
of the 2009 study sample, revealed that the median age for the onset of
contact sexual offenses was sixteen years old, while onset of child po-
rnography was twenty-four years old. 143 This revelation certainly suggests
that the number of admitted contact offenses included a significant per-
centage that was committed when the sample subjects were themselves
underage. Put another way, these various observations may well mean
that a large number of the contact offenses included in the results were
not of the adult-on-child sexual-penetration type as may have been pre-
sumed. 144 In addition, the fact that the contact offending predated child
pornography offending by many years suggests that the critical risk fa-
ctor is the former rather than the latter. 145

3. Overgeneralization

From an empirical perspective, the samples are biased in part be-
cause they do not use representative samples or control groups. 146 In

142 Richard Wollert et al., Federal Internet Child Pornography Offenders—Limited Offense
Histories and Low Recidivism Rates, in 7 THE SEX OFFENDER 2-1, 2-13 (Barbara K. Schwartz ed.,
2011); see also Bourke & Hernandez, supra note 95, at 186 (noting the use of "liberal criteria").
The data for the contact offenses was based on a psychosexual history questionnaire. Andrés E.
Hernandez & Michael L. Bourke, The Sex Offender Treatment Program: PHQ Update Form
(Dec. 15, 2004) (on file with author). It is a forty-seven-page form with thousands of questions
requiring extremely specific information about the person’s entire sexual history. Id. The sexual
abuse and assault portion of the questionnaire ambiguously queries about whether the inmate
“sexually abused, molested, or assaulted” an adult or child, which does not necessarily limit
offenses to what might amount to criminal conduct. The types of descriptors the individual can
check include: fondling over the clothes, fondling under the clothes, digital penetration, object
penetration, penile penetration, cunnilingus, analingus, fellatio, and a blank for “other.” Id. at
29. As perhaps encouragement to list multiple victims, the form allows for three pages with
thirty rows of victim information and another three pages of tables to summarize the number
of victims and their specific categories. Id. at 31–36.
143 ANDRES E. HERNANDEZ, PSYCHOLOGICAL AND BEHAVIORAL CHARACTERISTICS OF CHILD
PORNOGRAPHY OFFENDERS IN TREATMENT 8–9 (2009), available at http://www.iprc.unc.edu/
144 The majority of sexual offenses that juveniles commit against other minors are not pen-
etrative, but involve fondling. David Finkelhor et al., Juveniles Who Commit Sex Offenses Against
227763.pdf.
145 But see E-mail from Gregory Schiller, Assistant State Att’y, Palm Beach Cnty., Fla., to
author (Aug. 9, 2011, 10:56 EST) (on file with author) (suggesting an alternative explanation
considering that the first offenses likely occurred at a time which preceded the proliferation
of the Internet and the widespread availability of online child pornography).
146 See Ian Friedman et al., Sexual Offenders: How to Create a More Deliberate Sentencing
Process, 33 CHAMPION 12, 13 (2009); James V. Ray et al., Legal, Ethical, and Methodological
Considerations in the Internet-Based Study of Child Pornography Offenders, 28 BEHAV. SCI. & L.
84, 91 (2010); see also Julia Davidson, Legislation and Policy: Protecting Young People, Sentenc-
addition, samples with convicted offenders are in general “necessarily skewed.” Selection effects amplify these problems. During the years when the data was collected, this program was the most intensive sex offender treatment program offered in the federal prison system. The program generally required eighteen months of treatment with fifteen programmatic hours per week of cognitive-behavioral programming in a group-based setting. Space was limited to 112 beds. As a result, offenders were selectively accepted only after they volunteered for admission and were individually screened and approved by departmental personnel. Additionally, offenders must have received at least a thirty-six-month sentence to be eligible. These offenders may well, then, have represented particularly dangerous offenders who were a high risk to children since they had been prosecuted, convicted, given more than minimal prison sentences, and accepted into the limited-space program because of a perceived need by themselves and program clinicians for a lengthy and intensive residential program.

A debate about this issue burdened the publication process for the 2009 Butner Study. When the study’s authors were attempting to publish it in a social science journal, Federal Bureau of Prisons officials ordered the submission withdrawn because the authors refused to add suggested limiting comments about the generalizability of the study’s results. Officials were “apparently concerned that the results might be misinterpreted.” As one Bureau spokesman explained: “We believe it is unwise to generalize from limited observations gained in treatment or in records review to the broader population of persons who engage in


148 Bourke & Hernandez, supra note 95, at 185.


150 The fact that the sex offenders in the sample were serving at least thirty-six months does not by itself necessarily indicate they were more dangerous than other convicted sex offenders in the federal system, considering the mean sentences overall for these crimes. See, e.g., supra notes 31–37 and accompanying text. Still, there is other evidence of the high-risk nature of sexual offending of those in the program. For example, the other group (n=4) (those whose conviction involved nonsexual offenses, such as bank robbery, fraud, or drugs) admitted to a more than 3000% increase in contact sexual offenses than previously known. See HERNANDEZ, supra note 95, at 4 fig.2, 5. While seventy-six percent of the child porn–travel group admitted to contact offenses post-treatment, a very similar seventy-five percent of them, of the nonsexual offenders, admitted to prior contact sexual offenses. Id. at 4–6.

151 Tori DeAngelis, Porn Use and Child Abuse: The Link May Be Greater Than We Think, a Controversial Study Suggests, 40 MONITOR 56, 56 (2009).

such behavior.” The journal published the 2009 Butner Study when the authors resigned from the prison system and undertook other employment.

Responding to the Bureau of Prison’s caution, one of the authors originally explained, paradoxically: “We felt it would have been scientifically incorrect to say the findings are not generalizable—we simply don’t know the degree to which the results are generalizable to other child pornography offenders.” But this view was quickly retracted. In a 2009 public presentation, that researcher strongly cautioned against using his research for broad claims about child pornographers:

Some individuals have misused the results [of the Butner studies] . . . to fuel the argument that the majority of [child pornography] offenders are indeed contact sexual offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence. The incidence of contact sexual crimes among [child pornography] offenders, as we reported in our studies, is important and worthy of considerable empirical examination. However, it is not a conclusive finding that can be generalized to all [child pornography] offenders. Notwithstanding, some individuals in law enforcement are tempted to rely on a biased interpretation of our study (i.e., to prove that the majority of [child pornography] offenders are child molesters).

He noted, additionally, that the “study did not address the questions of how, and under what circumstances, exposure to Internet child pornography affects individuals.”

4. Methodological Issues

Some problematic issues exist with the researchers’ methodological choices and resulting conclusions. Importantly, the acceptance criteria and nature of the residential program raises questions about the validity of the data for the variable of contact sexual offenses. First, the outcome measure for undetected hands-on offenses was based solely on self-reports with no identifying information about the victims (other than gender and age). This precludes verification of the self-reports or any
datum in them. Further, the studies do not provide intercoder reliability statistics to ascertain the quality of coding for the contact-offense variable.

Second, critics refer to bias in self-reports resulting from selection effect in sex offender treatment programs. Incentives for participation in prison-based programming include advantages in prison relocation and parole decisions, which influence prisoners' behavior. Programmatic rules often carry a strong "suggestion that offenders had much incentive to admit to sexual contacts even if untrue." Hence, it is possible that study subjects made admissions and statements that they perceived would please the clinicians, who would in turn view them as more honest and positive toward their rehabilitative outcomes. Interestingly, at a national training seminar for federal probation officers, one of the studies' authors highlighted that the Butner program used peer pressure and systematic influence to garner admissions. He told the audience that program participants generally would not trust a prisoner who denied further victims. Similarly, in the 2000 Butner Study presentation, the same author suggested that those Internet offenders who refused to admit to contact offenses were either lying or did not have access to potential victims.

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158 Wollert et al., supra note 142, at 2-13. Despite this being a methodological flaw, for social science purposes, a reasonable explanation for this choice is possible. Program participants were not given immunity. Thus, if they offered further details that could be used to identify specific victims, the government could use the admissions to prosecute them for additional sex crimes. Bourke & Hernandez, supra note 95, at 186.


160 See Jon Taylor, Policing Social Networking Sites and Online Grooming, in INTERNET CHILD ABUSE, supra note 117, at 134; see also Fulda, supra note 159, at 68–69 (suggesting such potential benefits for cooperating as improved access to psychological care and prescription medicine and more favorable attitudes directed at them by staff).

161 MICHAEL C. SETO, ASSESSING THE RISK POSED BY CHILD PORNOGRAPHY OFFENDERS 4 (2009), available at http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf; see also Wollert et al., supra note 142, at 2-11 (noting that staff "apparently expected all treatment participants to make new disclosures on an ongoing basis").

162 See Matt O'Brien & Stephen Webster, Assessment and Treatment Approaches with Online Sexual Offenders, in INTERNET CHILD ABUSE, supra note 117, at 167 ("[W]e hold concerns about the likely reliability of such data given that in Federal US prisons release is contingent on satisfying staff views."). Social scientists refer to the phenomenon as "demand characteristics." Wollert et al., supra note 142, at 2-14.

163 See Fulda, supra note 159, at 68–69.


165 Id. While in the 2009 study the authors indicated that polygraph examinations showed "no evidence of over-reporting with any subject," half of the subjects were for some reason not polygraphed. Bourke & Hernandez, supra note 95, at 189.

166 HERNANDEZ, supra note 95, at 6; see also Fulda, supra note 159, at 69 (criticizing researchers for believing in admissions while being skeptical of denials).
Third, fear of expulsion may also have contributed to the potential for overreporting.\textsuperscript{167} An offender’s participation could be terminated for violating any of the programmatic rules, which included acceptance of responsibility for undetected offenses.\textsuperscript{168} Further, as a Federal Bureau of Prisons memorandum on the program warned, anyone expelled from the program faced “transfer and other consequences.”\textsuperscript{169}

Fourth, the fact that the researchers were also the clinicians opens the studies up to additional questions of reliability.\textsuperscript{170} The potential for interviewer bias exists when the researcher is also the clinician providing the research sample with treatment.\textsuperscript{171} This is particularly true where there is no evidence of independent oversight of the methods or analyses.\textsuperscript{172} A judge recently indicated his distrust in the study, stating:

The Court finds these results highly questionable given the extraordinarily high percentages, as well as the fact that the researchers saw a 2,369% increase “in the number of contact sexual offenses acknowledged by the treatment participants” during the course of the Study. These astronomical figures lead the Court to question whether this unvetted prison Study, conducted by the former chief of the federal sexual offender treatment program and distributed by the Department of Justice to prosecutors, is, in actuality, a product of the tremendous “political pressure applied” to researchers in this research field.\textsuperscript{173}

A final issue with this data is that the studies published the average number of contact sexual offenses without further explanation, which this author finds troublesome. In the 2000 study, the average number of contact offenses is given as 23.65 for the child porn–traveler group with


\textsuperscript{168} An expert witness testifying at a sentencing hearing in a child pornography case, for example, observed that the high dropout rate of almost 23% of the original 2009 Butner Study sample increased the likelihood that participants felt pressured to admit to additional sexual offenses or face expulsion from the program for being uncooperative or lying. Id.

\textsuperscript{169} FED. BUREAU OF PRISONS, supra note 149, at 6; see also United States v. Phinney, 599 F. Supp. 2d 1037, 1045 (E.D. Wis. 2009) ("[T]he Butner studies are flawed. Most significantly, participants risk being kicked out of treatment if they do not admit prior contacts.").

\textsuperscript{170} See Appellant’s Opening Brief, United States v. King, 378 F. App’x 748 (9th Cir. 2009) (No. 09-50063), 2009 WL 6599074 (defense calling it “a biased report by a BOP official”); Fulda, supra note 159, at 69–70 (wondering if without the high rate of purported admissions there would be questions about the need for the program).

\textsuperscript{171} Fulda, supra note 112, at 70. The fact that the second study was published in a peer-reviewed journal does not save it from these flaws. As another commentator pointed out, the Journal of Family Violence encourages authors to suggest their own reviewers, which introduces potential bias. Written Statement, Heather E. Williams, U.S. Sentencing Comm’n, “View from the Defense Bar” Panel (Jan. 21, 2010), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20100120-21/Williams_Testimony.pdf.

\textsuperscript{172} Fulda, supra note 159, at 70 (critiquing the failure to conduct statistical controls for reliability and validity and lacking reproducibility).

\textsuperscript{173} United States v. Johnson, 588 F. Supp. 2d 997, 1007 n.9 (S.D. Iowa 2008) (citation omitted).
a range of zero to 202. In the 2009 study, the average was 13.56 with a standard deviation of 30.11. With such a large range in the first study and a large standard deviation in the later, from a practical perspective, the averages are rather meaningless. Based on these numbers, it is possible that a few offenders generated dozens of offenses while many might have reported a single occurrence.

B. The Notable Pedophilia Study

Legal and psychological commentators who refer to empirical support for the correlation between child pornography consumption and pedophilia often cite the research study conducted by a trio of sex offender treatment specialists. The title of their 2006 study reflects their conclusion: “Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia” (the “Seto, Cantor, and Blanchard Study”). The study uses data from a forensic sample of patients who presented themselves or were referred by parole–probation officers, lawyers, or correctional authorities for evaluation at a mental health clinic specializing in sexual addictions in Toronto, Canada. Researchers used the sample’s sexual offense histories (which included both formally known and self-reported histories of contact offenses and child pornography charges) to segregate the sample into four general categories. The first category was the child pornography group. The other three groups had no previous charges involving child pornography. One group had a history of sexually offending with a child victim (the child-victim group), another had a history of sexually offending with an adult (the adult-victim group), and the final group was comprised of general sexology patients with no prior sexual offenses.

Phallometric tests, which recorded changes in penile blood volume, provided data on sexual preference. Stimuli used for measurement included slides with audiotaped narratives depicting neutral, nonsexual

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174 HERNANDEZ, supra note 95, at 5. Curiously, neither study reported missing information. This seems implausible since the victim information included specific ages and it appears questionable that offenders could accurately report the age of each victim in his offending history.

175 Bourke & Hernandez, supra note 95, at 187.


177 Seto et al., supra note 96.

178 Id. at 611. Participants were included regardless of whether there were any pending charges or convictions.
activity and several categories of sexualized stories involving prepubescent children, pubescent children, or adults. From the plethysmographic results, subjects were assigned a pedophilic index—simplistically, a relative difference in one’s sexual response to adults as compared to one’s response to children. Those whose resulting pedophilic index exceeded a specified threshold were classified as pedophilic.

The results of the Seto, Cantor, and Blanchard Study indicated that the prevalence of pedophilic preference varied among the groups as follows: sixty-one percent of the child pornography offenders, thirty-five percent of the child-victim group, thirteen percent of the adult-victim group, and twenty-two percent of the general sexology patients. The researchers then determined the average pedophilic indices—basically, a measurement of how much more penile blood volume changed with child sex stimuli than changed with stimuli involving adults—within groupings. Results indicated that the child-pornography-offending group was significantly more likely to have a higher pedophilic index than any other group. From the foregoing, the study authors concluded that a history of child pornography offending was a more salient predictor of pedophilic interest than the other categories, including the child-victim group.179

Thus, many point to this study to connect child pornography viewing with pedophilic interest as well as pedophilic behavior.180 For example, a federal judge recently cited the study to support these observations:

It would seem that the intuitive relationship between known child molestation and possessing child pornography would be stronger than the inverse, the inverse being the relationship between possessing child pornography and the possibility of subsequently molesting a child. Some research literature question that the first of these two suppositions has a stronger relationship, this being contrary to what was intuited.181

In another case, the prosecution argued that the study supported the otherwise “common sense” risk that the defendant, who pleaded

179 Id. at 613.
180 E.g., JULIA DAVIDSON ET AL., ONLINE ABUSE: LITERATURE REVIEW AND POLICY CONTEXT 9 (2011), available at http://www.europeanonlinegroomingproject.com/wp-content/uploads/EOGP-Literature-Review.pdf (citing it, as well as the 2009 Butner Study, as evidence of the co-occurrence of contact offending against children and child pornography offending); Sara Dillon, What Human Rights Law Obscures: Global Sex Trafficking and the Demand for Children, 17 UCLA WOMEN’S L.J. 121, 179 n.161 (2008) (citing the study as “documenting a link between pornographic images and pedophilic behavior”); Angela W. Eke et al., Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-Up Study, 35 LAW & HUM. BEHAV. 466, 466 (2011) (“Many child pornography offenders are likely to be pedophilic or hebephilic, and thus may indeed pose a risk to children because of their sexual interests in prepubescent or pubescent children.”).
guilty to receiving and distributing child pornography on the Internet, would be at high risk of molesting children in the future.\textsuperscript{182} An expert speaker at a national educational conference for judges cited the study to support the proposition that child pornography possession is a “marker” for prior contact offending and pedophilia.\textsuperscript{183}

1. Limitations of the Study

Still, there are several reasons to question the significance of the study’s purported result about the correlation between child pornography possession and pedophilia, and to question the presumption that both indicate a high risk of contact offending. First, the study itself seems to undermine the concern that pedophilia is synonymous with contact offending. The group with prior child victims was significantly less likely to be classified as pedophilic. Pedophilic preference may correlate with arousal to stories of sexual acts with children, but pedophilia is evidently weak with respect to explaining contact offending. Notably, most of the offenders with the child-victim group were not classified as pedophilic. As the researchers noted in their article, the odds of a pedophilic identification for the child-victim group was several times less likely than for the child pornography group.\textsuperscript{184} The authors suggested that, “[a] possible explanation for this finding is that some nonpedophilic men victimize children sexually, such as antisocial men who are willing to pursue sexual gratification with girls who show some signs of sexual development but are below the legal age of consent.”\textsuperscript{185}

As for the result with the child pornography group, a prolific researcher and writer in the field of child sexual exploitation provided another perspective:

Another possible, or at least partial, explanation for the results of this important study may lie in the nature of the stimuli themselves, and that for men who have spent long periods downloading and accessing child pornographic images and masturbating to ejaculation to them, the visual stimuli themselves are highly salient, and perhaps

\textsuperscript{182} Initial Brief of Appellee-Respondent, United States v. Thompson, 653 F.3d 688 (8th Cir. 2011) (No. 10-3840), 2010 U.S. 8th Cir. Briefs 3840, at *27–28.


\textsuperscript{184} Seto et al., supra note 96, at 612.

\textsuperscript{185} Id. at 613. At least one study’s results contradicts that of Seto, Cantor, and Blanchard, finding in their sample that contact offenders were more likely to be pedophilic than child pornography viewers. See McCarthy, supra note 19, at 192 (showing also that contact offenders more likely to use the Internet to locate and groom victims and to network with others with similar deviant interests).
more so than for others who use private fantasies or actual children as the focus of their arousal.\textsuperscript{186}

The second concern is that all groups showed a more than minimal pedophilic response to sexual stories involving children. The adult-victim group showed the lowest prevalence rate, but still thirteen percent sexually responded more strongly to sexual images involving children than adults. Plus, twenty-two percent of the general sexology category, i.e., those who were referred for clinical assessment, but who had no prior offenses, tested positive with pedophilic interest being their primary sexual preference.\textsuperscript{187} The study also revealed that the average maximum phallometric responses to children—meaning the greatest penile blood volume increase to sexual stimuli involving juveniles—were statistically similar across multiple subgroups, including child pornography offenders without victims, those with more than three child victims, and general sexology patients.\textsuperscript{188} On this measure, these subgroups were indistinguishable. Overall, the considerable proportions of the sample sexually responding to provocative images of children suggest that the sample may be skewed. The fact that the sample was entirely composed of those referred to a sexual addiction clinic for assessment may mean that it was biased toward those whose sexual proclivities were sufficiently deviant to cause concern to themselves or authorities.

Third, there is some concern with the operationalization of the variable of interest. The study purports to examine each participant’s pedophilic index. But, the study’s definition of pedophilic interest is not entirely consistent with the official definition of pedophilia or with what a contingent of treatment professionals views as deviant. In the DSM-IV-TR, the official bible of the American Psychiatric Association, a pedophilia diagnosis requires the following criteria:

Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.\textsuperscript{189}

The Seto, Cantor, and Blanchard Study did not directly measure the latter criterion, and it is problematic with respect to the former criterion. The methodology did not strictly differentiate prepubescent from

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\textsuperscript{186} Ethel Quayle, The COPINE Project, 5 Irish Probation J. 65, 78 (2008) (citation omitted).

\textsuperscript{187} Seto et al., supra note 96, at 612 fig.1. It is possible the results were skewed as the researchers excluded more than twenty percent of the original sample for failing to sufficiently respond to any stimuli, equipment malfunction, or refusal to participate. Id. at 611.

\textsuperscript{188} See id. at 613 fig.2.

\textsuperscript{189} AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.2 (2000).
pubescent minors as it grouped together images involving children up to age fifteen. Though the DSM includes a generic age limit of thirteen, experts on sexual offending now generally agree that puberty commonly occurs earlier, such as around age eleven, making the DSM age unrealistic.\textsuperscript{190} The argument is that concern about men’s sexual attraction to pubescent girls is overrated considering that studies have shown that large proportions of heterosexual men sexually respond to pubescent girls and that it may just be a residual, evolutionarily adaptive trait.\textsuperscript{191} Nonetheless, the study merged pedophilic interest with what is referred to by psychiatric experts as hebephilic interest. But hebephilia, which involves sexual interest in pubescent children (about age eleven to fourteen), is not a formally recognized paraphilia.\textsuperscript{192}

Fourth, the use of phallometry in diagnosing paraphilia is controversial. A recent study, for instance, found no correlation between a phallometric test and a DSM-based diagnosis for pedophilia.\textsuperscript{193} There is also no standardized procedure for conducting the test;\textsuperscript{194} and there are significant questions about its validity and reliability.\textsuperscript{195} Litigants have accordingly challenged the admissibility of penile plethysmography results in court for those reasons.\textsuperscript{196}


\textsuperscript{191} Karen Franklin, The Public Policy Implications of “Hebephilia”: A Response to Blanchard et al., 38 ARCHIVES SEXUAL BEHAV. 319, 319 (2009) (expressing concern, too, that the legal system uses DSM labels to incapacitate undesirable people).

\textsuperscript{192} One of the study’s authors had previously surmised that there was no theoretical reason to distinguish between pedophilia and hebephilia. See Ray Blanchard et al., Sensitivity and Specificity of the Phallometric Test for Pedophilia in Nonadmitting Sex Offenders, 13 PSYCHOL. ASSESSMENT 118, 125 (2001). Blanchard and colleagues have recently advocated that the American Psychiatric Association formally combine pedophilia and hebephilia as a single diagnosis or, alternatively, recognize hebephilia as a separate psychiatric disorder. See Ray Blanchard et al., Pedophilia, Hebephilia, and the DSM-V, 38 ARCHIVES SEXUAL BEHAV. 335, 347–48 (2009) (suggesting also the term for the combination as pedohebephilia). In a later study, Blanchard and colleagues distinguished images of prepubescent from pubescent children and were able to separate groups with different responses to them. Id. at 335–36. Other research had shown group differences in risk-relevant personal attributes, such as IQ and education, between pedophilic and hebephilic men. See Carl Clegg & William Fremouw, Phallometric Assessment of Rapists: A Critical Review of the Research, 14 AGGRESSION & VIOLENT BEHAV. 115, 118 (2009).

\textsuperscript{193} Wilson et al., supra note 190, at 270.

\textsuperscript{194} MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION 35 (2008).


2. The Relevance of the Pedophilia Connection

Experts allude to broader complications about the utility of a pedophilia diagnosis for assessing issues of risk. Several studies show that a pedophilic finding, regardless of the method (such as using phallometry or the DSM diagnostic criteria), is not predictive of sexual recidivism for known child molesters. The researchers themselves have acknowledged that pedophilia itself is not synonymous with either contact sexual abuse or child pornography. For example, Seto later noted the paradox in the data... about adult male child pornography offenders [since there]... is a group of men who are likely to be pedophiles yet are nonetheless relatively unlikely to go on to have sexual contact with a child, especially if they have no such history in their past.

Blanchard likewise recognized that it is “widely accepted that not all child molesters are pedophiles, and not all pedophiles are child molesters” and that, in reality, a large majority of those who molest children are not pedophiles. Besides, if child pornography viewing is an acceptable proxy for the risk of child molestation, the proxy approach could be extended to incapacitate individuals bearing other correlative factors. For example, researchers have found that pedophilia is correlated with having suffered an episode of unconsciousness as a result of an early childhood accident, having a mother with psychiatric problems, and with left-handedness.

Altogether, the evidence supports the idea that it is more appropriate to differentiate child pornography viewers from child molesters in terms of the criminogenic risk they pose for contact offending. The widely popular empirical studies touted by proponents of the child pornography crusade are not so useful when subjected to critical analysis. Even the Seto, Cantor, and Blanchard Study results attest that being...
sexually interested in children was not the only explanation for child pornography offending. Many other reasons, deviant as well as innocuous, are explored below. The holistic policy underlying the child sexual exploitation strategy, then, can realistically be explained only by a deontological, or moral, approach to child pornography. Yet the next Part delineates some more practical grounds for contesting this philosophical choice as an ill-conceived practice that diverts attention away from the most dangerous child sexual exploitation offenders.

III. CHALLENGING THE DEONTOLOGICAL APPROACH

The political agenda that considers child pornography consumers as morally bankrupt regardless of any direct consequences appears to be an overreaction in late modern society to the controversial issue of the sexuality of children. The conceptualization often poses a duality of the dangerous pedophile and the innocent child:

[W]hat is portrayed as criminal and deviant is often a reflection and manifestation of something that is covertly normal and desirable. The innocence/danger dichotomy is undermined by youngsters themselves, cultural aesthetics, the commercial lifestyle/entertainment industry, the social implications of technology, the fight against child pornography, the fluidity of sexual identities and tensions within the family. These are all sources of power that trouble the asexuality of childhood, therefore hinting at the generality of [pedophilic] desire which is far more diffuse and blurry.

In this Part, some of these practical considerations undermining the validity of the innocence–danger dichotomy are explored. Still, the problematic conflation of the diffusive pedophilic interest with child pornography and molestation considered supra is also germane here.

The trouble is that the child pornography crusade is overly encompassing, perhaps because the ideology is bound to unsubstantiated stereotypical views. For one, the claim that sexual exploitation of children is flourishing is erroneous. Overall, the rate of child sexual abuse in the United States dropped sixty-two percent nationwide from 1992 to 2010.

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205 J.C.W. Gooren, Deciphering the Ambiguous Menace of Sexuality for the Innocence of Childhood, 19 CRITICAL CRIMINOLOGY 29, 30 (2011).
tend that this long-term and significant downward trend deserves more public attention and analysis than it has received. Proponents may argue that the child pornography crusade is the reason for such a success as it has incapacitating or deterring would-be child molesters. However, such a suggestion is vitiated by other evidence such as the fact that other indicators of child welfare also improved during that time period, demonstrated by substantial reductions in the rates of juvenile suicide, runaways, and teen pregnancy. Instead, the falling rates of child sexual abuse is more appropriately considered in the broader context of declining societal crime and violence overall, including a large reduction in rape, during that same period.

A. The Stereotypes of Predator and Innocent Young Victim

The clichéd view of a child molester is that of a dirty old man; a pedophile seeking out random children to sexually exploit. Clearly, officials reshaped the child pornography crusade upon the premise of severe punishment, in large part, to deter the pedophilic stranger whose use of child pornography leads him to sexually abuse children. However, empirical studies indicate that most sexual abusers of children are family members or are otherwise known to them; few are strangers. The U.S. Department of Health and Human Services reports that the majority of perpetrators of sexual abuse against children are parents, partners of a parent, or other relatives.

See id. at 3. Notably, similar downward trends have been reported by multiple official agencies and are not the result of enforcement, administrative, or statistical artifacts, changed standards, or decreased reporting. See id. at 2. David Finkelhor et al., Trends in Childhood Violence and Abuse Exposure: Evidence from 2 National Surveys, 164 ARCHIVES PEDIATRICS & ADOLESCENT MEDICINE 238, 238–39 (2010) (using data from Developmental Victimization Survey (2003) and the National Study of Children Exposed to Violence (2008)).

Id. at 240 tbl.1. For example, the overall rate of rape substantially decreased, from 2.8 per 1000 females at its highest in 1979 to 0.3 per 1000 in 2009. Key Facts at a Glance, BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm (last updated Mar. 24, 2012) (providing data from the Uniform Crime Reports which definitionally limits rape to female victims).

Lisa DeMarni Cromer & Rachel E. Goldsmith, Child Sexual Abuse Myths: Attitudes, Beliefs, and Individual Differences, 19 J. CHILD SEXUAL ABUSE 618, 631 (2010). The stereotype may be starting to change as the result of the television news series To Catch a Predator, in which police, with news cameras rolling, capture men on tape allegedly showing up to meet and have sexual contact with a person they believe, based on online communications, is underage. Ryan C.W. Hall & Richard C.W. Hall, A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues, 82 MAYO CLINIC PROC. 457, 457 (2007).

the production of child pornography. The National Center for Missing and Exploited Children has generated perhaps the most complete report, synthesizing cases in which the actual children used in pornography materials were identified. The group determined that the vast majority of producers were known to the children: twenty-seven percent were their parents, ten percent were other relatives, and twenty-three percent were family friends. On the other hand, less than four percent were strangers. Markedly, the pornographic material was self-produced in eight percent of the reported cases. A close, personal relationship is likewise observed in data from federal convictions for producing child pornography. Of the defendants sentenced in 2009 for production, more than half were parents, guardians, or persons with care and control of the children involved.

In contrast to the stereotypical pedophilic man molesting children, statistical measures show that perpetrators of child sexual abuse are often not adults. In other words, a substantial percentage of offenders who sexually abuse children are themselves underage. Two national surveys of youth victimization reveal that approximately one-third of sexually assaulted juveniles are victimized by their peers. Similarly, according to statistics of crimes known to police from the National Incident-Based Reporting System (NIBRS), juveniles commit over thirty-five percent of sex crimes against minors. The NIBRS study results also suggest that juvenile perpetrators may pose a greater danger to young victims in that juveniles are more likely than adult offenders to

213 Id.
214 See U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: FISCAL YEAR 2009, at 36 (2009), available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2009/09_glinexgline.pdf; see also SpearIt, Child Pornography Sentencing and Demographic Data: Reforming Through Research, 24 FED. SENT’G REPORTER 102, 104 (2011) (“[M]ost sex perpetrators are parents, partners of a parent, or relatives . . . . The same holds true in child pornography production, where the Department of Justice found ‘the vast majority of children who appear in child pornography have not been abducted or physically forced to participate.’”).
215 Finkelhor et al., supra note 208, at 240.
216 Finkelhor et al., supra note 144, at 1–3 (noting also that the NIBRS is not nationally representative since not all states fully report); Wendy Koch, Many Sex Offenders Are Kids Themselves: Study Is Based on Federal Data, USA TODAY, Jan. 4, 2010, at 3A (“Juveniles are 36% of all sex offenders who victimize children.”).
target victims under age twelve and to offend in groups. Underage offenders are also more likely to target male victims.

Other studies likewise subvert the stereotypical sexual-predator model in the online world. A large national survey found that those soliciting sex from youth online “did not match the stereotype of the older male ‘Internet predator’” on several measures. Most of the solicitors were themselves young. Over forty percent of the solicitors were under age eighteen, while another thirty percent of online solicitors were between eighteen and twenty-five years old. Further, only a small proportion targeted younger children—ninety percent of Internet sexual solicitations were of teenagers. Most were not very assertive in moving to offline contact, and hands-on offenses were rare. Of the online sexual solicitations, thirty-one percent made aggressive moves to make offline contact with the youth. The youth solicited generally were able to ward off the advances; only two teenage girls met with their solicitors and were sexually assaulted. Studies have also indicated that young recipients of Internet-initiated solicitations almost always know when the invitations are from adults. Further, the vast majority of victims of Internet-initiated sex crimes are in their teens, which makes sense considering that younger children generally enjoy limited unmonitored online access. At the same time, soliciting pubescent youth undermines the archetypal pedophilic profile of interest in prepubescence.

The fact that more juveniles are becoming caught in the net of the child pornography crusade as defendants is a cause of current controversy. This has led some to express concern that the expansive child pornography laws and the media hype of the Internet sexual predator may distort the danger to children. A national dataset covering the

217 Id. at 4 (indicating that the proportion of victims younger than twelve years of age is fifty-nine percent for juvenile sex offenders, versus thirty-nine percent for adult sex offenders).
218 Id. (indicating that twenty-four percent of juveniles offended in groups, versus fourteen percent of adults).
219 Id. at 4–5 (indicating twenty-five percent for juveniles versus thirteen percent for adults).
221 Id.
222 Id. at 16.
223 Id. at 18.
224 Id.
225 Janis Wolak et al., Online “Predators” and Their Victims: Myths, Realities, and Implications for Prevention and Treatment, 63 AM. PSYCHOLOGIST 111, 112–13 (2008).
226 See id. at 115, 118.
227 See Quayle, supra note 212, at 2 (“Media coverage of Internet mediated crimes against children often seem to mirror the polarized positions of professionals and academics who work in the area, with the pendulum swinging between those who feel that there is a danger of distorting the threat posed to children, and those for whom it appears that the threat has been grossly underestimated.”).
years 1997 to 2000 showed that juvenile offenders accounted for about ten percent of child pornography cases. The proportion is probably far greater in recent years and the numbers are likely to increase considering that recent technological advances have influenced the sexual behaviors of youth into unseen territories, such as the phenomena of “sexting.” Because of this, growing numbers of young people are engaging in activities that arguably violate child pornography laws.

Recent studies of youth behavior on the Internet are consistent in showing substantial proportions of them are producing, distributing, and receiving materials that may well be classified as child pornography. An MTV—Associated Press online survey found that twenty-four percent of those fourteen to seventeen years-of-age had been involved with naked sexting. Of respondents in the fourteen to seventeen years-of-age category, twenty-four percent admitted passing naked images onto others. In a 2008 survey, the National Campaign to Prevent Teen and Unplanned Pregnancy estimated that twenty-two percent of teenage girls and eighteen percent of teenage boys had self-produced and distributed pornographic material by using technology to post nude or seminude photos of themselves. The context of sexting is clearly contrary to the dangerous sexual predator stereotype. The survey found that most of the images were sent to boyfriends or girlfriends, and for a majority of the teens, the purpose was rather benign—trying to be “fun or flirtatious.”

There is also evidence that there is a high risk of young people committing a crime by distributing child pornography that is produced by others. In the same survey, nearly forty percent of teenagers admitted to receiving sexually suggestive text messages or e-mails that were meant for someone else. Similarly, a different survey by the media firm Cox Communications found that one-in-five teens between

229 ASSOCIATED PRESS & MUSIC TELEVISION, A THIN LINE: 2009 AP-MTV DIGITAL ABUSE STUDY 3 (2009). Much of the foregoing activity likely constitutes child pornography for criminal purposes, though it depends on the applicable statutory language. See DENA T. SACCO ET AL., YOUTH & MEDIA POLICY WORKING GRP. INITIATIVE, HARVARD LAW SCH., SEXTING: YOUTH PRACTICES AND LEGAL IMPLICATIONS 9–12 (2010). One scholar has suggested that state legislatures should narrow the reach of child pornography laws so as to preclude the prosecution of innocent minors. Correy A. Kamin, Note, Unsafe Sexting: The Dangerous New Trend and the Need for Comprehensive Legal Reform, 9 OHIO ST. J. CRIM. L. 405, 422–29 (2011) (“[T]he legal system [should] only be implicated when its punitive and rehabilitative objectives would actually be furthered by holding an adolescent criminally responsible for his or her actions.”).
231 Id. at 4.
232 See id. at 3 (noting that percentages were thirty-eight percent for girls and thirty-nine percent for boys).
thirteen and eighteen years old had sent, received, or forwarded sexually suggestive photos through text or e-mail, with sixty percent having sent them to a boyfriend or girlfriend.\textsuperscript{233}

Not only is the renowned model of the modern sexual predator mistaken, but also the stereotypical view of the child engaged in a sexual act as an always-unwitting victim in need of protection is too simplistic. As an indication of cultural standards, youth are often portrayed in sexual ways. Recent commercial campaigns and popular media offer numerous depictions of sexualized children. A recent movie internationally distributed included music videos of the then sixteen-year-old Justin Bieber flirtatiously taking his shirt off and gyrating in front of screaming girls.\textsuperscript{234} A photo spread in Vanity Fair featured sexually racy photos of a then fifteen-year-old Miley Cyrus.\textsuperscript{235} The American version of the television show Skins received publicity when it was first broadcast as it contained some nude shots of underage actors, the proliferation of sexual stimulants, and explicit dialogue and scenes involving casual sexual encounters among high schoolers.\textsuperscript{236} Producers explained that the storylines came directly from teenagers they had hired, who had claimed that

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\item \textsuperscript{233} COX COMM’NS, TEEN ONLINE & WIRELESS SAFETY SURVEY: CYBERBULLYING, Sexting, and Parental Controls 11, 36 (2009). The Pew Research Center conducted a nationally representative survey of youth ages twelve to seventeen with cell phones. AMANDA LENHART, PEW RESEARCH CTR., TEENS AND SEXTING: HOW AND WHY MINOR TEENS ARE SENDING SEXUALLY SUGGESTIVE NUDE OR NEARLY NUDE IMAGES VIA TEXT MESSAGING 2 (2009). Of those surveyed, four percent admitted they had sent a sexually suggestive nude or nearly nude image of themselves to someone via texting while fifteen percent received a sexually suggestive nude or nearly nude images of someone they knew. The statistics were higher for the older teens, with eight percent of seventeen-year-olds with cell phones sending and thirty percent receiving sexually provocative images. Id.

\item \textsuperscript{234} See David Noh, Film Review: Justin Bieber: Never Say Never, FILM J. INT’L (Feb. 10, 2011), http://www.filmjournal.com/filmjournal/content_display/reviews/major-releases/e3iacab13f1c68905c3614a5f75222cee4e (indicating the movie “includes numerous shots of a shirtless Bieber, which elicited Pavlovian audience screams and made anyone of a more advanced age feel just a tad creepy”); Zane Henry, Justin, Please Just Keep Your Shirt On, STAR (South Africa), Mar. 11, 2011, at 4 (complaining that in the movie Bieber “takes his shirt off a bit too often for my comfort,” but recognizing that “[t]he tweens . . . love it though.”).

\item \textsuperscript{235} An observer described the photos with the actress “naked to the waist with a satin sheet tucked under her arm and chest. Her disheveled hair and knowing stare suggests she is not just waiting to be tucked in. That the photo presents a sexualized view of the underaged actress is unquestionable.” A Plea for Decency in the Age of Celebrity, MACLEAN’S, May 12, 2008, at 2. Then at the age of seventeen, Miley shot a music video in which “she caresses her body in a $25,000 corset and shimmies against a pole—and the poles of her male backup dancers—in a black bustier and hot pants.” Mark Marino, Miley Cyrus’ Nearly Naked Style—Has the Teen Queen Gone Too Sexy?, STYLELIST (June 29, 2010, 7:55 PM), http://main.stylelist.com/2010/06/29/miley-cyrus-nearly-naked-style-too-sexy/.

\item \textsuperscript{236} Producers quickly became concerned after the initial episodes of the show in the United States that some of the content may violate child pornography laws and toned down the content. Brian Stelter, A Racy Show with Teenagers Steps Back from a Boundary, N.Y. TIMES, Jan. 20, 2011, at A1. The show stars real teens, as young as fifteen, with one particular “shot of a boy standing naked with a cloth over his pill-enhanced erection.” Alessandra Stanley, Sexy Kids?: O.K. But a Channel from Arabs? No, N.Y. TIMES, Feb. 2, 2011, at C1.
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these actions were representative of accepted behavior, common among their peers. Still, the sexualization of youth is not limited to teenagers. Reality shows such as *Toddlers & Tiaras* and *Little Miss Perfect* showcase “[sexualized] toddlers in skimpy outfits, covered in make-up” and made to look like women in adult beauty pageants.\(^{237}\)

From a practical perspective, the presumption that society generally abhors males who find youth sexually enticing is unrealistic. Historically and cross-culturally, males have been sexually attracted to pubescent and postpubescent youth for their health and beauty.\(^{238}\) Certainly, it was evolutionarily adaptive for such attraction, considering that these ages represent the peak of reproductive fertility.\(^{239}\) Even today, studies with community samples of men find that pedophilic sexual fantasies are not uncommon.\(^{240}\) In a study of undergraduate students, twenty-one percent reported sexual attraction to small children, with nine percent having sexual fantasies involving children.\(^{241}\) In another sample of nonoffender males, over twenty-five percent either self-reported pedophilic interest or exhibited penile arousal to pedophilic stimuli.\(^{242}\) Together, this means that the child pornography crusade, which does not adequately distinguish differences among types of offenders, victims, or behaviors, is misguided. The risk of consumers is considered next.

### B. The Criminogenic Risk of Child Pornography Consumers

Despite the deontological presumptions underlying the child pornography crusade, researchers in the child sexual abuse arena contend that the evidence to date strongly and rather consistently shows that child pornography consumption does not itself represent a risk factor


\(^{238}\) See *SETO*, supra note 194, at 13.


\(^{240}\) Christoph Joseph Ahlers et al., *How Unusual Are the Contents of Paraphilias?: Paraphilia-Associated Sexual Arousal Patterns in Community-Based Sample of Men*, 8 J. SEXUAL MEDICINE 1362 (2011) (finding in a community sample of German men, 9.5% held pedophilic sexual fantasies).


for contact sexual crimes.\textsuperscript{243} Instead, multiple studies show that child pornography offenders are at a much lower risk for contact sexual offending than previously known contact offenders.\textsuperscript{244} Further, the proliferation of technology has not fulfilled crusaders’ fears of a more dangerous type of sexual predator. To the contrary, international scholars acknowledge that the Internet may well have bred a new category of sex offender, but in a unique form not involving contact with children.\textsuperscript{245} Online technology permits users to compulsively acquire massive collections of pornography without regard to specific content, and acquisition fuels addictive sexual behavior involving cybersex interests.\textsuperscript{246} It is not uncommon for some producers to create a thematic or narrative series of images that appeal to collectors’ interest in completing a set.\textsuperscript{247} Thus, international experts warn that assumptions that Internet child pornography offenders are at high risk of contact offenses are premature\textsuperscript{248} or simply erroneous.\textsuperscript{249} Scientists with the United States–based Crimes Against Children Research Center agree that

the facts do not suggest that the Internet is facilitating an epidemic of sex crimes against youth. Rather, increasing arrests for online predation probably reflect increasing rates of youth Internet use, a migra-

\textsuperscript{243} See, e.g., Jéréôme Endrass et al., The Consumption of Internet Child Pornography and Violent and Sex Offending, 9 BMC PSYCHIATRY 43 (2009).

\textsuperscript{244} See id.; see also SETO, supra note 161, at 5; Andrew Bates & Caroline Metcalf, A Psychometric Comparison of Internet and Non-Internet Sex Offenders from a Community Treatment Sample, 13 J. SEXUAL AGGRESSION 11, 17 (2007); Ian Alexander Elliott et al., Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders, 21 SEXUAL ABUSE 76, 87–88 (2009); Neutze et al., supra note 1, at 229 tbl.3; L. Webb et al., Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters, 19 SEXUAL ABUSE 449, 450 (2007). But see E-mail from Gregory Schiller, supra note 145 (suggesting that low recidivism rates may simply reflect offenders learning from law enforcement strategies to counteract detection efforts).

\textsuperscript{245} See Brigitta Surjadi et al., Internet Offending: Sexual and Non-Sexual Functions Within a Dutch Sample, 16 J. SEXUAL AGGRESSION 47, 54–56 (2010).

\textsuperscript{246} McCarthy, supra note 19, at 184 (“Unlike the paedophile or child molester who may have a sexual interest in children, the ‘cybersex addict’ reportedly accesses child pornography because of poor impulse control and an insatiable sexual appetite.”).


\textsuperscript{248} John Carr & Zoe Hilton, Combating Child Abuse Images on the Internet: International Perspectives, in INTERNET CHILD ABUSE, supra note 117, at 54 (“Without more conclusive research it is a struggle to predict the likelihood of future risks to children and be confident about the appropriateness and impact of different criminal justice and treatment interventions.”); Quayle, supra note 186, at 79 (“[T]he reality is that we still know very little about this group and how comparable they are to those who commit offences against children in the offline world.”).

\textsuperscript{249} See David Middleton, From Research to Practice: The Development of the Internet Sex Offender Treatment Programme (i-SOTP), 5 IRISH PROBATION J. 49, 54 (2008). In the vast majority of cases of child pornography known to police, authorities were not able to link the offender to committing a crime directly against an actual child. See Finkelhor & Ormrod, supra note 228, at 7 (reporting data from 1997 to 2000).
tion of crime from offline to online venues, and the growth of law enforcement activity against online crimes.\textsuperscript{250}

So, how can one explain the low-risk nature of child pornography consumers in general, and why would their risk differ substantially from those with prior hands-on offenses with children? The reasons are many and they vary because child pornography offenders do not neatly fit together as a homogeneous group, but rather, they differ substantially in personal characteristics, motives, and antisocial tendencies.\textsuperscript{251} Nonetheless, there are several commonly observed factors that render child pornography consumers as a group at low risk of sexually offending against children. Paraphilic interest does not motivate all child pornography offenders, but is one among many explanations for consumption.\textsuperscript{252} Consistent with the Seto, Cantor, and Blanchard Study’s results, another study found that Internet child pornography offenders were more likely than contact offenders to have sexual fantasies involving female children than contact offenders.\textsuperscript{253} Yet both studies indicate that paraphilic fantasy is not an adequate explanation since the findings question any simple, direct model linking sexual fantasy to contact offending and contradict the sexual preference hypothesis. In other words, if theory is correct and fantasy drives behaviour, Internet offenders should report the lowest levels of [pedophilic] fantasy as they have no reported acts against children, yet the reverse was true.\textsuperscript{254}

Paraphilic motivation is also not the only motivation for child molesters. A meta-analysis of studies of the risk of online sex offenders concludes that “pedophilic interests do not necessarily result in contact sexual offenses against children.”\textsuperscript{255} Rather, experts studying child sexu-

\textsuperscript{250} WOLAK ET AL., supra note 12, at 1–2.

\textsuperscript{251} See id. at 1; see also Olivia Henry et al., Do Internet-based Sexual Offenders Reduce to Normal, Inadequate and Deviant Groups?, 16 J. SEXUAL AGGRESSION 33, 41 (2010); David Middleton et al., An Investigation into the Applicability of the Ward and Siegert Pathways Model of Child Sexual Abuse with Internet Offenders, 12 PSYCHOL. CRIME & L. 589, 598, 600 (2006); Nielssen, supra note 138; Lotte Reijnen et al., Demographic and Personality Characteristics of Internet Child Pornography Downloaders in Comparison to Other Offenders, 18 J. CHILD SEXUAL ABUSE 611, 618 (2009); Webb et al., supra note 244, at 460.

\textsuperscript{252} Surjadi et al., supra note 245, at 54–56.

\textsuperscript{253} 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 PSYCHOL. 137, 152 (2008).

\textsuperscript{254} Id.

\textsuperscript{255} Seto et al., supra note 203, at 140. The results of this meta-analysis of sexual contact history and recidivism rates must be viewed with caution. The underlying samples varied widely in defining variables. For instance, online sexual offenses were not limited to child pornography, but included materials defined as illegal in foreign countries that did not involve children or pornography, and also included online enticing of children for sexual contact. Contact sexual offending was operationalized in significantly different ways in the underlying samples,
al exploitation attest that those who commit contact offenses against children are driven by motivations other than sexual fantasies about children:

One possible explanation for this non-association between fantasy and offending is that contact sexual offenders have lower [pedophilic] fantasies because they have difficulty generating fantasy about children. In this context, contact-only offenders had more confrontational non-contact fantasies more than Internet perpetrators, such as exposing one’s genitals to an unsuspecting girl(s) . . . . Perhaps the purpose of the sexual offences against children lies partly in this need [for confrontation] rather than in the need to act out sexual fantasies against children.256

Similarly, it is surmised that child molestation without pedophilic interest likely entails the combination of antisociality with opportunity.257 Given that child pornography offenders tend to score low on antisocial tendencies, they are not likely to imitate the pornographic scenes with real children.258

Investigations of child pornography consumers have yielded several other, relatively nondeviant, motives that render these offenders at lower risk. Briefly, these motives include using the images as a substitute for contact offending,259 curiosity and accidental access,260 facilitating social relationships,261 and avoiding real life.262 Personal characteristics also differentiate consumers of child pornography from contact offenders in various risk-relevant ways. Using group-based statistics, child pornography offenders are more socially isolated than contact offenders,263 while less likely to engage in sexually risky behaviors,264 be overas-
sertive, or maintain offense-supportive attitudes and beliefs. In addition, there is evidence that child pornography offenders are more likely to identify with fictional characters, which may partially account for the unlikelihood that they would seek out sexual contact with live children.

Further, child pornography offenders are better prospects for postconviction rehabilitation, with far better rates of compliance when treated and when supervised postrelease, compared to child molesters. This may be the case, in part, since child pornography offenders may have more incentives as they tend to be better educated, of higher intelligence, and more likely to be gainfully employed than other types of sexual offenders. In sum, child pornography offending as a signal crime used to invoke fear for the safety of children is a social construction that misses the mark.

C. Alternative Considerations

From a broad criminal justice policy perspective, an obvious curiosity emerges: have we not learned from the war on drugs? In the drug war, the United States wages battle without much differentiation among producers, importers, distributors, or users. It is mostly a bottom-feeding exercise whereby low-level drug users are easy targets, presumably useful to bolster statistical measures of performance for criminal justice personnel. Seldom has law enforcement apprehended those most responsible for causing the greatest harm, i.e., drug producers. For this reason, the drug war is widely considered an abject failure, costing billions of dollars and contributing to prison overcrowding without substantially reducing demand. The analogy here is that the war on child sexual abuse snare s the more easily identifiable child pornography down loaders and traders, thereby attracting law enforcement resources to these offenders. Yet there is little or no evidence that this approach has yielded the expected deterrence value or has succeeded in protecting children. In fact, potential long-term negative consequences are proba-

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265 Elliott et al., supra note 244, at 84.
266 See Bates & Metcalf, supra note 244, at 16–17; Webb et al., supra note 244, at 458; Elliott et al., supra note 244, at 87.
267 Elliott et al., supra note 244, at 87–88.
268 See Webb et al., supra note 244, at 459 (reporting study finding that Internet offenders did not miss any supervision or treatment sessions, compared to eight percent and thirteen percent, respectively, for child molesters, and while four percent of Internet offenders dropped out of treatment, eighteen percent of child molesters did).
269 See Endrass et al., supra note 243.
270 See supra notes 65–79 and accompanying text (providing statistical measures).
Where law enforcement initiatives have taken on a child pornography-centric approach, the campaign against child sexual exploitation has lost sight of what should be the primary interest: protecting actual children from sexual abuse. As child pornography consumers are not the high-risk offenders they are presumed to be, resources are misdirected at imprisoning scores of defendants who do not pose a risk of future harm. Policy-makers would seem to have an incentive to allow more rational minds to prevail.

So what are the potential alternatives that may equitably balance the interest in protecting children without widening the net to low-risk offenders? It may be useful to reconsider the variations of harm and moral culpability interests proposed earlier in this Article. Public debate should properly explore these hypotheticals further, in isolation and in combination:

- the viewer is an eighteen-year-old male, thirty-year-old female, or a fifty-year-old man;
- the child is age six, eleven, or seventeen years of age;
- the picture is morphed to appear sexually explicit, is of a naked child alone, or is of a child being sadistically penetrated by an adult.

The first variation is relevant for both normative and risk-based reasons. As for the teenager proposed, several legal commentators have protested the application of child pornography laws to teenagers who run afoul of them by rather innocuous behaviors, such as sexting. One writer insightfully remarked that “[i]t is likely that minors prosecuted for child pornography are . . . collateral damage of the breadth of laws designed to target pedophiles.” While interested in protecting underage defendants, this observation leads to a broader question: what is the true scope of the “collateral damage” of overly broad child pornography laws and is it justified? In the example posed earlier, the “eighteen” was offered as the age for ideological reasons. Many of those who would propose different rules for teenage “sexters” would limit them to those under the age of majority, so they would not cover individuals classified as adults. But is an eighteen-year-old male (or even one who is nineteen or twenty, for that matter) who downloads provocative images of pubescent and postpubescent teenagers so repugnant that he deserves a five to fifteen year sentence (in the federal system) for receiving child pornog-

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272 Kimpel, supra note 84, at 310.
raphy? Actually, it might be normatively unorthodox for him not to be sexually attracted to teenagers, particularly to those within his peer group. The fifty-year-old man is the easiest target on which to impose social expectations, though considering the prevalence of men with sexual attractions to young females, it is still open to debate in terms of normative boundaries. The thirty-year-old female poses unease in terms of the age difference, but, on the other hand, women are at very low risk of sexual contact offenses. Yet child pornography laws do not generally consider gendered differences in morality or risk.

The age of the child has important policy implications, too. As domestic child pornography laws generally define a child as anyone under eighteen, one aspect of net-widening becomes clearer. Do public morals truly find equally egregious a sexualized photo of a mature seventeen-year-old as it does a sexually explicit image of a six-year-old? Is the harm to each child truly equivalent and do they deserve the same moral antipathy? Modern society may be troubled by evidence of teen and adolescent sexuality. But the criminalization and application of strict sentencing regimes to all sexual images of those under the age of eighteen is unwarranted as a criminal justice policy and likely not demanded by current cultural standards. Much of the problem stems from the grouping of newborns through seventeen-year-olds into a single protected class. This amorphous class obscures the reality that modern culture recognizes roughly three categories of maturity: children, pubescents, and teenagers. Sexual norms vary widely among them, yet child pornography laws often do not.

Possibilities for policy change include altering the legal age of a minor for child pornography law purposes (such as lowering the upper limit to a lower number, such as sixteen, as it was in the federal system before 1988) or at least creating categories of ages with far more significant graduated differences between them. This issue is certainly not a novel one for public discourse. Debates about the appropriate age for legal consent to sexual activity and corresponding discussion about age disparities between partners in statutory rape laws have enlivened political and social commentary in modern times. More particularly, the current struggle with sexting may already be evidence that political fig-

273 Id. at 311.

274 It is true that some child pornography laws provide some age graduations already in terms of defining offenses and sentencing consequences. Most, though, yield small differences; and minimum sentences are still quite long. For example, in the federal sentencing system for child pornography crimes, the image of a prepubescent child yields an additional two levels to the base offense level of twenty-two for receipt or distribution. Depending on the defendant’s criminal history, this increase certainly shifts the sentencing range higher (though the ranges still overlap), but does not alter the five-year mandatory minimum. Still, the recommendation here is that age should take a far more substantive role in child pornography laws than it currently maintains in any jurisdiction.
ures are willing to discuss the issue of age—regarding both offenders and victims—in child pornography laws. Alternatively, more laws could be revised toward prepubescence rather than specific years in age, though that obviously raises additional definitional issues.

As for the consideration of the sexual character of the image involved, international experts have recently noted the importance in distinguishing between child sexual abuse and child sexual exploitation. The latter may or may not involve sexual abuse, but it requires other activities that violate a child’s sexual innocence.275 Surreptitiously taking a photo of a naked or partially nude child, perhaps at the beach or swimming pool, may be exploitative, but would not constitute the deeper harm of sexual abuse.276 There is also a need to differentiate the degree of exploitation involved in the material. A popular categorization is offered by the Combating Paedophile Information Networks in Europe (COPINE Project). It ranks the type of images on a scale of one to ten, from least to greatest harm: indicative, nudist, erotica, posing, erotic posing, explicit erotic posing, explicit sexual activity, assault, gross assault, sadistic or bestiality.277 A useful purpose for such a ranking is that, from a punishment-theory standpoint, crimes and sentences are appropriately based on the level of suffering involved. Thus, a system that strives for proportional and rational punishment requires laws that differentiate between unequal harms. The practicality underlying the ranking also calls into question the presumption that production necessarily involves sexual abuse. To the extent the child can voluntarily consent to an image being taken or to the extent that the image is morphed, no sexual abuse may occur even if it is somewhat exploitative.

Still, several concerns held by child pornography crusaders should be addressed. One is the argument that there is value to pursuing child pornography offenders generally, in order to reduce the production market. The market thesis, though, is more speculative and ideological than supported by experiential data. The global nongovernmental organization End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes (ECPAT) acknowledges that organized crime is rarely involved with child pornography.278 Furthermore, a United Nations report indicates skepticism that children are sexually abused for the sole purpose of making a marketable product.279 The argument is also troubling on several other—though somewhat contra-

275 See Quayle et al., supra note 212, at 10.
276 See id.
277 Id. at 14–15.
dictory—grounds. The illegality of the content may encourage consumption as many report that the unlawful nature of the content is what makes the material more sexually enticing. From an economic-theory perspective, just as the country witnessed with the war on drugs, the criminality itself could conceivably drive profits for those organizations that can charge for the material. In actuality, however, the Internet permits widespread trading and downloading of child pornography materials for free, thereby creating a disincentive to those who believe they can profit by creating new products. Nevertheless, even if the market theory were valid, it does not necessarily mean more live children will be used. Technological advances, even those generally available, like Photoshop, permit producers to create quite realistic-looking images, such as by morphing innocent photos of children to appear sexually explicit, compositing images using a combination of body parts from a child and adult, or digitally mastering entirely virtual, though lifelike, children.

Another argument for crusaders is the harm thesis, which contends that the Internet has increased the risk to children of the modern sexual predator. But research to date provides evidence to the contrary. Those attributes that are likely required to successfully engage young people online, establish a relationship, and convince them to meet make solicitors unlikely to be impulsive, antisocial, or violent. Besides, jurisdictions already maintain more specific statutes, along with harsh consequences, that criminalize these types of contacts. These include offenses involving the Internet-facilitated solicitation of minors for sexual contact and the grooming of children with the use of child pornography. Child pornography laws are therefore an unnecessary backdoor effort to deter those offenses. Further, the ideology of the modern sexual predator as a stranger lurking on the Internet is itself potentially dangerous to the safety of children. It obscures that the persons they might really need to be wary of are those closest to them since the vast majority of those who commit sexual abuse against the underage are family members, friends, and peers.

Additional impediments plague the theory that harsh consequences are necessary for child pornography because it whets the appetite of consumers to commit sexual abuse in the future. Any causal connection is far too contingent and remote. Besides, the contention that incarceration is justifiable based on the thesis that material with a deviant theme will cause the viewer to act out such a theme in real life is a slippery slope. It would theoretically countenance the criminalization of

280 Quayle & Taylor, supra note 261, at 340.
281 See generally Janis Wolak et al., supra note 225.
282 See Wayne A. Logan, Megan’s Laws As a Case Study in Political Stasis, 61 SYRACUSE L. REV. 371, 405 (2011).
material with images of drugs, violence, terroristic activities, etc... which may equally invoke emotive responses and imitative behaviors.

Naturally, there is an entirely different approach that society can embrace in response to a social problem. Instead of addressing it primarily as a criminal justice issue, a public health model may be more suitable. While it is beyond the scope of this Article to fully address what such a response would entail, it is of note that there have been some great successes around the world in addressing relevant harms and risks. These include school-based programs to teach students about sexual issues and how to protect themselves from sexual harm, as well as public education campaigns that aim to improve the safety of youth on the Internet. According to the Internet Safety Technical Task Force, a professional collaboration tasked by the states’ attorneys general to report on safe practices in social networking, web companies are active in employing effective technological methods to seek out and restrict materials that may include child pornography and otherwise limit potential contacts with juveniles. In terms of the risk that child pornography consumers pose, sexual treatment specialists are working to improve prevention, treatment, and intervention strategies. It is of importance that sexual offender clinicians believe that sexual interests are often malleable in nature and can be modified.

CONCLUSIONS

A review of the history and current status of child pornography laws yields several conclusions. First, there continues to be a strong political appetite to expand the laws’ scope and its punitive consequences. Second, legislators and criminal justice personnel are strongly inclined to enforce these laws. Child pornography initiatives generally attract positive media attention and exemplify a strict moral agenda from the government. Third, the rhetorical discourse of the child pornography crusade has shifted its focus from the harm posed to actual children to one of moral depravity of offenders. It has also moved to a risk-based presumption that child pornography consumers are at high risk of molesting children.

284 See generally QUAYLE ET AL., supra note 275, at 92–96.
286 See generally SETO, supra note 194.
Yet there is some hope on the horizon that the concerns underlying these conclusions may receive some attention. Recent debates involving teenage sexting offers some promise that policy-makers may be willing to revisit the practical consequences of the laws, at least with respect to youth and erotic images not involving sexual abuse. In terms of law enforcement resources spent on the crusade, other criminal justice needs may naturally take precedence. For example, a recent federal audit criticized the FBI’s use of resources devoted to investigating cybercrimes. It found that forty-one percent of its cyber agents investigated online child pornography matters, compared to the nineteen percent investigating national security intrusions. The audit concluded that the underutilization of resources left the country vulnerable to national security threats. As for the presumptive correlation between child pornography offending and molestation, voices in legal circles that question its validity are just beginning to emerge. This Article has provided further bases on which to question this assumption. In the end, the sexual abuse of the very young is horrendous. Net-widening, though, means that a policy in which resources are redirected toward individuals at low risk of offending fails as a general device to adequately protect minors from sexual offenses.
