

# Redressing Transgression: In Defense of the Federal Sentencing Guidelines for Child Pornography Possession

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## ABSTRACT

*In recent years, members of the defense bar, federal judges, and the media have criticized the Federal Sentencing Guidelines as they apply to the crime of child pornography possession. Some of these critics perceive the crime itself as victimless. Others believe that the Guidelines fail to distinguish between levels of “dangerousness” among defendants. Still others condemn the Guidelines as the product of unwarranted congressional meddling—an unjustified creation of the political process.*

*This Note argues that these critics of the Guidelines misapprehend the nature of the harm inherent in possessing child pornography. An application of psychodynamic principles to victims of child pornography concludes that each individual that possesses images of child pornography perpetuates the harm suffered by the children depicted.*

*This Note analyzes the framework the Guidelines utilize for the crime of child pornography possession and argues that the sentences the Guidelines suggest accurately punish defendants for the harm*

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*suffered by the victims of child pornography. This Note concludes that, given the nature and extent of the harm suffered by the child victims, the sentences indicated by the Guidelines are sufficient, but not greater than necessary to redress the harm the victims experience.*

## INTRODUCTION

*There can be no keener revelation of a society's soul than the way in which it treats its children*<sup>1</sup>

When Nicole was a baby, her parents split up.<sup>2</sup> Her mother had custody, but Nicole visited her father every other weekend.<sup>3</sup> When Nicole was only nine years old, her father began showing her child pornography and telling her that fathers and daughters normally “played games” like the images depicted.<sup>4</sup> Before long, he progressed to forcing her to perform oral sex on him.<sup>5</sup> He dressed his daughter in tight clothes and makeup.<sup>6</sup> He tied her up.<sup>7</sup> He raped her.<sup>8</sup> Nicole’s horrific sexual abuse continued for four years, until she was thirteen.<sup>9</sup> Finally, at age sixteen, Nicole broke down and told her mother what her father had done.<sup>10</sup> He was arrested, let out on bail, and ultimately fled the country.<sup>11</sup> Nicole knew that her father took pictures of the abuse, but

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<sup>1</sup> Quote commonly attributed to Nelson Mandela. See Nelson Mandela, Speech by President Nelson Mandela at the Launch of the Nelson Mandela Children’s Fund (May 8, 1995), available at [http://db.nelsonmandela.org/speeches/pub\\_view.asp?pg=item&ItemID=NMS250&txtstr=Mahlamba](http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS250&txtstr=Mahlamba).

<sup>2</sup> Emily Bazelon, *Money Is No Cure: But Can Winning Restitution from Consumers of Child Pornography Help Victims Rebuild Their Lives?*, N.Y. TIMES, Jan. 27, 2013, (Magazine), at 24.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

what she did not know was that he also distributed them on the Internet.<sup>12</sup>

Photos and videos memorializing Nicole's abuse circulated the globe.<sup>13</sup> Thousands of men<sup>14</sup> downloaded her images as they gained increasing popularity among child pornography collectors, and the images went viral.<sup>15</sup> In 2006, Nicole learned that the images of her abuse were among the most widely circulated images of child pornography on the Internet, but even then she did not realize the scope of the violation.<sup>16</sup> Once law enforcement identified Nicole as the victim of a major child pornography investigation, she began receiving notices every time a man who possessed her image was prosecuted.<sup>17</sup> The letters overflowed basket after basket until they no longer fit in her house.<sup>18</sup>

Nicole has struggled to move forward with her life since learning that the images of her abuse have been downloaded and viewed by so many men all over the world.<sup>19</sup> While her father was a fugitive—but before Nicole knew her images were widely disseminated—Nicole went on television to plead for help in apprehending her father and bringing him to justice.<sup>20</sup> While her actions did eventually lead to the recapture and eventual prosecution of her father, Nicole also experienced unintended consequences.<sup>21</sup> The thousands of men who, for years, had obtained prurient pleasure by viewing images of Nicole's abuse now knew who she was and where to find her.<sup>22</sup> One of these men hounded her on the Internet, calling her a “porn star” and asking whether he could

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> I refer here to the perpetrators of the crimes as male. I recognize that sexual abuse is not always committed by males and the victims are not always female. However, for ease of reading this Note, I refer throughout to the perpetrators as male and the victims as female.

<sup>15</sup> Bazelon, *supra* note 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 25. The Department of Justice utilizes an Automated Victim Notification System that informs federal crime victims of the status and progress of the case in which they are victims. See *Automated Victim Notification System (AVNS)*, U.S. DEPARTMENT JUST., <http://www.justice.gov/criminal/vns/about/doj-avns.html> (last visited Feb. 16, 2013).

<sup>18</sup> Bazelon, *supra* note 2, at 25.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 24.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 25.

visit her.<sup>23</sup> Finally, Nicole realized what it truly meant that so many men, so many strangers, were downloading, viewing, and enjoying the images of her pain.<sup>24</sup> It was a terrifying ordeal.<sup>25</sup> In her own words: “I was still scared of my father, but I knew him. These other people, they were strangers, and there were so many of them.”<sup>26</sup>

Sadly, Nicole’s story is not uncommon. As horrifying as it is to imagine a child’s innocence ripped away in a shocking act of sexual abuse, it is even more alarming to realize that when the abuser memorializes the acts, the child victim<sup>27</sup> is repeatedly exposed to the violation by an ever-increasing number of viewers. Particularly with the advent of the Internet, the distribution of even one photograph may have severe and long-lasting consequences for the victim.<sup>28</sup> Perhaps surprisingly, child pornography was not even considered a form of child sexual abuse until the mid-1970s.<sup>29</sup> Finally, Congress passed the Crime Control Act of 1990, making possession of child pornography a federal crime.<sup>30</sup> Since 1990—as both the Internet, and the law’s understanding of the Internet have evolved—the punishments federal law imposes for

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> I refer to the sexual abuse survivors as children because that is what they were when the abuse occurred. However, many of the long-term effects discussed in this Note are felt as the child progresses into adulthood. For the sake of simplicity, I will continue to refer to the victims as “children” throughout.

<sup>28</sup> See MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY 194 (2003). Taylor and Quayle argue that distribution of child pornography has severe implications for the child victim and her family in that it “represents a violation of the child and his or her family’s privacy, and generally a visible demonstration of abuse of position or relationship.” *Id.* They further note that, “[o]nce a photograph is digitised [sic] and distributed on the Internet, it can be perfectly reproduced or modified endlessly by anyone in possession of it.” *Id.* Once an image is uploaded to the Internet there is simply no way to destroy it permanently. *Id.*

<sup>29</sup> PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 32–33 (2001).

<sup>30</sup> Crime Control Act of 1990, Pub. L. No. 101-647, §§ 323(a)-(b), 104 Stat. 4789, 4818–19 (codified as amended at 18 U.S.C. § 2252 (Supp. II 2008), *amended by* Pub. L. No. 112-206, § 2(a), 126 Stat. 1490, 1490 (2012)).

the possession of child pornography have also evolved to reflect the limitless nature of the Internet.<sup>31</sup>

In the federal system, the Federal Sentencing Guidelines (“Guidelines”) impose a structure that all federal judges must consider before imposing sentences.<sup>32</sup> Although the Guidelines are no longer binding, judges must nevertheless consider the applicable recommendations when sentencing defendants.<sup>33</sup> The Guidelines function by assigning a base offense level—a number—to each federal crime, which is then subject to enhancements based upon the particular defendant’s specific offense characteristics, for example, the age of the victim or a pattern of behavior.<sup>34</sup> The defendant is assigned a criminal history category, another number, based upon his previous sentencing history.<sup>35</sup> The two numbers are applied to a grid with the criminal history category as the x-axis and the offense level as the y-axis, which then yields the recommended sentencing range in months.<sup>36</sup>

Despite the horrendous nature of the abuse that underlies the possession of child pornography, there are those who believe that the sentences the Guidelines recommend for this crime are too harsh.<sup>37</sup> These critics believe that the Guidelines are flawed because they recommend “draconian” sentences for what some see as a victimless

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<sup>31</sup> See, e.g., Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8, 9 (2010) (discussing the evolution of consequences under federal law from recommended sentences of only a few months, up to their current levels); cf. MARK MOTIVAN & TRACEY KYCKELHAHN, U.S. DEP’T OF JUSTICE, NCJ-219412, BUREAU OF JUSTICE STATISTICS BULLETIN: FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 2 (2007) (noting that the Internet has dramatically increased the ability to quickly exchange images of child pornography).

<sup>32</sup> See *United States v. Booker*, 543 U.S. 220, 259 (2005).

<sup>33</sup> *Id.*

<sup>34</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 2, introductory cmt. (2012).

<sup>35</sup> *Id.* § 4A1.1.

<sup>36</sup> See *id.* ch. 5, pt. A, sentencing tbl., at 394.

<sup>37</sup> Many of these critics are criminal defense lawyers and federal judges. See, e.g., Mark Hansen, *A Reluctant Rebellion*, A.B.A. J., June 2009, at 54, 59 (citing a federal judge who likened the Guidelines for child pornography possession to “witchcraft trials and burnings” from the past). See also Amir Efrati, *Judges Trim Jail Time for Child Porn—Data Show Trend Toward Leniency for People Who View Images but Aren’t Molesters*, WALL ST. J., Jan. 20, 2010, at A2.

crime<sup>38</sup>—the possession of pornographic images.<sup>39</sup> But these criticisms miss a vital point: possessing child pornography is a crime that creates a palpable and profound harm to its victims, like Nicole, whose images are forever memorialized. Critics of the Guidelines seem to discount the harm possession inflicts on the subjects of the images.

This Note argues that, despite criticism of the Guidelines from criminal defense attorneys and some federal judges, the Guidelines correctly redress the harm the child victims suffer. This harm is multifaceted. First, the images of child pornography eternally memorialize scenes of horrific sexual abuse. The children who are the subjects of these images are thus doubly harmed. Not only do they suffer the initial abuse, they are forever burdened with the knowledge that a permanent record of their abuse exists out in the world; a record they are powerless to control or destroy.<sup>40</sup> Each time an individual downloads, views, or otherwise procures an image of their abuse, these children are victimized anew.<sup>41</sup> Second, by purchasing the images, the child

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<sup>38</sup> See *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998) (rejecting defendant's argument that when he committed the crime of receiving child pornography, the children depicted were not "victimized" by that act, and therefore were not "victims"); Statement of Ernie Allen, President and CEO of the National Center for Missing & Exploited Children, U.S. Sentencing Comm'n Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984, at VI (October 20, 2009) [hereinafter *USSC Hearing*], [http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20091020-21/Allen\\_testimony.pdf](http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Allen_testimony.pdf); cf. *United States v. Toler*, 901 F.2d 399, 403 (4th Cir. 1990) (describing the primary "victim" in child pornography transportation cases as society, rather than the child subjects of the images); Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 850 (2008) (noting that *Toler* focused prospectively on the harm to future victims and, by extension, society at large, rather than on the actual harm suffered by the children depicted in the images).

<sup>39</sup> See Hansen, *supra* note 37 (discussing criticism that the Guidelines allow no distinction between aggravated and less aggravated behavior).

<sup>40</sup> See TAYLOR & QUAYLE, *supra* note 28.

<sup>41</sup> See *id.* (noting the additional violation experienced as each new person possesses an image); Bazelon, *supra* note 2, at 25 (quoting a child pornography victim as saying that it was not until she was contacted by a man who had possessed and viewed her images for five years that she "realized what it meant for these pictures to be out there"). See also Kenneth V. Lanning, *Collectors*, in CHILD PORNOGRAPHY AND SEX RINGS 83, 83 (Ann Wolbert Burgess ed., 1984) (noting that even very young children recognize the

pornography possessor is creating a market for the abusive images.<sup>42</sup> This aspect of the harm is itself two-pronged. From a forward-looking perspective, the child pornography possessor is part of the machinery creating a demand and economic incentive for the production of additional abusive images. But from a backward-looking perspective, the child victims who are the subjects of the images were, in a sense, initially victimized specifically for the pleasure of those who would eventually procure the images.<sup>43</sup> This Note focuses primarily on the former.

This Note begins in Part I by detailing the harm suffered by the young victims of child pornography. Part II reviews and rebuts several common arguments against harsh penalties for possession offenses. Part III analyzes the Federal Sentencing Guidelines as they relate to child abuse offenses, including possession of obscene images. Part IV concludes by arguing that the harsh sentences suggested by the Guidelines are necessary and appropriate given the magnitude of the harm of this crime.

## I. THE DESTRUCTION OF INNOCENCE

For many years courts have struggled to define “pornography.”<sup>44</sup> However adult pornography may be defined, the United States Supreme Court has held that any images “depicting sexual activity by juveniles”

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permanence of a photograph and can understand that it is available for other people to view).

<sup>42</sup> See *Norris*, 159 F.3d at 930. The *Norris* court accepted the conclusions of both Congress and the Supreme Court that possession of child pornography fuels the market for the production of additional images. *Id.* The court noted that “there is no sense in distinguishing . . . between the producers and the consumers of child pornography. Neither could exist without the other.” *Id.* The court concluded that the children depicted in the pornographic images were the victims of the crime of child pornography possession, stating “[t]he consumers of child pornography thereby victimize the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects.” *Id.* See also TAYLOR & QUAYLE, *supra* note 28, at 83–86 (discussing the often compulsive nature of child pornography collecting, a phenomenon that creates a vast market for ever more images).

<sup>43</sup> See *United States v. Goff*, 501 F.3d 250, 259 (3d Cir. 2007) (“Children are exploited, molested, and raped for the prurient pleasure of [those] who support child pornography.”).

<sup>44</sup> See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244–46 (2002) (discussing the tension between the First Amendment’s guarantee of freedom of speech, and the government’s right to curtail obscenity).

are by their nature obscene and thus subject to criminal sanction.<sup>45</sup> Federal law defines child pornography as “any visual depiction . . . where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct . . . .”<sup>46</sup> However, even labeling all sexually explicit images of children as obscenity does not go far enough in categorizing them.<sup>47</sup> Calling these images “child pornography” fails to capture their inherently abusive nature.<sup>48</sup> When we think of pornography, perhaps we imagine the glossy pages of *Playboy* or *Penthouse Magazines*. To compare child pornography to such relatively innocuous publications “trivializes the material and lends credence and legitimacy to the meaning that offenders bring to the phrase . . . .”<sup>49</sup> Indeed, such images are not pornography in the way we commonly

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<sup>45</sup> *New York v. Ferber*, 458 U.S. 747, 760–61 (1982).

<sup>46</sup> 18 U.S.C. § 2256(8)-(8)(A) (2006).

<sup>47</sup> I recognize that the federal law arbitrarily draws the line for child pornography at the age of consent and thus images featuring seventeen-year-olds might still be classified as child pornography. *Cf.* Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 173 (2004) (noting that the law prohibits sexual encounters with minors by virtue of their age). However, the focus of this Note is on the effects participation in child pornography has on developing children; that is, children below the age of puberty. This focus is additionally appropriate because children forced to participate in pornography are generally younger than those who are sexually exploited in other ways. *See* EVA J. KLAIN ET AL., AM. BAR ASSOC. CTR. ON CHILDREN & THE LAW, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, *CHILD PORNOGRAPHY: THE CRIMINAL-JUSTICE-SYSTEM RESPONSE* (2001).

<sup>48</sup> While “child pornography” may not be the appropriate label for these sexually abusive images, the term is readily recognizable throughout the world and as such I will continue to refer to the images as “child pornography” throughout this Note. *See, e.g.*, Anthony R. Beech et al., *The Internet and Child Sexual Offending: A Criminological Review*, 13 *AGGRESSION & VIOLENT BEHAV.* 216, 218 (2008).

<sup>49</sup> *Id.*



understand that word;<sup>50</sup> rather they are images of a crime scene, the memorialization of “serious sexual assaults on young children.”<sup>51</sup>

Understanding the intrinsic harms of the images is integral to properly punishing their possession. It is vital not to lose sight of the fact that “child pornography” cannot be produced without the subject of the images suffering sexual abuse.<sup>52</sup> The images with which this Note is concerned cannot be produced unless the child subject “is either physically abused, or posed in sexualized ways,” actions that are abusive and illegal from their inception.<sup>53</sup>

To properly evaluate the harms that possession of child pornography cause, it is necessary to fully appreciate what the child victims suffer, both during the contact abuse,<sup>54</sup> and during the continuing victimization caused by the subsequent possessors of the images. The following section enumerates some of these consequences.

#### A. *Surviving Sexual Abuse*

The prevalence of childhood sexual abuse in our society is disturbingly high.<sup>55</sup> Accordingly, mental health professionals have undertaken a great deal of study regarding the long-term effects such abuse has on its victims.<sup>56</sup> Dr. John Briere, an expert in the field of childhood sexual abuse, asserts that the sexually abused child reacts to the abuse in three distinct stages: the initial reaction to the abuse as it occurs, the child’s accommodation to the abuse as it continues, and the long-

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<sup>50</sup> Cf. *Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity as work that depicts sexually explicit conduct in an offensive way, such that an average person, viewing the work as a whole, would find that it lacks “serious literary, artistic, political, or scientific value”).

<sup>51</sup> Tim Tate, *The Child Pornography Industry: International Trade in Child Sexual Abuse*, in *PORNOGRAPHY: WOMEN, VIOLENCE AND CIVIL LIBERTIES* 201, 203 (Catherine Itzin ed., 2002).

<sup>52</sup> See TAYLOR & QUAYLE, *supra* note 28.

<sup>53</sup> *Id.*

<sup>54</sup> I use the phrase “contact abuse” to apply to the abuse the child suffers at the hands of the person who physically abused her. Contact abuse differs from the “non-contact abuse” the child suffers as other individuals later possess the images memorializing her abuse. See, e.g., Michael L. Bourke & Andrew E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, J. FAM. VIOLENCE, Dec. 2008, at 183, 188.

<sup>55</sup> JOHN N. BRIERE, *CHILD ABUSE TRAUMA* 4–5 (1992) (noting a sexual victimization rate of around 20–30% for women and around 10–20% for men).

<sup>56</sup> *Id.*

term impacts the child suffers through developmental disruptions and the cultivation of coping mechanisms.<sup>57</sup> The psychological consequences suffered specifically by the victims of child pornography are often given short shrift in the literature.<sup>58</sup> This is understandable given the relatively recent criminalization of child pornography and the impact that widespread Internet use has had in this area.<sup>59</sup> There simply has not been enough time to adequately study and publish the long-term harm of child pornography possession on the depicted children. In the absence of peer-reviewed studies, it is necessary to rely more heavily on anecdotal evidence of the harms suffered by individual child pornography survivors. Still, evidence to this point indicates that victims of child pornography are at an even greater risk of psychological harms such as depression, suicidality, posttraumatic stress disorder, substance abuse, and general interpersonal problems than other victims of childhood sexual abuse.<sup>60</sup> This Note endeavors to undertake a rigorous analysis of the psychological harms, with particular application to the long-term effects on the child victims.

### 1. *Posttraumatic Effects*

Childhood sexual abuse can cause the victim to develop post-traumatic stress disorder (“PTSD”).<sup>61</sup> Sexual abuse survivors with PTSD symptoms often suffer from sensory flashback memories of their abuse, including visual and auditory memories, as well as intrusive physical sensations.<sup>62</sup> These uncontrolled memories and thoughts may make the sufferer incapable of concentrating or functioning normally.<sup>63</sup> Additionally, victims who suffer from sexual abuse-related PTSD often experience nightmares conforming to one of two types: either the

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<sup>57</sup> *Id.* at 17–18.

<sup>58</sup> *See, e.g.,* KLAIN ET AL., *supra* note 47, at 10 (noting the paucity of information directly bearing on the psychological damage to victims of having photos of their abuse continually circulating).

<sup>59</sup> *See, e.g.,* JENKINS, *supra* note 29.

<sup>60</sup> *See* Tink Palmer, *Behind the Screen: Children Who Are Subjects of Abusive Images, in* VIEWING CHILD PORNOGRAPHY ON THE INTERNET 71 (Ethel Quayle & Max Taylor eds., 2005).

<sup>61</sup> BRIERE, *supra* note 55, at 19–21.

<sup>62</sup> *Id.* at 21.

<sup>63</sup> *Id.*

nightmare is a “graphically realistic rendition[] of the original abuse trauma,” or it is a “symbolic representation[] of victimization . . . .”<sup>64</sup>

In addition to the intrusive memories and nightmares, PTSD sufferers often persistently avoid all things they associate with their trauma.<sup>65</sup> They often experience numbness and demonstrate a lack of responsiveness.<sup>66</sup> Troublingly, one study has shown that adults who suffered childhood sexual abuse are up to five times more likely to be diagnosed with PTSD than the general population.<sup>67</sup>

How much more damaging would the symptoms of PTSD be for a child who knows that images of her abuse are still being circulated, purchased, and viewed? Kenneth Lanning, a former FBI Agent specializing in the abuse of children, states that children recognize the permanence of a photograph.<sup>68</sup> Thus, even if the child does not know exactly how many individuals are viewing the pornographic images of her abuse, or when those images are being viewed, she is still forever aware that those images are available to any and all who wish to see them.<sup>69</sup> These child victims are forever rocked back and forth across the stages of their reaction to abuse due to its continuing nature.<sup>70</sup> The typical PTSD

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<sup>64</sup> *Id.*; see also KLAINE ET AL., *supra* note 47, at 10.

<sup>65</sup> Nicole P. Yuan, et al., *The Psychological Consequences of Sexual Trauma*, VAWNET.ORG (Mar. 2006), [http://www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=349](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=349).

<sup>66</sup> *Id.*

<sup>67</sup> See *id.*

<sup>68</sup> Lanning, *supra* note 41.

<sup>69</sup> See, e.g., *United States v. Hicks*, No. 1:09-cr-150, 2009 WL 4110260, at \*5 (E.D. Va. Nov. 24, 2009) (“‘Type II abuse’ [] stems from the ‘knowledge of the dissemination and proliferation of the images of her at her times of greatest humiliation and degradation.’” (quoting psychiatric evaluation)). The report credited by the court in *Hicks* described the knowledge that images of the victim’s abuse were forever circulating and available as “a chronic, toxic condition, the knowledge of which continuously works like corrosive acid on the psyche of the individual.” *Id.* See also *United States v. Staples*, No. 09-14017-CR, 2009 WL 2827204, at \*2 (S.D. Fla. Sept. 2, 2009) (“[C]urrent post traumatic stress symptoms were brought on by and are more resistant to treatment because of [her] knowledge of the memorialization of the sexual abuse, the continued existence of the images, and the widespread dissemination of those images on the Internet.” (quoting psychiatrist)).

<sup>70</sup> See, e.g., Government’s Memorandum of Law Regarding the Victims’ Losses at 8, *United States v. Monzel*, No. 09CR00243, 2011 WL 10549405 (D.D.C. Jan. 11, 2011), 2010 WL 6845823 (“The truth is, I am being exploited and used every day and every night somewhere in the world by someone. How can I ever get over this when the crime that is happening to me will never end? How can I get over this when the

sufferer may, over time and with treatment, be able to confront the intrusive memories and thereby lessen the memories' hold over his or her psyche.<sup>71</sup> But for the child pornography victim, these memories may never lose their terrifying hold.<sup>72</sup> Instead, the trauma is ever-present in the victim's life, perpetually reawakened at the thought that new abusers are taking pleasure in her pain.<sup>73</sup>

## 2. Cognitive Effects

Sexually abused children also often display cognitive effects stemming from the abuse. These cognitive distortions, while certainly arising from the sexual abuse, are psychological in nature.<sup>74</sup> For example, the abused child is likely to misjudge the prevalence of danger in the world, as well as the incidence of danger or adversity in her own life.<sup>75</sup> Additionally, the child will tend to internalize negative events, attributing their occurrence to her own actions, while at the same time externalizing the good things that happen in her life.<sup>76</sup> The child's distorted cognitive capacity results, in part, from her feelings of inherent "badness" as a result of the abuse she endured in childhood.<sup>77</sup>

The sexually abused child may also be hyper-vigilant of potential dangers in her world.<sup>78</sup> She may mistakenly perceive sexual motives in the authority figures in her life and react with either terrified compliance

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shameful abuse I suffered is out there forever and being enjoyed by sick people?" (quoting victim impact statement)).

<sup>71</sup> See BRIERE, *supra* note 55, at 131–32.

<sup>72</sup> See Staples, 2009 WL 2827204, at \*2.

<sup>73</sup> Cf. Lanning, *supra* note 41 ("[C]hild victims can fantasize that some day the activity will be over and they can make a fresh start. But there is no denying or hiding from a sexually explicit photograph.").

<sup>74</sup> BRIERE, *supra* note 55, at 24.

<sup>75</sup> *Id.* at 23.

<sup>76</sup> *Id.* at 23–24.

<sup>77</sup> *Id.* at 25.

<sup>78</sup> *Id.* See also United States v. Hicks, No. 1:09-cr-150, 2009 WL 4110260, at \*2–3 (E.D. Va. Nov. 24, 2009) (discussing a child pornography victim's "anxiety [and] fear that 'any man who looked at her must have viewed her downloaded video,'" and quoting the victim herself as saying: "This knowledge has given me paranoia. I wonder if the people I know have seen these videos. I wonder if the men I pass at the grocery store have seen them").

or overly sexualized behavior.<sup>79</sup> Passivity is also a common result.<sup>80</sup> During the abuse, the child learned that she is powerless to escape her abuser,<sup>81</sup> and many sexually abused children display low self-esteem, in part due to the stigma they feel.<sup>82</sup> The child may feel that she somehow brought the abuse upon herself; that she “asked for it.”<sup>83</sup> Such stigmatization is often compounded by the questions that well-meaning interrogators pose once the abuse is discovered.<sup>84</sup> While these interrogators doubtless have good intentions, their questions often imply guilt on the part of the victim.<sup>85</sup> Faced with both internal and external voices asking her why the abuse occurred, the sexually abused child internalizes guilt and shame that erode her sense of self-worth.<sup>86</sup>

The sense of stigma and danger that a typical sexual abuse victim may feel is increased when the sexual abuse is captured in images that are available for anyone to view. In the words of one child pornography survivor: “Usually, when a kid is hurt and the abuser goes to prison, the abuse is over. But because [the defendant] put my pictures on the Internet the abuse is still going on.”<sup>87</sup> For victims like her, the world truly *is* a dangerous place, if only because reminders of the abuse endured are so readily available and so impossible to escape.

Moreover, a particular hallmark of child pornography is that the abusers go to great lengths to make the child subjects appear as though they are enjoying the experience.<sup>88</sup> It is important to many collectors of such images that their fantasies are kept intact, a requirement that necessitates happy-looking, smiling victims.<sup>89</sup> How can a child then

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<sup>79</sup> BRIERE, *supra* note 55, at 26.

<sup>80</sup> *Id.* at 26–27.

<sup>81</sup> *Id.* at 26.

<sup>82</sup> *Id.* at 27.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., Ann W. Burgess et al., *Impact of Child Pornography and Sex Rings on Child Victims and Their Families*, in CHILD PORNOGRAPHY AND SEX RINGS, *supra* note 41, at 111, 112–114; see also Palmer, *supra* note 60, at 63–64 (noting that the “feelings of guilt, shame and self-blame” the victims experience may be so powerful that the victims continue to deny the images’ existence even when confronted with them).

<sup>86</sup> BRIERE, *supra* note 55, at 27.

<sup>87</sup> ALEXANDRA GELBER, U.S. DEP’T OF JUSTICE, RESPONSE TO “A RELUCTANT REBELLION” 3 (2009), available at [http://www.ussc.gov/Education\\_and\\_Training/Annual\\_National\\_Training\\_Seminar/2010/009c\\_Reluctant\\_Rebellion\\_Response.pdf](http://www.ussc.gov/Education_and_Training/Annual_National_Training_Seminar/2010/009c_Reluctant_Rebellion_Response.pdf).

<sup>88</sup> TAYLOR & QUAYLE, *supra* note 28, at 22.

<sup>89</sup> *Id.*

reconcile her own memories of the abuse with the unchanging image of her own face, projecting happiness while the abuse took place? It is easy to see how the cognitive dissonance<sup>90</sup> this would produce is extremely difficult to overcome. Each time the image is viewed, the illusion will be perpetuated.<sup>91</sup> She must have asked for this; she must have wanted this to happen; she really must be a bad person. One victim eloquently described how she felt when she discovered that thousands of men had viewed the images of her father raping her while she smiled: “You know it’s not true [that I enjoyed what was happening], but all those other people will believe that it’s you—that this is who you really are.”<sup>92</sup> As long as the image exists, the dissonance exists as well.

### 3. *Emotional Effects*

Altered emotionality is common among childhood sexual abuse survivors.<sup>93</sup> One study reported that patients who experienced sexual abuse in childhood were four times as likely to warrant a diagnosis of depression.<sup>94</sup> Indeed, depression is the most commonly reported symptom among adults who were sexually abused as children.<sup>95</sup>

Sexual abuse victims also often present with anxiety disorders.<sup>96</sup> The abused child learns that she is vulnerable and subject to extreme violation at a critical point of her development.<sup>97</sup> Furthermore, in order to develop into mentally healthy adults, children must be able to form

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<sup>90</sup> Cognitive dissonance is defined as “psychological conflict resulting from incongruous beliefs and attitudes held simultaneously.” *Cognitive Dissonance*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/cognitive%20dissonance> (last visited Apr. 15, 2013).

<sup>91</sup> See Bazelon, *supra* note 2. In Nicole’s case, detectives came to her house to show her the pictures of her father raping her when she was ten years old. *Id.* They showed them to her so that she could confirm that she was the victim whose images had gone viral. *Id.* Websites commenting on her images called her an “eager participant” because she smiled and spoke as her father had instructed her. *Id.* at 25.

<sup>92</sup> *Id.*

<sup>93</sup> BRIERE, *supra* note 55, at 28-29.

<sup>94</sup> *Id.* at 29.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 32.

<sup>97</sup> *Id.*

secure attachments.<sup>98</sup> When a child is able to rely on the adults in her life to provide safety, constancy, and responsiveness, the child can form secure attachments and “approach the world with confidence . . . .”<sup>99</sup> Failure to form appropriate attachments results in the formation of pathological attachments and significantly impacts the child’s later emotional development, as well as her ability to form and maintain relationships.<sup>100</sup> Sexual abuse can be linked to pathological attachments in one of two ways: either the attachment figure perpetrates the abuse, thus disrupting the formation of a secure attachment, or the attachment figure fails to protect the child from her abuser and the same ultimate result occurs.<sup>101</sup> Abused children often demonstrate a disorganized attachment style wherein the child exhibits extremely conflicted behaviors.<sup>102</sup> Significantly, 15-35% of children who have not suffered abuse typically exhibit disorganized attachment styles, compared to 80% of abused children.<sup>103</sup>

Children with attachment disorder often develop into unusually anxious adults, exhibiting fear and anxiety in many, if not most, of their interpersonal interactions.<sup>104</sup> One of the most commonly exhibited fears or anxieties among sexual abuse survivors is a fear of sex or sexual dysfunction.<sup>105</sup> The abused child grows to associate sexual activity with pain and violation.<sup>106</sup> One therapist noted that 87% of her adult patients who had suffered childhood sexual abuse reported “serious sexual problems, as opposed to 20% of those without sexual abuse histories.”<sup>107</sup> Indeed, sexual dysfunction is sometimes characterized as the most

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<sup>98</sup> See *id.*; see also *Attachment Theory – Child & Adolescent Development Overview*, MENTALHELP.NET, [http://www.mentalhelp.net/poc/view\\_doc.php?type=doc&id=10105](http://www.mentalhelp.net/poc/view_doc.php?type=doc&id=10105) (last updated July 24, 2006).

<sup>99</sup> BRIERE, *supra* note 55, at 32.

<sup>100</sup> *Id.*; see also Lyons T. Hardy, *Attachment Theory and Reactive Attachment Disorder: Theoretical Perspectives and Treatment Implications*, J. CHILD & ADOLESCENT PSYCHIATRIC NURSING, Feb. 2007, at 28.

<sup>101</sup> *Cf.* Hardy, *supra* note 98, at 27–28.

<sup>102</sup> *Id.* at 28.

<sup>103</sup> See Ann G. Smolen, *Fixed Homelessness* (2008) (unpublished Ph.D. dissertation, The Clinical Social Work Institute) (on file with author) (citing Mary Main, *Recent Studies in Attachment: Overview with Selected Implications for Clinical Work*, in ATTACHMENT THEORY 407 (S. Goldberg et al. eds., 1995).

<sup>104</sup> BRIERE, *supra* note 55, at 34.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

common interpersonal complaint among survivors of childhood sexual abuse.<sup>108</sup>

Abuse-focused psychotherapy treatment aims to help the abuse survivor reclaim her life.<sup>109</sup> Such therapy recognizes the emotional “scar tissue” the child has developed in order to survive what was done to her.<sup>110</sup> Its purpose is to provide a safe place for the child to revisit her past trauma and “to update [her] experience of [herself] and the world.”<sup>111</sup> But when the abuse is documented in photographs and disseminated to the world at large, it has not truly ended: how can the child even begin the process of healing when her emotional scars are repeatedly ripped open as new abusers view her pain? As one victim put it:

[T]hinking about all those sick perverts viewing my body being ravished and hurt like that makes me feel like I was raped by each and every one of them . . . even though I don't know them, they are hurting me still. They have exploited me in the most horrible way.<sup>112</sup>

To the child pornography survivor, the abuse is ongoing; the world is still a dangerous place where reminders of past horrors are still very much in the present.<sup>113</sup>

#### 4. *Dissociative Effects*

The final psychological response this Note discusses is dissociation.<sup>114</sup> Defined as “a defensive disruption in the normally

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<sup>108</sup> Lucy Berliner & Diana M. Elliot, *Sexual Abuse of Children*, in THE APSAC HANDBOOK ON CHILD MISTREATMENT 55, 64 (John E.B. Myers et al. eds., 2d ed. 2002).

<sup>109</sup> BRIERE, *supra* note 55, at 82.

<sup>110</sup> *Id.* at 82–83.

<sup>111</sup> *Id.* at 83.

<sup>112</sup> GELBER, *supra* note 87.

<sup>113</sup> *Id.*

<sup>114</sup> The range of psychological consequences arising from childhood sexual abuse is extraordinarily varied and thus beyond the scope of this article. For a more detailed analysis of the subject see, for example, Yuan et al., *supra* note 65 (discussing Borderline Personality Disorder, Paranoid Personality Disorder, Avoidant Personality Disorder,



occurring connection among feelings, thoughts, behavior, and memories,” dissociation affects a sexually abused child in various ways.<sup>115</sup> Child victims of sexual abuse dissociate to escape painful realities, to contain traumatic memories, to detach themselves from sensations and situations they cannot bear to experience, and to numb the pain of their circumstances.<sup>116</sup>

Some child victims experience psychogenic amnesia, or repression.<sup>117</sup> Research indicates that 60% or more of childhood sexual abuse victims report either incomplete memories or a complete absence of abuse-specific memories.<sup>118</sup> Such deep dissociation is a defense mechanism for the child whose reality is so painful she cannot face it fully conscious.<sup>119</sup>

Part of sexual abuse treatment involves recovering and exploring memories of the abuse in order to desensitize the victim to their painful effects.<sup>120</sup> During treatment, the therapist generally exercises extreme care not to expose the victim too quickly to memories for which she may not be adequately prepared.<sup>121</sup> This is done in an attempt to avoid retraumatizing the child.<sup>122</sup> But the child pornography survivor may not fully be able to benefit from this careful treatment. Her memories—even if she has repressed them—are forever captured on film. When those who possess her images are caught and prosecuted, the victim is contacted and sometimes asked to view the photographs to confirm that she was indeed the child pictured in the images.<sup>123</sup> There is no care exercised in this regard. Many sexually abusive images on the Internet are downloaded by multiple individuals and remain active for many years.<sup>124</sup> The reality is that one child may be repeatedly victimized as defendants who have downloaded her images are serially brought to justice. Whether she is emotionally prepared or not, the child will be forced to confront

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Dependent Personality Disorder, suicidality, substance abuse, and changes in consciousness and memory as being among the sequelae of childhood sexual abuse).

<sup>115</sup> BRIERE, *supra* note 55, at 36.

<sup>116</sup> *Id.* at 37.

<sup>117</sup> *Id.* at 39.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 131.

<sup>121</sup> *Id.* at 134.

<sup>122</sup> *Id.*

<sup>123</sup> See Bazelon, *supra* note 2; U.S. DEP'T OF JUSTICE, *supra* note 17.

<sup>124</sup> See TAYLOR & QUAYLE, *supra* note 28, at 211.

memories of her abuse as more and more procurers of the images of her victimization are punished.<sup>125</sup> In this way, the treatment the victims of child pornography receive may not be as effective as treatment of victims of non-recorded sexual abuse.<sup>126</sup>

## II. THE MYTH OF PASSIVITY

The preceding Part has reviewed some of the common mental health outcomes for children who suffer sexual abuse. The existence of these consequences is not a particularly controversial issue; even those who argue against harsh sentences for possession of obscene sexual images do not do so by refusing to believe that the children who are the subjects of those images were harmed in their production. Critics of the Guidelines would, however, argue that the sentences inappropriately place the blame for these harms on the individual who merely possesses the images, rather than the individual who created the images in the first place. This Part discusses two of the more common arguments made by

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<sup>125</sup> See, e.g., Bazelon, *supra* note 2, at 25 (describing the repetitive process of victim notification). Nicole, the victim Bazelon describes, received so many letters from the Department of Justice chronicling the prosecution of those who possessed photos of her that they eventually filled multiple laundry baskets and had to be stored in the garage. *Id.* Nicole, age seventeen at the time the letters began arriving, could not bear to look at them and had her mother keep them out of sight. *Id.*

<sup>126</sup> The widespread nature of the Internet is a relatively recent phenomenon and thus there is a dearth of research regarding the long-term consequences for survivors of child pornography specifically. See TAYLOR & QUAYLE, *supra* note 28, at 211. However, given the repeated notifications victims receive as those who view their images are brought to justice, it is a reasonable inference that treatment outcomes will differ. *Cf.* Government's Memorandum of Law Regarding the Victims' Losses at 8, *United States v. Monzel*, No. 09CR00243, 2011 WL 10549405 (D.D.C. Jan. 11, 2011), 2010 WL 6845823 ("Every day of my life [sic] I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. . . . It is hard to describe that [sic] it feels like to know that at any moment, anywhere, someone is looking at pictures of me as a little girl being abused . . . and is getting some kind of sick enjoyment from it. It's like I'm being abused over and over again" (quoting victim impact statement)). In response to learning that more and more men are viewing the images of her abuse, one victim stated: "After all these years and going to different counselors, I still haven't learned the trick to let my mind rest." Bazelon, *supra* note 2.

critics of the Guidelines regarding the presumed lack of harm caused by possession of child pornography.

### A. Continuing Victimization

One argument advanced by critics is that mere possession of child pornography is a passive act, akin to witnessing a crime rather than actually committing one.<sup>127</sup> Former prosecutor, Troy Stabenow, equates those who take pleasure in viewing images of child pornography to those who enjoy a popular horror film like *Saw*.<sup>128</sup> This argument misses the point. Obviously, mass-produced horror movies are completely fictitious in nature. The actors involved in the films are just that—actors. No one watching the movie believes that people are actually being murdered. Just the opposite is true of those who possess and view child pornography.<sup>129</sup> Part of the illicit thrill experienced by those who collect such materials is that the images depict real children involved in real sexual acts.<sup>130</sup> Indeed, there is evidence that some individuals who seek out such images do so in part to imagine themselves engaging in the obscene acts depicted therein.<sup>131</sup> Thus, any comparison between child pornography possessors and those who enjoy a good slasher film is tenuous at best.

Critics further argue that “the typical offender . . . is swapping and downloading child porn online with other like-minded individuals in the presumed privacy of his own home.”<sup>132</sup> This description conjures up

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<sup>127</sup> Hansen, *supra* note 37, at 58 (discussing former prosecutor Troy Stabenow’s belief that the Guidelines “equate the titillation of witnessing an illegal act with its actual commission”).

<sup>128</sup> *Id.*

<sup>129</sup> The focus of this Note is on pornographic images depicting actual child victims. It should be noted, however, that images of virtual child pornography may be criminalized as well, although they must first be found legally obscene. *See* 18 U.S.C. § 1466A (2006); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 248–49 (2002).

<sup>130</sup> *See* Gelber, *supra* note 87, at 5 (discussing the recorded reactions of one defendant upon accessing images).

<sup>131</sup> *See, e.g.,* TAYLOR & QUAYLE, *supra* note 28, at 24–25 (“A [clear] risk lies in pornographic material becoming the model that encourages and generates viewers to take photographs themselves . . . . ‘I would say it fueled my interest that I had anyway that was in me . . . but it seemed to reinforce it and . . . made me want to act on it.’” (quoting an abuser) (second and third omissions in original); Gelber, *supra* note 87, at 5 (“[T]here is legitimate cause for concern when someone reacts to a video of a child being sexually assaulted, not in horror, but in envy of the participants and with a desire for more material.”).

<sup>132</sup> Hansen, *supra* note 37, at 56.

an image of an individual—perhaps not a sympathetic or likeable person, but nonetheless relatively harmless—sitting in front of his computer with no tangible connection to any harm present in the images he is viewing. But this ignores the economic reality of the child pornography industry. Simply by downloading the images, the child pornography possessor creates a demand for the production of additional images.<sup>133</sup>

The child pornography possessor's place in the machinery of the production of such images is exacerbated by the Internet's role in child pornography. There is often a compulsive aspect to downloading and collecting obscene images, with collections commonly consisting of thousands of images.<sup>134</sup> Moreover, many of the images currently available on the Internet are old images, taken twenty or even thirty years ago.<sup>135</sup> The incredible volume of images that one individual can access spurs a heightened demand for additional images to be produced.<sup>136</sup> Perhaps most troubling of all, there is evidence that the newer images that are appearing on the Internet depict the abuse of ever-younger children, in more violent and victimizing situations.<sup>137</sup> Thus, the idea that the at-home procurer's putative passivity has no impact on the child

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<sup>133</sup> See *United States v. Myers*, 355 F.3d 1040, 1042–43 (7th Cir. 2004). The *Myers* court upheld the distinction between the penalties for receipt and those for possession because “receiving such materials, trafficking in such materials, or producing such materials, serves the purpose of the statute to end the abuse of children because those actions are more directly tied to the market for such products.” *Id.* See also *United States v. Ellison*, 113 F.3d 77, 81 (7th Cir. 1997) (“[E]ven the receipt of prohibited materials for personal use, without more, keeps producers and distributors of this filth in business.”); TAYLOR & QUAYLE, *supra* note 28, at 24 (“The viewer is in a sense aiding and abetting that process by providing a market for the material . . . .”); Gelber, *supra* note 87, at 6. Gelber argues that “those who collect child pornography exploit and victimize the children in those images, and create a demand for the production of more child pornography,” even when there is no proof that they have done more than download the images. *Id.*

<sup>134</sup> TAYLOR & QUAYLE, *supra* note 28, at 159–60 (noting that “with ease of access comes volume” so that collections can grow from, for example, 3000 to 40,000 images over the span of only a few months).

<sup>135</sup> *Id.* at 211.

<sup>136</sup> *Id.* at 161 (“In order to supply the demand by collectors for new material, more photographs have to be taken that depict the ongoing sexual abuse of children.”).

<sup>137</sup> *Id.* at 77.

pornography industry, and by extension on the suffering of its victims, is a misapprehension.

### 1. Normalizing “Childism”

As discussed above,<sup>138</sup> regardless of the clinical label applied to the child victims of pornography, there is little doubt that the damage is severe.<sup>139</sup> Not only does the child suffer ongoing effects, but normalizing the behavior depicted in the images can perpetuate damaging stereotypes about children. For example, Dr. Elisabeth Young-Bruehl notes that the premature sexualization of children can have severe consequences.<sup>140</sup> She argues that when a child is forced to play a role that no child should be forced to play, “terrible distortion” is experienced by the victim.<sup>141</sup> Moreover, the traumatized child experiences an internal split when subjected to abuse.<sup>142</sup> While part of the child struggles to overcome the trauma, another part internalizes the abuser’s mindset.<sup>143</sup> Thus, the child attempts to heal while simultaneously “laps[ing] into self-blame and self-traumatizing, which contributes to later ill health and destructive behavior.”<sup>144</sup> In this way the sexually abused child absorbs her abuser’s motivations, a further inescapable trauma.<sup>145</sup>

Young-Bruehl further argues that those who abuse children do so in part because of a pathological attitude toward children in general, one that she terms “childism.”<sup>146</sup> Abusers do not see their young victims as fully human with the attendant wants and needs.<sup>147</sup> Rather, they view children as possessions, naturally subservient beings, existing to serve

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<sup>138</sup> See *supra* Part I.A.

<sup>139</sup> This Note is concerned with the emotional injuries suffered by the child forced to participate in the production of pornography, although there are often unquestionably severe physical injuries incurred as well. See, e.g., J. Elizabeth McBath, *A Case Study in Achieving the Purpose of Incapacitation-Based Statutes: The Bail Reform Act of 1984 and Possession of Child Pornography*, 17 WM. & MARY J. WOMEN & L. 37, 61 (2010) (describing some of the horrific injuries suffered by very young victims of sexual abuse). These physical harms, however, are beyond the scope of this Note.

<sup>140</sup> ELISABETH YOUNG-BRUEHL, *CHILDISM* 239 (2012).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 224.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 225.

<sup>146</sup> *Id.* at 7–9.

<sup>147</sup> *Id.*

their adult masters.<sup>148</sup> Additionally, Young-Bruehl claims that when a child is abused, that child internalizes the prejudice her abuser holds toward her.<sup>149</sup> Such children develop into “divided beings, carrying inside themselves an oppressor adult and an oppressed child.”<sup>150</sup> Thus, the abused child absorbs his abuser’s projections, which in turn transform into the child’s “inner pain and conflict.”<sup>151</sup>

Young-Bruehl’s construct of childism becomes particularly troubling when applied to the abuse that occurs in child pornography. While it is distressing enough that individual adults who abuse children bear such prejudice toward their victims, even more worrisome is the manner in which society as a whole comes to rationalize or normalize such a view of children’s place in the social order.<sup>152</sup> The abusive adult cannot see the child’s needs and does not respect the child’s rights, but this prejudice becomes exponentially worse when society as a whole internalizes childism.<sup>153</sup>

An individual who possesses and views images of child pornography is certainly buying into the original abuser’s perspective that the child’s purpose is to serve the adult’s needs. As discussed above,<sup>154</sup> producers of child pornography often instruct their victims to smile, talk, and look happy.<sup>155</sup> They do this because they know that the images will be more popular if the child appears to enjoy what is being done to her.<sup>156</sup> The producer of the images instructs the victim to do as he commands, and the later consumers are more than willing to accept the

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<sup>148</sup> *Id.* at 5.

<sup>149</sup> *Id.* at 45.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 104.

<sup>152</sup> *See id.* at 6.

<sup>153</sup> *See id.*

<sup>154</sup> *See supra* Part I.A.2.

<sup>155</sup> TAYLOR & QUAYLE, *supra* note 28, at 22; Bazelon, *supra* note 2, at 25.

<sup>156</sup> TAYLOR & QUAYLE, *supra* note 28, at 22; Bazelon, *supra* note 2, at 25 (discussing the response of the men who later possessed images of child pornography and quoting one who called the victim “an eager participant” because she followed directions instructing her to talk and smile).

facade presented as reality.<sup>157</sup> Presumably, the more images the individual views, the more ingrained the childism will become.<sup>158</sup>

Equally concerning is the possibility that repeated criticisms of the Guidelines sentences for child pornography possession, when combined with a misunderstanding of the crime's attendant harms, will have a similar effect on society as a whole. Judicial decisions that refuse to acknowledge or redress the harm possession causes to its true victims create a risk that our culture will come to rationalize this crime.<sup>159</sup> The more the behavior is normalized, the less harshly it will be punished. Thus, more lenient sentences for possession of child pornography could ultimately have the effect of encouraging more offending through a general acceptance of childist attitudes, and more children will be harmed in the final analysis.

### B. Possession as a Discrete Harm

A second common criticism of harsh sentencing outcomes for the possession of child pornography is that there is no proven link between accessing images and contact offending.<sup>160</sup> Critics argue that the Guidelines in effect are punishing offenders for "presumed future behavior."<sup>161</sup> While by no means all individuals who possess child pornography have or will necessarily seek out flesh and blood victims, recent studies have demonstrated a link between accessing the images and contact offending.<sup>162</sup>

Exposure to child pornography causes the line between fantasy and reality to blur.<sup>163</sup> Viewing the abusive images "normalizes child/adult sexuality, dehumanizes children, and desensitizes the offender to the harmful consequences of child victimization."<sup>164</sup> While such conclusions

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<sup>157</sup> See TAYLOR & QUAYLE, *supra* note 28, at 22; Bazelon, *supra* note 2, at 25.

<sup>158</sup> See TAYLOR & QUAYLE, *supra* note 28, at 24 (noting that one of the reasons we should be concerned about possession of child pornography is that by watching a sexual assault, it normalizes the activity).

<sup>159</sup> See, e.g., *United States v. Goldberg*, 491 F.3d 668, 673 (7th Cir. 2007) (criticizing the district court's characterization of the defendant as in need of protection from the people with whom he would potentially be incarcerated).

<sup>160</sup> Hansen, *supra* note 37, at 57.

<sup>161</sup> *Id.* at 58.

<sup>162</sup> See, e.g., Bourke & Hernandez, *supra* note 54.

<sup>163</sup> TAYLOR & QUAYLE, *supra* note 28, at 24.

<sup>164</sup> Bourke & Hernandez, *supra* note 54.

may be questionable in the adult pornography context,<sup>165</sup> a comparison between rapists and child molesters indicates that, given similar exposure to various pornographic materials, child molesters were “more likely to use such materials prior to and during the commission of an offence.”<sup>166</sup> Indeed, more than one third of child molesters studied had been incited to offend by exposure to pornography.<sup>167</sup> Other studies have found that “[a]n estimated forty to sixty percent of defendants arrested for possession of child pornography were also found to have sexually abused children.”<sup>168</sup> Although many of those arrested for and even convicted of child pornography possession have no criminal record of contact offenses, research indicates that many such individuals later admitted to having committed undetected sexual offenses against children.<sup>169</sup> Therefore, while the link between possession of child pornography and physical abuse is certainly not yet definitive, there is compelling evidence that the link is stronger than critics of the Guidelines like to admit, and that rather than being “faced with a new type of *offender*, [we are faced with] a new type of *offending*.”<sup>170</sup>

Thus, the premise that the Guidelines punish child pornography possessors for “presumed future behavior”<sup>171</sup> is false. The Guidelines do not punish offenders based on an “assumption that anyone who would access and view child porn is a potential [contact abuser].”<sup>172</sup> However, not only are the men who “merely” possess child pornography creating a demand for more and more images to be produced,<sup>173</sup> they are themselves victimizing the children depicted in the images they possess.<sup>174</sup> Certainly they can be said to differ from those who commit

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<sup>165</sup> TAYLOR & QUAYLE, *supra* note 28, at 25.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Rebecca Michaels, Note, *Criminal Law—The Insufficiency of Possession in Prohibition of Child Pornography Statutes: Why Viewing a Crime Scene Should Be Criminal*, 30 W. NEW ENG. L. REV. 817, 826 (2008).

<sup>169</sup> Bourke & Hernandez, *supra* note 52, at 189–90.

<sup>170</sup> *Id.* at 190.

<sup>171</sup> Hansen, *supra* note 37, at 58.

<sup>172</sup> *Id.*

<sup>173</sup> See sources cited *supra* note 133.

<sup>174</sup> See, e.g., *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (“The pornography’s continued existence causes the child victims continuing harm . . .”); *New York v.*



physical offenses against children, but this is a difference in kind, not in degree. The Guidelines do not punish possession as a proxy for contact abuse; instead, they function as a symbol of abhorrence for the discrete crime these defendants have committed—a crime with a very real and distinct harm to its victims.<sup>175</sup>

Accordingly, those who access and possess obscene sexual images of children, even in the privacy of their homes, are not passive, but rather are engaging in a form of child sexual abuse—the possession of child pornography—by collecting and viewing the images. The Guidelines are not intended to punish such people based on the premise that they might someday break free from their “passivity” and go out and rape a child. Instead, they are aimed at “prohibit[ing] the exploitation of children through the collection of the images, a distinct and deplorable form of child abuse that inflicts specific harm on its victims.”<sup>176</sup>

### III. SEXUAL OFFENDERS, THE GUIDELINES, AND RESULTING PUNISHMENTS

The sentences the Guidelines suggest for possession of child pornography are unquestionably harsh. But in order to make a reasoned argument either for or against their imposition, it is necessary to understand exactly what the Guidelines recommend and where the sentencing ranges stand in comparison to other offenses, both similar to and different from the offense of possession of child pornography. This Part analyzes the Guidelines with reference to both child pornography offenses and other sexual and violent crimes.

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Ferber, 458 U.S. 747, 759 (1982) (“[T]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”); *USSC Hearing*, *supra* note 38, at III (2009) (“The continual circulation of these images, coupled with the offender’s purpose for possessing the images and the psychological effects caused to the child whose images are created and possessed, further exemplifies that each viewing, possession, or distribution of a child’s pornographic image is a new, separate victimization.”); Bazelon, *supra* note 2, at 25 (“For Nicole, knowing that so many men have witnessed and taken pleasure from her abuse has been excruciating.”); Gelber, *supra* note 87, at 3 (“[T]hinking about all those sick perverts viewing my body being ravished and hurt like that makes me feel like I was raped by each and every one of them.”).

<sup>175</sup> See Gelber, *supra* note 87, at 8.

<sup>176</sup> *Id.*

### A. *The Guidelines*

Enacted pursuant to the Sentencing Reform Act of 1984, the Federal Sentencing Guidelines are complex and confusing. The United States Sentencing Commission initially submitted the Guidelines to Congress in April 1987; they took effect later that same year.<sup>177</sup> The Guidelines' purpose is threefold: (1) to impose order on federal sentences by creating an "effective, fair sentencing system"; (2) to create uniformity in sentencing by eliminating wide disparities among similarly situated offenders; and (3) to seek "proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."<sup>178</sup> Sentences are calculated by means of a sentencing table where prosecutors, defense attorneys, and judges are able to determine the appropriate sentence by locating the conjunction of the defendant's criminal history category and his offense level.<sup>179</sup> The base offense level may be adjusted higher based on the particular characteristics of the offense, or lower due to acceptance of responsibility, the defendant's role in the crime, or myriad other considerations.<sup>180</sup> The Guidelines are not binding on the sentencing court, although the judge is required to consider the suggested range when making his or her ultimate ruling.<sup>181</sup>

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<sup>177</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(2), at 2 (2012).

<sup>178</sup> *Id.* at pt. A(1)(3), at 2-3.

<sup>179</sup> *See id.* at ch. 5, pt. A, sentencing tbl. The defendant's offense level is determined first by matching the violated statute to the applicable section of the Guidelines Manual to determine the base offense level. *See id.* § 1B1.1. The base offense level is then adjusted either higher or lower depending on the specific offense characteristics. *Id.* The defendant's criminal history category is determined by assigning numerical points for previous sentences the defendant has served. *Id.* Those points are added up and applied to criminal history category levels, ranging from category I (no, or virtually no past criminal activity) to category VI (requiring thirteen or more criminal history points). *Id.* at ch. 5, pt. A, sentencing tbl.

<sup>180</sup> *See id.* § 1B1.1(a).

<sup>181</sup> *United States v. Booker*, 543 U.S. 220, 259 (2005) ("Without the 'mandatory' provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.").

The Guidelines are promulgated by the United States Sentencing Commission, an independent agency.<sup>182</sup> However, the Guidelines specifically contemplate that Congress “retains authority to require certain sentencing practices and may exercise its authority through specific directives to the Commission with respect to the guidelines.”<sup>183</sup> Congress has exercised this authority with respect to child pornography offenses.<sup>184</sup>

Also impacting ultimate sentencing determinations are the mandatory minimum sentences Congress requires for certain offenses.<sup>185</sup> For example, simple possession of child pornography carries a mandatory maximum of ten years, unless the defendant already has a conviction relating to sexually abusive behavior, in which case he is subject to a mandatory minimum of ten years imprisonment.<sup>186</sup> Relatedly, receipt, distribution, reproduction, sale, active solicitation, and distribution to a minor of child pornography are all subject to a mandatory minimum sentence of five years.<sup>187</sup> The application of the statutory mandatory minimums is dependent in large part on the federal prosecutor’s charging decision and if the defendant pleads guilty, the resulting plea deal.<sup>188</sup> Prosecutors retain a great deal of discretion to choose a charge that avoids

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<sup>182</sup> See *An Overview of the United States Sentencing Commission*, U.S. SENT’G COMMISSION, [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) (last visited Mar. 16, 2013).

<sup>183</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(2), at 14 (2012).

<sup>184</sup> See *United States v. Cunningham*, 680 F. Supp. 844, 849 (N.D. Ohio 2010) (“The PROTECT Act was the first and only time Congress has directly amended the child pornography Guidelines. The Act added the image table to the Guidelines and also added the enhancement for possessing sadistic or masochistic images.”); John Gabriel Woodlee, *Congressional Manipulation of the Sentencing Guideline for Child Pornography Possession: An Argument for or Against Deference?*, 60 DUKE L.J. 1015, 1025–31 (2011) (discussing the ways in which Congress has directly impacted the child pornography Guidelines).

<sup>185</sup> Congress enacted the mandatory minimums in 2003, in the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (“PROTECT Act”). Pub. L. No. 108-21, 117 Stat. 650 (2003). Congress was motivated by what it considered a compelling interest in protecting children from sexual predators at every level of the chain of distribution. *Id.* § 501(2), 117 Stat. at 676.

<sup>186</sup> 18 U.S.C. § 2252A(b)(2) (Supp. III 2009), amended by Pub. L. No. 112-206, § 2(b), 126 Stat. 1490, 1490 (2012).

<sup>187</sup> *Id.* § 2252A(b)(1) (Supp. III 2009).

<sup>188</sup> See UNITED STATES ATTORNEYS’ MANUAL tit. 9 § 27.300 (1997), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm).

the mandatory minimums.<sup>189</sup> If the prosecutor insists on a charge that triggers a mandatory minimum, the judge then retains almost no discretion to sentence the defendant below that threshold.<sup>190</sup> However, if the mandatory minimums are not implicated, the judge has considerable discretion in sentencing.<sup>191</sup> Thus, while the Guidelines do, to some extent, work in tandem with the statutorily-based mandatory minimums in producing ultimate sentencing determinations, the Guidelines are advisory only, while the statutory provisions are, of course, mandatory.<sup>192</sup>

Critics of sentencing outcomes for child pornography possession argue that such offenders are treated “as seriously as murderers, rapists or child molesters.”<sup>193</sup> One defense attorney claimed: “You can get a lower score for killing somebody than for downloading child porn.”<sup>194</sup> Close scrutiny of the applicable Guidelines section, however, reveals that the Guidelines sentences for child pornography possession are almost without exception lower than those for other sexual and violent crimes.<sup>195</sup>

The base offense level for viewing or possessing material involving the sexual exploitation of a minor is eighteen.<sup>196</sup> Assuming a criminal history category of I,<sup>197</sup> this indicates that a sentence of 27-33 months is appropriate.<sup>198</sup> Where the charged crime is instead receipt<sup>199</sup> of child

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<sup>189</sup> *See id.*

<sup>190</sup> *Understanding Federal Sentencing Laws*, FAMILIES AGAINST MANDATORY MINIMUMS, <http://www.famm.org/federal/UnderstandingFederalSentencingLaws.aspx> (last visited Mar. 28, 2013) (explaining that the only two exceptions are by providing “substantial assistance” to the government, or meeting narrow eligibility criteria for the “safety valve” provision).

<sup>191</sup> *See* *United States v. Booker*, 543 U.S. 220, 259 (2005).

<sup>192</sup> *Cf. id.*

<sup>193</sup> Hansen, *supra* note 37, at 56.

<sup>194</sup> *Id.* at 58 (quoting defense lawyer Mark Richards).

<sup>195</sup> Gelber, *supra* note 87, at 9; *see also infra* pp. 64–65.

<sup>196</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(1) (2012).

<sup>197</sup> For all subsequent Guidelines calculations, I will assume the defendant qualifies for a criminal history category I; that is, he has little or no past criminal history.

<sup>198</sup> U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2012).

<sup>199</sup> The distinction between receipt and possession is slight, but at least one court has characterized receipt as “conduct that creates or strengthens the market for child pornography.” *United States v. Ellison*, 113 F.3d 77, 81 (7th Cir. 1997). In general, receipt is considered a less passive offense, one that engages actively with the market for

pornography with no attendant intent to distribute it, the base offense level rises to twenty<sup>200</sup> with a resulting recommended sentence of 33-41 months.<sup>201</sup> As with almost all crimes punishable under the Guidelines, these base offense levels are subject to adjustment based on factors such as the age of the child or children depicted in the images, whether the defendant in turn distributed the images, the violent content of the images, the use of a computer in possessing or transmitting the images, whether the defendant distributed the images to a minor, and the number of images the defendant ultimately possessed.<sup>202</sup> The age group of children that this Note focuses on would add an adjustment of two levels, for a base offense level 20 and a suggested sentencing range of 33-41 months.<sup>203</sup>

By contrast, the base offense level for the *production* of child pornography is significantly higher. A defendant who produces sexually explicit materials depicting a minor or minors has a base offense level of thirty-two under the Guidelines, leading to a suggested sentence of 121-151 months.<sup>204</sup>

The following table<sup>205</sup> demonstrates where recommended sentencing for child pornography possession actually stands in comparison to that of other sexual and violent crimes:

Crime	Sentencing Guidelines Section	Base Offense Level	Recommended Guidelines Sentence
Involuntary Manslaughter (Criminal Negligence)	2A1.4(a)(1)	12	<b>10–16 months</b>
<i>Possession of Materials Depicting</i>	<i>2G2.2(a)(1)</i>	<i>18</i>	<i><b>27–33 months</b></i>

child pornography. *See, e.g.*, United States v. Myers, 355 F.3d 1040, 1042–43 (7th Cir. 2004); United States v. Grosenheider, 200 F.3d 321, 332–33 (5th Cir. 2000).

<sup>200</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(1) (2012).

<sup>201</sup> *Id.* at ch. 5, pt. A, sentencing tbl.

<sup>202</sup> *Id.* § 2G2.2.

<sup>203</sup> *Id.* at ch. 5, pt. A, sentencing tbl.

<sup>204</sup> *Id.* § 2G2.1(a).

<sup>205</sup> All information contained in this table derives from the U.S. SENTENCING GUIDELINES MANUAL (2012).

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<i>the Sexual Exploitation of a Minor</i>			
Involuntary Manslaughter (Reckless Conduct)	2A1.4(a)(2)(A)	18	<b>27–33 months</b>
Statutory Rape of a Child Between the Ages of Twelve and Fifteen	2A3.2(a)	18	<b>27–33 months</b>
Receipt of Child Pornography with No Intent to Distribute	2G2.2(b)(1)	20	<b>33–41 months</b>
Distribution of Child Pornography	2G2.2(a)(2)	22	<b>41–51 months</b>
Involuntary Manslaughter (Reckless Operation of a Vehicle)	2A1.4(a)(2)(B)	22	<b>41–51 months</b>
Enticement or Sex Trafficking of a Child	2G1.3(a)(3)	28	<b>78–97 months</b>
Voluntary Manslaughter	2A1.3	29	<b>87–108 months</b>
Adult Rape	2A3.1(a)(2)	30	<b>97–121 months</b>
Production of Child Pornography	2G2.1(a)	32	<b>121–151 months</b>
Child Exploitation Enterprises	2G2.6(a)	35	<b>168–210 months</b>
Rape of a Child Under Twelve	2A3.1(a)(1)	38	<b>235–293 months</b>
Selling or Buying Children for Use in the Production of Pornography	2G2.3	38	<b>235–293 months</b>

Second Degree Murder	2A1.2	38	<b>235–293 months</b>
First Degree Murder	2A1.1	43	<b>Life in prison</b>

As this table demonstrates, according to the Guidelines recommendations, simple possession of child pornography is punished less harshly than other child sexual crimes such as statutory rape<sup>206</sup> or child rape,<sup>207</sup> child exploitation,<sup>208</sup> and production of child pornography.<sup>209</sup>

### *B. Guidelines Interactions with Mandatory Minimums and the Resulting Punishments*

Of course, the statutory mandatory minimums may apply in a particular defendant's case, thus increasing the sentence imposed from the suggested Guidelines range to a far greater exposure.<sup>210</sup> Mandatory minimum sentences, though, are not unique to child pornography; in fact, most congressionally enacted mandatory minimums apply to crimes involving drugs or guns.<sup>211</sup> With their statutory basis, mandatory minimum sentences reflect congressional judgment that certain crimes are so heinous that judicial discretion is inappropriate or only appropriate after a certain threshold is already met.<sup>212</sup>

It can be troubling when the Guidelines recommendations vary widely from the mandatory minimum sentences imposed by statute. For example, a first-time offender might be convicted of drug dealing for selling marijuana to government informants in a series of three "controlled buys."<sup>213</sup> This defendant would face a recommended Guidelines sentence of 78-97 months.<sup>214</sup> But because the defendant carried a gun on each of the three controlled buys, he would be subject to

<sup>206</sup> See *id.* § 2A3.2(a).

<sup>207</sup> See *id.* § 2A3.1(a)(1).

<sup>208</sup> See *id.* § 2G2.6(a).

<sup>209</sup> See *id.* § 2G2.1(a).

<sup>210</sup> See 18 U.S.C. § 2252A(b)(1)–(2) (2006).

<sup>211</sup> Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 9 (2010).

<sup>212</sup> See *id.* at 10–11.

<sup>213</sup> See *id.* at 57–58 (describing the case of *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004)).

<sup>214</sup> *Id.* at 58.

a five year mandatory minimum for the first buy, a twenty-five year mandatory minimum for the second buy, and a twenty-five year mandatory minimum for the third buy, to be served concurrently.<sup>215</sup> Thus, the unfortunate drug dealer would be subject to a mandatory fifty-five year sentence where the Guidelines would recommend a sentence between six and eight years.<sup>216</sup>

The mandatory minimums may function similarly in child pornography possession cases. For example, a defendant's conduct might be limited to intentionally seeking out images of child pornography by means of an online chat room, resulting in a download of eight images of prepubescent children. The defendant then changes the hair color of the children depicted and forwards the images to an adult friend. This defendant would be subject to a base level of 22 for receipt of child pornography,<sup>217</sup> an increase of two levels for forwarding the materials,<sup>218</sup> an enhancement of two levels for images depicting minors under age twelve,<sup>219</sup> and an increase of two levels for use of a computer<sup>220</sup> for a total offense level of 28. This would lead to a recommended Guidelines sentence of 78-97 months.<sup>221</sup> Assuming the defendant was charged with and convicted of all of this behavior, he would be subject to a mandatory minimum sentence of five years for receiving the child pornography, and a statutory maximum of fifteen years for altering the images and sending them to his friend.<sup>222</sup> Thus, while the Guidelines recommend a sentence

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Possession and receipt are distinct categories under the Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(1)–(2) (2012). While this may appear to be a distinction without a difference, numerous federal courts have held that simple possession is a far more passive offense, while receipt implies that the receiver sought out the material. *See, e.g.*, *United States v. Myers*, 355 F.3d 1040, 1042–43 (7th Cir. 2004); *United States v. Grosenheider*, 200 F.3d 321, 332–33 (5th Cir. 2000). The general rationale for treating receipt more harshly than possession is that receipt of child pornography more actively supports the market for additional materials than does simple possession. *See Myers*, 355 F.3d at 1042–43.

<sup>218</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3)(F) (2012).

<sup>219</sup> *Id.* § 2G2.2(b)(2).

<sup>220</sup> *Id.* § 2G2.2(b)(6).

<sup>221</sup> *Id.* at ch. 5, pt. A, sentencing tbl.

<sup>222</sup> *See* 18 U.S.C. § 2252A(b)(1), (3) (2006).



between six and eight years, under the statute the same defendant could face up to twenty years.<sup>223</sup>

Troubling as this discrepancy is, there are ways to ameliorate the problem. For example, the United States Attorneys' Manual describes the process by which federal prosecutors are intended to choose which crimes to charge.<sup>224</sup> When selecting charges, federal prosecutors must consider both the Guidelines and any potentially applicable mandatory minimums.<sup>225</sup> Before deciding how to charge a defendant, the prosecutor must apply these considerations to the specific case at hand.<sup>226</sup> The ultimate charging decision should include "the most serious offense that is consistent with the nature of the defendant's conduct . . . ."<sup>227</sup> While prosecutorial discretion may alleviate some concerns regarding mandatory minimums, a true solution to the discrepancies ultimately rests with Congress. There are certainly those who speak fervently in favor of abolishing mandatory minimums in sentencing.<sup>228</sup> It is telling, however, that critics of the Guidelines sentences for child pornography possession rarely mention them except as a potential reason for the gradual increase of the base offense level and some of the applicable enhancements.<sup>229</sup> In sum, while the mandatory minimums may ultimately impact the sentence imposed, their mere existence has no real bearing on arguments for or against the child pornography possession Guidelines.

### C. *Enhancing the Punishment*

Mandatory minimum sentences aside, critics of the Guidelines nevertheless argue that the available enhancements<sup>230</sup> unreasonably

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<sup>223</sup> See Luna & Cassell, *supra* note 209, at 75.

<sup>224</sup> See UNITED STATES ATTORNEYS' MANUAL: PRINCIPLES OF FEDERAL PROSECUTION, § 9-27.300, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm) (last visited Feb. 17, 2013).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See, e.g., Luna & Cassell, *supra* note 209, at 60–82.

<sup>229</sup> See generally TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES (2009), available at <http://www.lb7.uscourts.gov/documents/INND/110CR40.pdf>.

<sup>230</sup> Section 2G2.2(b), Special Offense Characteristics, contains seven subsections detailing possible enhancements:

expand defendants' exposure such that "a person who only views and downloads child porn online faces a recommended sentence [of] 210 to 262 months."<sup>231</sup> Such hyperbole has no basis in the Guidelines.<sup>232</sup> An informed view of the Guidelines demonstrates that, in order for a

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(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by 2 levels.

(2) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels.

(3) (Apply the greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.

(C) Distribution to a minor, increase by 5 levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by 6 levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.

(F) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.

(4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.

(5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.

(6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.

(7) If the offense involved—(A) at least 10 images, but fewer than 150, increase by 2 levels; (B) at least 150 images, but fewer than 300, increase by 3 levels; (C) at least 300 images, but fewer than 600, increase by 4 levels; and

(D) 600 or more images, increase by 5 levels.

U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b) (2012).

<sup>231</sup> Hansen, *supra* note 37, at 58.

<sup>232</sup> For a comprehensive judicial refutation of this argument see *United States v. Cunningham*, 680 F. Supp. 884, 851–53 (N.D. Ohio 2010).

defendant to qualify for such an extreme sentence, most, if not all of the possible aggravating factors would need to be present. For example, in order to move a defendant's recommended sentence from the base level of 27-33 months up to the extreme 210-262 months, the defendant's base offense level would need to increase from eighteen to thirty-seven—an additional nineteen points.<sup>233</sup> One way a defendant could incur such a drastic increase would be as follows: Two-point increase for use of a computer;<sup>234</sup> two-point increase for materials depicting minors under the age of twelve;<sup>235</sup> four-point increase for material depicting sadistic, masochistic, or otherwise violent conduct;<sup>236</sup> four-point increase for the possession of more than 300 images;<sup>237</sup> and seven-point increase for distribution to minor in order to induce the minor to engage in sexual activity.<sup>238</sup>

While this calculation is certainly not an exhaustive list of all the ways a defendant's base offense level can be increased, it demonstrates that no one who is "only" convicted of simple possession can be subject to a base offense level of thirty-seven with its attendant extreme recommended sentence. To the contrary, such a sentence would only be applicable to an individual far more likely to engage in contact offenses, not someone guilty only of simple possession.

Another common criticism of the Guidelines is that many, if not most, of those convicted of child pornography possession have a criminal history category of I, meaning that they have likely never before served a sentence for criminal conduct.<sup>239</sup> Yet this argument obscures the true nature of the offense of which these individuals have been convicted. It may be true that this is the first time the individual has been caught engaging in criminal activity, however, each image the defendant possesses represents a separate occasion of criminal activity.<sup>240</sup> Even if a particular defendant has not committed contact abuse, the nature of the

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<sup>233</sup> See U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2012).

<sup>234</sup> *Id.* § 2G2.2(b)(6).

<sup>235</sup> *Id.* § 2G2.2(b)(2).

<sup>236</sup> *Id.* § 2G2.2(b)(4).

<sup>237</sup> *Id.* § 2G2.2(b)(7)(C).

<sup>238</sup> *Id.* § 2G2.2(b)(3)(E).

<sup>239</sup> See, e.g., Gelber, *supra* note 87, at 6 (noting that defendants often cite to their "purported lack of criminal history" when arguing for reduced sentences); Hansen, *supra* note 37, at 54 (discussing the sentencing of "an otherwise law-abiding father of three" who had spent several years trading child pornography over the Internet).

<sup>240</sup> See McBath, *supra* note 137, at 67.

offense for which he has been convicted indicates that he is not truly a first time offender. In fact, only a defendant who is guilty of possessing no more than a single sexually abusive image actually lacks a criminal history. A defendant's plea for mercy, because his lack of criminal history suggests that he is unlikely to reoffend, should be meaningless where the very nature of his crime indicates that, in a sense, "he has [already] recidivated hundreds, if not thousands, of times."<sup>241</sup> These defendants' many crimes are not charged as such, but neither should they be ignored for sentencing purposes. While such defendants technically fall into criminal history category I and should be sentenced accordingly, arguments that the low criminal history category should generate additional leniency ignore the truth about the defendants' acts.<sup>242</sup>

In sum, although some individuals who qualify for multiple enhancements can face heavy recommended sentences under the Guidelines, these sentences are not arbitrary. They take into account the specific circumstances of a particular defendant's offense, and thus adequately serve the original purposes for which the Guidelines were enacted.

#### IV. SUFFICIENT AND NOT GREATER THAN NECESSARY

The foregoing Parts have reviewed some of the common emotional harms suffered by child pornography victims, addressed some of the arguments against harshly penalizing possession offenses, and analyzed the Federal Sentencing Guidelines as applied to child pornography possession. This Part directly addresses some of the more controversial enhancements available for child pornography possession and argues that the Guidelines suggest appropriate sentences for those who possess child pornography in light of the harmful nature of this offense.

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<sup>241</sup> *See id.*

<sup>242</sup> *See id.*

### A. Punishing Possession

As discussed above, the base offense for child pornography possession is punishable by a suggested sentence of 27-33 months.<sup>243</sup> Two to three years in prison does not seem too high a price to pay for possessing images depicting the criminal sexual abuse of children. The individual who possesses such images should be punished for the harm caused by the perpetuation of such abuse.<sup>244</sup> Even the violator who possesses a single obscene image has harmed the child subject of that image and should be punished accordingly.<sup>245</sup> Not only has the child been forced to endure physical sexual abuse at the hands of the pornography producer, “the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”<sup>246</sup> For such harms, a sentence within the suggested Guidelines range does not seem too severe.

And yet, some defense attorneys and judges argue that the “penalties for child porn offenses under the guidelines far exceed the seriousness of the crime committed by the typical offender . . . .”<sup>247</sup> Take the case of Bruce Pugh.<sup>248</sup> Pugh pleaded guilty to the “knowing possession of images of child pornography,” a crime that, with the applicable enhancements, indicated a recommended sentence of 97-120 months in prison.<sup>249</sup> Pugh’s computer contained at least sixty-eight obscene sexual images of children, as well as videos.<sup>250</sup> His collection included “a horrifying video of an infant girl being raped by an adult male, a video of a young girl performing oral sex on an adult male, and an image of male and female children engaged in sex acts with an adult male.”<sup>251</sup> Pugh admitted to forwarding images to Internet chat rooms, to soliciting additional images by pretending to be a young girl, and to

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<sup>243</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(1) (2012); ch. 5, pt. A, sentencing tbl.

<sup>244</sup> See *Osborne v. Ohio*, 495 U.S. 103, 111 (1989) (“[P]ornography’s continued existence causes the child continuing harm by haunting the children in years to come.”).

<sup>245</sup> See Gelber, *supra* note 87. Gelber quotes child pornography victims as saying “I’m more upset about the pictures on the Internet than I am about what [the defendant] did to me physically,” and “even though I don’t know them, they are hurting me still.” *Id.*

<sup>246</sup> *United States v. Ferber*, 458 U.S. 747, 759 (1982).

<sup>247</sup> Hansen, *supra* note 37, at 56.

<sup>248</sup> *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008).

<sup>249</sup> *Id.* at 1182.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 1183.

sending images on to other collectors under the pretense that he was the subject of the photos.<sup>252</sup>

The recommended Guidelines sentence for Pugh was enhanced from its base offense level due to the prepubescent victims, the added distribution of images, depictions of violence, the use of a computer, and the volume of images possessed.<sup>253</sup> Nevertheless, the district court sentenced Pugh to a five-year term of probation with no time at all served in prison.<sup>254</sup> The court based its sentencing decision on its opinion that “Pugh was not a pedophile and presented a low risk of re-offending,” that he “had not re-offended since his arrest,” and that it was “convinced that it would never see Pugh again.”<sup>255</sup> Moreover, the court characterized Pugh’s offense as “passive” and “incidental,” adjectives supporting a less severe sentence than “more typical child pornography offenders.”<sup>256</sup>

Similarly, in *United States v. Goldberg*, the district court imposed a sentence of one day in prison followed by a period of supervision for a child pornography offender.<sup>257</sup> Goldberg had, over the course of approximately eighteen months, amassed a collection of hundreds of obscene images of child pornography.<sup>258</sup> Among his collection were images of two and three-year-old children “being vaginally penetrated by adult males.”<sup>259</sup> Some of the images portrayed the bondage of young children; others depicted sadistic and masochistic sexual activities.<sup>260</sup> A psychologist’s report of Goldberg stated that he had “little knowledge, understanding or empathy for the little girls depicted in the images,” that he had “admitted to other deviant behaviors,” and that he had sociopathic tendencies and “little respect for the law or social conventions.”<sup>261</sup>

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1184.

<sup>254</sup> *Id.* at 1187.

<sup>255</sup> *Id.* (internal quotation marks omitted).

<sup>256</sup> *Id.* at 1193 (quoting Appellee Supplemental Brief at 19, *id.* (No. 07–10183)).

<sup>257</sup> *United States v. Goldberg*, 491 F.3d 668, 673 (7th Cir. 2007).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 674.

<sup>261</sup> *Id.* at 673 (internal quotation marks omitted).

Although Goldberg's recommended Guidelines sentence was between sixty-three and seventy-eight months, the district court imposed a sentence of virtually no incarceration whatsoever.<sup>262</sup> The court claimed to recognize that "the viewing of child pornography over the Internet destroys the lives of young children," but nevertheless refused to imprison Goldberg on the ground that a prison sentence would "ruin his life in many ways."<sup>263</sup> The court stated that Goldberg's was the only life affected by the ruling, and rather than expose him in prison "to people who are dangerous to him," the court chose not to follow the Guidelines and, indeed, not to impose a prison sentence at all.<sup>264</sup>

These two cases are indicative of a belief among some judges that the Guidelines sentences are too harsh. In 2009, for example, federal judges imposed below-Guidelines sentences in 44% of child pornography possession and distribution cases.<sup>265</sup> Mark Hansen argues that the battle between proponents and opponents of the Guidelines stems from "a debate that pits polite society's disgust and revulsion against a judge's solemn duty to impose a penalty that serves the . . . purposes of sentencing . . . ."<sup>266</sup>

Hansen's argument, however, trivializes the nature of the crime for which these defendants are sentenced. As the Ninth Circuit noted in *United States v. Boos*, the victims of child pornography offenses are the children who are the subjects of the abusive images.<sup>267</sup> Boos spent eighteen months in regular correspondence with another child pornography aficionado, swapping obscene photos and discussing their "respective interests in child pornography."<sup>268</sup> Boos's collection included "numerous pornographic photographs depicting young girls engaged in various sexually explicit acts . . . ."<sup>269</sup>

The Ninth Circuit discussed in detail the nature of the harms inflicted by the actions of Boos and those like him through the possession of child pornography:

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<sup>262</sup> *Id.* at 669.

<sup>263</sup> *Id.* at 669–70.

<sup>264</sup> *Id.* at 671.

<sup>265</sup> See, e.g., Efrati, *supra* note 37.

<sup>266</sup> Hansen, *supra* note 37, at 56.

<sup>267</sup> *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir. 1997).

<sup>268</sup> *Id.* at 1208.

<sup>269</sup> *Id.*

[I]t was the children depicted—and not society at large—who were “acted on” and “adversely affected,” who oftentimes were “force[d]” to participate in the production of the pornography in which Boos traded, who were “injured” (both physically and psychologically) as a result of Boos’s patronage of the porn industry, who were “sacrificed” to satisfy Boos’s curiosities, who were “subjected” to the cruelest form of “oppression, hardship, [and] mistreatment” at the hands of pornography producers and photographers, and whose lives were quite possibly “destroyed” in the process.<sup>270</sup>

The conflict between the recommended Guidelines sentences and the feelings of those who oppose them is thus not indicative of mere “revulsion” regarding these defendant’s prurient interests.<sup>271</sup> Rather, some of the conflict regarding the recommended Guidelines sentences stems from a misapprehension of the true harm these defendants cause.<sup>272</sup> It is, perhaps, easier to argue for lenient sentences for possession of child pornography if one views the victim as society as a whole.<sup>273</sup> But if one accepts, as the Ninth Circuit did in *Boos*,<sup>274</sup> that this is a crime that imposes a distinct and palpable harm on the children whose images are depicted, then it is far more difficult to justify imposing a virtual slap on the wrist.<sup>275</sup>

Child pornography cannot be produced without exposing the children, who are the subjects of the images, to additional and ongoing sexual abuse.<sup>276</sup> Even though the defendants who “only” possess the

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<sup>270</sup> *Id.* at 1210 (alterations in original) (quoting and applying Webster’s Dictionary definition of “victim”).

<sup>271</sup> See Hansen, *supra* note 37, at 56.

<sup>272</sup> See Gelber, *supra* note 87, at 16 (“It appears that it is easy to understand traditional child exploitation where the defendant and the victim are face to face, but harder to understand the severity of the crime when a computer stands between the defendant and victim.”).

<sup>273</sup> See, e.g., Rogers, *supra* note 38 (discussing the view that possession of child pornography harms society, rather than the children depicted).

<sup>274</sup> 127 F.3d at 1210.

<sup>275</sup> See Gelber, *supra* note 87, at 16.

<sup>276</sup> TAYLOR & QUAYLE, *supra* note 28, at 24.



images did not participate in the initial abuse, they are nonetheless active participants in the children's ongoing abuse. The Seventh Circuit recognized this in overturning the district judge's non-custodial sentence in *United States v. Goldberg*.<sup>277</sup> The court noted that the district judge's sentence "was influenced by the erroneous belief that a sentence affects only the life of the criminal and not the lives of his victims."<sup>278</sup> Refusing to appropriately punish the defendant surely sent a message to the child victims of his crime: You do not matter, it stated. I may be sorry that you were "raped in order to enable the creation of sadistic child pornography to assist the defendant in masturbating," but I cannot help you.<sup>279</sup> What the defendant did to you is inconsequential to this sentencing decision and so I will not punish him in an amount commensurate to what he caused you to suffer. In correcting the district court's error the Seventh Circuit properly refocused the sentencing goals. "Young children were raped in order to enable the production of the pornography that the defendant both downloaded and uploaded... ." <sup>280</sup> A proper sentence for the possession of child pornography must focus on the harm inflicted upon the child victims.

### B. Applying Enhancements to Redress Harms

Some critics of the Guidelines argue that the existence of sentencing enhancements renders the Guidelines sentences inappropriate for the offense of possession, since the enhancements tend to add up quickly and result in significantly higher sentences.<sup>281</sup> It is true that most defendants convicted of child pornography possession will likely be subject to at least one of the enhancements available under the Guidelines.<sup>282</sup> However, a closer look at the enhancements available in section 2G2.2 of the Guidelines reveals that each enhancement appears

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<sup>277</sup> *United States v. Goldberg*, 491 F.3d 668, 673 (7th Cir. 2007).

<sup>278</sup> *Id.*

<sup>279</sup> *See id.* at 671. Of course, this is not literally what the court said, but rather how a victim might interpret the ruling.

<sup>280</sup> *Id.* at 674.

<sup>281</sup> *See, e.g.*, Hansen, *supra* note 37, at 58.

<sup>282</sup> For a view that the ubiquity of certain enhancements actually increases their validity see *United States v. Cunningham*, 680 F. Supp. 2d 844, 852–53 (N.D. Ohio 2010) ("The fact that certain enhancements apply on a frequent basis does not serve as a basis for negating the Guidelines. If anything, the fact that more than fifty percent of offenders have over 300 images and that over sixty-percent have sadistic and masochistic images supports a conclusion that even more harsh sentences are required . . .").

designed to redress specific harms the defendant's acts inflict upon victims.

For example, images containing sadistic, masochistic, or otherwise violent conduct raise the base offense level by four points.<sup>283</sup> As discussed above,<sup>284</sup> victims of sexual abuse may react to the pain and trauma of their circumstances with dissociation. Particularly severe abuse can result in dissociative identity disorder—formerly known as multiple personality disorder—an extreme dissociative disturbance.<sup>285</sup> Although once thought to be quite rare, more recent studies indicate that there may be thousands of individuals suffering from dissociative identity disorder in the United States.<sup>286</sup> Significantly, up to 90% of those suffering from the disorder have histories of childhood sexual abuse.<sup>287</sup> One researcher described the nature of abuse that is likely to lead to dissociative identity disorder: “I am struck by the quality of extreme sadism that is frequently reported by most [dissociative identity disorder] victims. Bondage situations; the insertion of a variety of instruments into vagina, mouth, and anus; various forms of physical and sexual torture are common reports.”<sup>288</sup>

It is therefore believed by some that sexual sadism is a particularly harmful form of sexual abuse.<sup>289</sup> The child victim of an image depicting sadism or violence has been exposed to particularly horrific abuse with concomitantly severe emotional effects.<sup>290</sup> It is thus eminently understandable that the Guidelines impose an additional enhancement of four points to the base offense level for images containing sadism, masochism, or violent sexual acts.<sup>291</sup>

The two-level enhancement for possession of images of prepubescent minors is likewise appropriate.<sup>292</sup> Particularly in the cases of

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<sup>283</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(4) (2012).

<sup>284</sup> See discussion *supra* Part I.A.4.

<sup>285</sup> BRIERE, *supra* note 55, at 40.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 41.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(4) (2012).

<sup>292</sup> See *id.* § 2G2.2(b)(2).

young children, family members, or those close enough to the family to warrant entrusting a young child to their care, most often perpetrate sexual abuse.<sup>293</sup> The magnitude of the damage done to those children who do suffer sexual abuse is amplified *because* the abuse is perpetrated by a family member or trusted person.

The prepubescent sexual abuse victim is often tormented by the added trauma caused by her pain being inflicted by those who should instead be safeguarding her welfare.<sup>294</sup> The abused child suffers an internal split when abused by a trusted adult: on the one hand she knows that what the adult is doing is wrong and bad, but on the other hand she cannot bear this knowledge and so internalizes the abuser's "badness" as her own culpability for the abuse.<sup>295</sup> Moreover, as previously noted,<sup>296</sup> prepubescent children are engaged in a vital developmental process throughout their childhoods. Sexual abuse during this developmental period can result in the formation of pathological attachments.<sup>297</sup> Attachment-related traumas are far more likely to occur when the abuser is an "attachment figure," that is, a parental figure.<sup>298</sup> The pain and horror of the sexual abuse is compounded by the betrayal that the abuser is an adult in a relationship of trust to the abused child.<sup>299</sup>

Attachment disorders with roots in early childhood have been shown to lead to pathological development and extremely unhealthy reactions to traumatic or difficult situations later in life.<sup>300</sup> The child who is abused at such a young age is not only physically harmed, not only emotionally damaged in that moment, but also robbed of the chance to develop along normal lines. It is also worth noting that sexual abuse of very young children often results in extensive physical injuries as well with their own attendant emotional traumas.<sup>301</sup> Given the long-lasting,

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<sup>293</sup> See, e.g., YOUNG-BRUEHL, *supra* note 138, at 176.

<sup>294</sup> Leonard L. Shengold, *Child Abuse and Deprivation: Soul Murder*, 27 J. AM. PSYCHOANALYTIC ASS'N 533, 541 (1979).

<sup>295</sup> *Id.*

<sup>296</sup> See discussion *supra* Part I.A.3.

<sup>297</sup> Giovanni Liotti, *Trauma, Dissociation, and Disorganized Attachment: Three Strands of a Single Braid*, 41 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING 472, 477 (2004).

<sup>298</sup> *Id.*; see also Smolen, *supra* note 103, at 9–11.

<sup>299</sup> *Id.* at 479.

<sup>300</sup> *Id.* at 478.

<sup>301</sup> See, e.g., McBath, *supra* note 137 (describing some of the injuries suffered by six, seven, and eight-year-old victims). Some injuries are so severe that it is "questionable

severe results of sexual abuse on prepubescent children, a two point increase to the base offense level for possession of images depicting children under the age of twelve makes a great deal of sense.<sup>302</sup>

One of the more controversial enhancements available under 2G2.2 is the so-called “computer enhancement.”<sup>303</sup> This enhancement applies a two-point increase when a defendant uses a computer or the Internet to possess or receive the images.<sup>304</sup> Critics of the computer enhancement argue that it is very difficult to delete images from your computer once they are there, and very easy to amass a large collection quickly with the Internet facilitating access.<sup>305</sup> It is absolutely true that it is easy to quickly access hundreds of images because of the Internet. And each image so accessed memorializes the criminal sexual abuse of a child. Even more troubling, once an image exists on the Internet there is virtually no way to destroy it.<sup>306</sup> The President of the National Center for Missing and Exploited Children, giving testimony before the Sentencing Commission, explains that: “[O]nce an image is placed on the Internet, it can never be removed and becomes a permanent record of the abuse inflicted upon that child. Each and every time such an image is viewed, traded, printed, or downloaded, the child in that image is re-victimized.”<sup>307</sup>

The child pornography possessor who utilizes the Internet to view and possess his pornographic images is perpetuating a problem exacerbated by the “unbounded nature” of the Internet itself.<sup>308</sup> Children recognize that images are permanent.<sup>309</sup> Thus, “[t]he continuous and uncontrollable distribution and possession of a child victim’s images impose an indelible and painful reminder of his or her sexual abuse.”<sup>310</sup>

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whether the victim would ever be able to engage in normal sexual intercourse or have children of her own.” *Id.*

<sup>302</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2) (2012).

<sup>303</sup> See *id.* § 2G2.2(b)(6).

<sup>304</sup> *Id.*

<sup>305</sup> Cf. Hansen, *supra* note 37, at 57.

<sup>306</sup> See Gelber, *supra* note 87, at 18.

<sup>307</sup> USSC Hearing, *supra* note 38.

<sup>308</sup> See *id.*

<sup>309</sup> See Lanning, *supra* note 68, at 83.

<sup>310</sup> *United States Sentencing Comm’n Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Reform Act of 1984*, *supra* note 38, at VI.

Similarly criticized is the multi-tiered system of enhancements based on the number of images possessed. It has been argued that these enhancements, along with the computer enhancement, make little sense, given their reliance on the victims' knowledge that one more person has accessed or viewed images of their abuse.<sup>311</sup> However, the justification for these enhancements is not grounded in the victims' realization that images of their abuse are being viewed. Rather, it is enough that the child victims recognize (or will later recognize with age) that the abusive images exist, forever circulating on the Internet.<sup>312</sup>

Additionally, repeated viewing of sexually abusive images has a tendency to normalize the behavior depicted therein.<sup>313</sup> The child pornography viewer may seek a greater quantity of images likely containing increasingly explicit sexual activity.<sup>314</sup> The more images he views, the more the viewer convinces himself that his behavior is acceptable.<sup>315</sup> Therefore, the enhancements for possession of myriad images make sense because they punish the offender for his multiple victims.

Finally, Guidelines critics argue that no single enhancement, standing alone, is problematic. Rather, the combination of enhancements for a single defendant can mean that an individual who "only" possesses obscene sexual images of children might be subject to a longer sentence than a contact offender.<sup>316</sup> In the abstract this is a troubling outcome since we, as a society, want to see those who commit the most heinous crimes be punished most severely. Indeed, the proportionality of punishment is a principle that undergirds our entire system of criminal law. And yet, while a contact offense like child rape—subject to a considerably higher base offense level than possession of child

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<sup>311</sup> Exum, *supra* note 31, at 44.

<sup>312</sup> See McBath, *supra* note 139, at 62 (noting that the healing process for victims of child pornography is extraordinarily difficult due to the uncontrollable, continuous circulation of their images on the Internet).

<sup>313</sup> See TAYLOR & QUAYLE, *supra* note 28, at 24.

<sup>314</sup> *Id.*; cf. *Hearing Before the Subcomm. on Crime to Examine the Federal Response to Serial Killings and Child Abductions, Focusing on FBI Efforts*, 104th Cong. 25–64 (1995).

<sup>315</sup> *Id.*

<sup>316</sup> See Hansen, *supra* note 37, at 58.

pornography<sup>317</sup>—is a horrific crime, those who commit it often harm relatively few children.<sup>318</sup> By contrast, “child pornography offenders victimize hundreds and even thousands of children through their collection of these illegal images.”<sup>319</sup>

It is true that one child pornography possessor could conceivably receive a heavier sentence than an individual who engages in contact sexual abuse. However, the pornography offender would necessarily have a huge collection of images that he likely also distributed, some depicting violent, sadistic behaviors.<sup>320</sup> For example, an individual who possesses sexually explicit images of a child under the age of twelve is subject to a Guidelines sentence of forty-one to fifty-one months<sup>321</sup> and the sentencing judge is statutorily capped at a sentence of twenty years.<sup>322</sup> In stark contrast is the individual who rapes a child under the age of twelve; such an offender is subject to a Guidelines sentence of 235-293 months<sup>323</sup> with a statutory sentence ranging from thirty years to life in prison.<sup>324</sup> Accordingly, as a general matter, contact offenses are punished far more harshly than possession offenses where the number of victims is similar. It is only when multiple aggravating factors are present that it can lead to a sentence for child pornography possession to exceed a sentence for contact child sexual abuse.<sup>325</sup>

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<sup>317</sup> Compare U.S. SENTENCING GUIDELINES MANUAL § 2A3.1 (2012) (suggesting a sentence of 235-293 months), with § 2G2.2 (suggesting a sentence of 27-33 months for possession of child pornography).

<sup>318</sup> Gelber, *supra* note 87, at 11.

<sup>319</sup> *Id.*

<sup>320</sup> See discussion *supra* Part III.

<sup>321</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2) (2012).

<sup>322</sup> 18 U.S.C. §§ 2252(a), 2252A(a) (Supp. II 2008), amended by Pub. L. No. 112-206, § 2(b), 126 Stat. 1490, 1490 (2012).

<sup>323</sup> U.S. SENTENCING GUIDELINES MANUAL § 2A3.1 (2012).

<sup>324</sup> 18 U.S.C. § 2241(c) (Supp. I 2007).

<sup>325</sup> Cf. U.S. SENTENCING COMM'N, PRELIMINARY QUARTERLY DATA REPORT tbl.19 (2012) (listing the median sentence in the first quarter of 2012 for sexual abuse generally as 120 months, while the median sentence for child pornography offenses generally was 96 months).

## CONCLUSION

The Federal Sentencing Guidelines for the possession of child pornography attempt to balance the harms of the crime committed with the aims punishment is supposed to serve. While the base offense level for simple possession of child pornography does not impose a relatively lengthy prison sentence, the addition of available enhancements can lead to recommended sentences in the triple digits.<sup>326</sup> However, as this Note has argued, the base offense level and the available enhancements all serve the purposes of redressing the harm caused to the child victims by those who later possess the record of their abuse.

It is also vital to remember that the Guidelines, while they must be considered, are not binding on the sentencing court.<sup>327</sup> Instead, the court is statutorily required to “impose a sentence sufficient, but not greater than necessary,” to serve the purposes of imposing punishment in the first place.<sup>328</sup> In this way, a court retains a great deal of discretion to consider the individualized circumstances of each defendant who comes before it. Where there is a defendant whose behavior truly does not merit a sentence within the suggested Guidelines range, the court is free to impose a lesser sentence.<sup>329</sup> Indeed, the court is *required* to consider the “nature and circumstances of the offense and the history and characteristics of the defendant” before imposing a sentence.<sup>330</sup> Therefore, as long as the sentencing judge carefully considers the details of the crime committed, and attempts to understand who the defendant is and what he did, the sentence imposed should be just, regardless of what the Guidelines recommend.<sup>331</sup>

Finally, and most importantly, the Guidelines recognize that the true victims of the crime of possession of child pornography are the children whose abuse is forever captured in the obscene images; abuse

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<sup>326</sup> See *supra* Part III.

<sup>327</sup> See *United States v. Booker*, 543 U.S. 220, 259 (2005).

<sup>328</sup> See 18 U.S.C. § 3553(a) (2006).

<sup>329</sup> See *Booker*, 543 U.S. at 259.

<sup>330</sup> 18 U.S.C. § 3553(a)(1) (2006).

<sup>331</sup> As previously discussed, the prosecutor’s charging decision will also bear on the ultimate sentence imposed. See *supra* Part III. Federal prosecutors are instructed to consider any applicable statutory mandatory minimums, as well as the recommended Guidelines range, in conjunction with the specific facts of a defendant’s life, crime, and other circumstances, when deciding how to charge, and eventually plead a case. See U.S. ATTORNEYS’ MANUAL §§ 9-27.300, 9-27.420 (1997).

that continues to affect the victims years after the physical abuse has ended. This is not a typical vice crime, a crime that lacks a victim other than perhaps society at large or the offender himself. In the words of the mother of one child victim:

My daughter is a real person. She was horribly victimized to provide this source of “entertainment.” She is exploited anew each and every time an image of her suffering is copied, trade [sic], or sold. While the crime is clearly conscienceless, it is hardly ‘victimless.’

I asked my daughter what she most wanted to ask of the judge. Her request: “Please, don’t let them pretend no-one’s getting hurt.”<sup>332</sup>

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<sup>332</sup> Gelber, *supra* note 87, at 18.