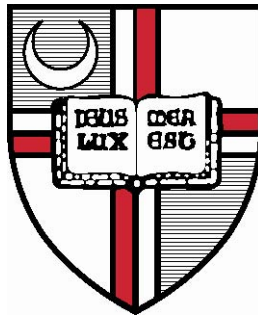


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**Self Produced Child Pornography: The Appropriate
Societal Response to Juvenile Self-Sexual Exploitation**

Mary G. Leary

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SELF-PRODUCED CHILD PORNOGRAPHY: THE
APPROPRIATE SOCIETAL RESPONSE TO JUVENILE SELF-
SEXUAL EXPLOITATION

Mary Graw Leary*

“I am here to speak about a danger facing this nation’s children. . . . I speak from experience. For five years, beginning when I was 13 years old, I operated a pornographic web site featuring images of myself fluttered on the Internet by webcams.”

- Justin Berry, age 19

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INTRODUCTION

Child pornography is a devastating plague in American culture.¹ Sadly, while the existence of images of sexually exploited children is not

¹ The term “child pornography” has been recognized as highly inadequate. *See, e.g.,* Ethel Quayle, *The Impact of Viewing on Offending Behavior*, in *CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER* 26 (Martin C. Calder ed., 2004) (“Many professionals working in the area have expressed the belief that such terminology allows us to distance ourselves from the true nature of the material. A preferred term is abuse images.”); Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study* at vii, n.1 (2005), available at http://www.missingkids.com/en_US/publications/NC144.pdf (“The term ‘child pornography,’ because it implies simply conventional pornography with child subjects, is an inappropriate term to describe the true nature and extent of sexually exploitive images of child victims.”); Save the Children Europe, Position Paper Regarding Online Images of Sexual Abuse and Other Internet-Related Sexual Exploitation of Children, Save the Children Europe, at 5 (Aug. 2005), available at www.savethechildren.net/alliance/get_involved/report/position_internet_abuse.pdf (“There has been much international discussion about the correct terminology that should be used to describe the sexual abuse and exploitation of children recorded on film or photograph. The term ‘child pornography’ is almost universally used But this term has been criticized . . . as it can be misinterpreted and undermines the seriousness of the abuse. It also tends to oversimplify what is a very complex social problem with many diverse factors”). This term has served to trivialize these images and fails to capture the horrific imagery of a child being sexually abused or exploited. For that reason, the author prefers the term “child abuse images.” However, as child

new, today's images are accessible to adults and children in a volume and severity never before seen.

Being illegal and difficult to obtain, child pornography was once, but is no longer, a limited problem. The Internet has provided the gateway through which child pornography invades our homes, schools and workplaces with seemingly unstoppable force, infecting minds and destroying lives.² Society has responded to this pestilence in a number of ways, including with aggressive criminal statutes³ reflecting an understanding that this material is dangerous contraband. Similarly, the Supreme Court acknowledged the significance and severity of the child pornography problem in *New York v. Ferber* when it ruled that child pornography is not speech that is protected by the First Amendment.⁴ While prosecution of such cases is on the rise,⁵ the incidence of production and distribution far outpaces society's efforts to cease it.⁶

pornography remains the more common label, and this article focuses on self-produced images, the article will refer to these images with the common term of child pornography.

² See, e.g., Debra Wong Yang, *Protecting Children from Online Exploitation and Abuse: An Overview of the Project Safe Childhood*, 34 PEPP. L. REV. 439, 443 (2007) (“[T]he Internet also is largely responsible for the significant increase in the proliferation and severity of child pornography.”).

³ See, e.g., ARIZ. REV. STAT. ANN. § 13-604.01(A) (1994) (“[A] person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving . . . commercial sexual exploitation of a minor, [or] sexual exploitation of a minor . . . shall be sentenced to a presumptive term of imprisonment for seventeen years.”); see also ARIZ. REV. STAT. ANN. § 13-3553(A) (2001). Louisiana has also adopted severe minimum sentences for the production and possession of child pornography, including a minimum sentence of 25 years imprisonment for the coercion of children under the age of 13 to participate in the production of pornography. See LA. REV. STAT. ANN. § 14-81.1(E) (2006) (At least twenty-five years of the sentence imposed shall be served without benefit of parole, probation, or suspension of sentence.); see also 18 U.S.C. § 2252(b)(1) (2006) (outlining the minimum sentence for possession of child pornography as “not less than 5 years” incarceration, and further describing sentences for repeat offenders as “not less than 15 years nor more than 40 years.”).

⁴ *New York v. Ferber*, 458 U.S. 747 (1982).

⁵ See General Accounting Office, *Combating Child Pornography: Federal Agencies Coordinate Law Enforcement Efforts, But an Opportunity Exists for Further Enhancement* (Nov. 2002), available at <http://www.gao.gov/new.items/d03272.pdf> (“Federal agencies responsible for combating child pornography have various coordinated mechanisms in place for combating this crime. These

More recently, juveniles are engaging in a related and disturbing activity at an alarming rate. Minors,⁷ without the grooming or coercion of adult offenders, are voluntarily creating and distributing self-produced child pornography.⁸ This “self-exploitation” occurs in countless circumstances including commercial production,⁹ producing with the intent that there will be a limited audience,¹⁰ self-posting of sexually

coordinated efforts have contributed to increases in the number of federal child pornography cases prosecuted over the past five years.”).

⁶ See David Finkelhor & Richard Ormrod, *Child Pornography: Patterns from NIBRS* (U.S. Department of Justice), Dec. 2004, at 3, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/204911.pdf> (“[F]or those law enforcement agencies that reported NIBRS data for both 1997 and 2000, the total number of crime offenses recorded decreased 2 percent . . . while . . . juvenile victim/child exploitation pornography offenses jumped 200 percent.”); General Accounting Office, *supra* note 5 (“The trafficking of child pornography through increasingly sophisticated electronic media, including Internet chat rooms, newsgroups, and peer-to-peer networks, has made such images more readily accessible.”).

⁷ The age of majority varies from state to state and from charge to charge. The term as used in this article refers to juveniles under the age 18, the federal age of majority for child sexual exploitation.

⁸ While no widely accepted definition exists, this article uses the term “self-exploitation” to refer to minors who produce images of themselves in sexually explicit poses or engaged in sexual conduct and display or distribute them to others. See 18 U.S.C. § 2252 (2006). This article does not address situations in which a minor produces child pornography at the request of an adult abuser. In that scenario the minor is completely the victim and has been exploited by the adult. It is these other examples with which society must wrestle and to which this article is directed.

⁹ See *Sexual Exploitation of Children Over the Internet: What Parents, Kids and Congress Need to Know About Child Predators: Hearing Before the Subcomm. on Oversight and Investigations*, 109th Cong. 75 (2006) [hereinafter *Hearings*] (testimony of Justin Berry) (“For 5 years, beginning when I was 13 years old, I operated a pornographic website featuring images of myself fluttered on the Internet by webcams. I was paid by more than 1,000 men to strip naked, masturbate, and even have sex with female prostitutes while on camera. My business was assisted by adult criminals, including companies that process credit card payments.”).

¹⁰ *E.g.*, *A.H. v. State*, 949 So.2d 234, 235 (Fla. Dist. Ct. App. 2007) (affirming child pornography conviction of appellant and 17 year old boyfriend for taking digital photos of themselves unclothed and engaged in sexual behavior); *State v. Vezzoni*, 127 Wash. App. 1012 (Wash. Ct. App. 2005) (affirming conviction of

explicit images on a web page or social networking site,¹¹ producing for fee,¹² making images of oneself and distributing or posting them on the Internet for recognition, attention, or profit,¹³ recording sexual encounters by a minor with another,¹⁴ and others.¹⁵ Whatever the

a 16 year old defendant who photographed his 16 year old girlfriend in various stages of undress exposing her breasts and genitals and showed pictures to classmates).

¹¹ E.g., M. Jane Brady, *Prosecution Responses to Internet Victimization*, 76 MISS. L.J. 623, 632 (2007) (discussing phenomenon of teens posting sexually exploitive, partially nude, pictures of themselves on social networking sites without regard that “once a person downloads it, it is there potentially forever”); Kurt Eichenwald, *Through His Webcam, A Boy Joins a Sordid Online World*, N.Y. TIMES, Dec. 19, 2005, at A1 (describing the self-produced pornography distributed by Justin Berry).

¹² Just as adults learn that they can profit from marketing child pornography, so too can children. See, e.g., Diana E.H. Russell & Natalie J. Purcell, *Exposure to Pornography as a Cause of Child Sexual Victimization*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 59, 77 (Nancy E. Dowd, Dorothy G. Singer & Robin Fretwell Wilson eds., 2006).

¹³ See, e.g., *Girl Charged with Posting Nude Photos on Internet*, PITTSBURGH TRIB.-REV., Mar. 27, 2004, available at

http://www.pittsburghlive.com/x/pittsburghtrib/s_186625.html; *Two Teens Face Child Pornography Charges*, ASSOCIATED PRESS, Mar. 29, 2006, available at

http://www.boston.com/news/local/rhode_island/articles/2006/03/29/two_teens_face_child_pornography_charges; *13-Year-Old Faces Child Pornography Rap*, UNITED PRESS INT’L, Oct. 15, 2004, available at

http://www.upi.com/NewsTrack/Top_News/2004/10/15/13yearold_faces_child_pornography_rap/5111/; Lindsay Nair, *Judge Scolds Teen Girls for Nude Photos*, ROANOKE TIMES, July 23, 2004, at B1; *Blog Prank Leads to Child Porn Charge*, ASSOCIATED PRESS, Mar. 29, 2006, available at

http://abclocal.go.com/wpvi/story?section=sci_tech&id=4034897&ft=print.

¹⁴ See, e.g., *Teen Incest Sex Case to be Tried as Adult*, ROANOKE TIMES, Nov. 24, 2004, at B3 (“A 17-year-old Roanoke County boy entangled in a web of incest and pornography . . . will be tried as an adult on the charges that he faces in connection with the crimes [H]e even videotaped himself with his stepsister, indicated that he had learned the wrong behavior and had begun to repeat it himself.”).

¹⁵ *State v. D.H.*, 9 P.3d 253, 254 (Wash. Ct. App. 2000) (affirming conviction of juvenile for exploitation of minor for repeatedly asking minor to expose her breasts to video camera); *Staunton Man Charged With Child Porn Case*, DAILY NEWS LEADER, Feb. 22, 2002 (14 year old and 16 year old juveniles charged with felony publication of child pornography after distributing nude pictures of themselves at a party).

circumstances, because this activity is the production of child pornography, these children face significant criminal penalties.¹⁶

Consequently, this phenomenon creates a difficult dilemma for society as it struggles to craft an appropriate response to children who self-produce child pornography. On the one hand, we have advocated for significant criminal sanctions for child pornography because we recognize the great social harm that child pornography poses to children both in or exposed to such images.¹⁷ On the other hand, self-exploitation is an act by a minor perhaps not fully mature enough to recognize the harms caused. Society is then left to determine the appropriate response to the social harm of self-exploitation by minors.

This article explores this issue and argues that juvenile prosecution should be considered, although not mandated, as a viable response to juvenile self-exploitation. Part One examines the scope of the child pornography problem and identifies the severe social harms caused by these images regardless of their source. Part Two introduces the immeasurable social ill of self-exploitation whose breadth demands a considered policy in response. Part Three reviews the significant doctrinal basis for governmental intervention. Both *parens patriae* and the state police powers allow for intervention in analogous juvenile self-destructive criminal behavior. By analyzing the statutory rape model, the child prostitution model, and child pornography by adult offenders model this Part concludes that significant basis exists for juvenile prosecution. Part Four proposes that the proper societal response to the production, possession, and/or distribution of child pornography by minors include the possibility of prosecution in the juvenile court system. This Part grounds its conclusion in the reality that social harms caused by child pornography extend beyond the child depicted, the critical need to eradicate the existence of all images of child pornography, the significant precedence for prosecuting juveniles for crimes in which they have victimized themselves, and the purpose of juvenile court. Recognizing the complexity of this issue, this article

¹⁶ See *A.H. v. State*, 949 So.2d at 235 (holding that the lower court did not err in finding two juveniles who created pornographic images of themselves were guilty of “producing, directing or promoting a photograph or representation that they knew to include the sexual conduct of a child”).

¹⁷ See *infra* Part I.C.

proposes parameters for implementing a protocol to address such criminal, yet complex, behavior.

I. THE PROBLEM OF CHILD PORNOGRAPHY: ITS GROWTH IS UNIMAGINABLE IN BOTH VOLUME AND SEVERITY

A. CHILD PORNOGRAPHY – DEFINED

Whenever discussing child pornography, it is essential to understand exactly the severe content of these materials. The misconception that these materials are simply “borderline” images of youthful appearing older teens has no place in any dialogue about child sexual exploitation. Such is not reality. Child pornography is the depiction of children, often as young as toddlers, engaged in “sexually explicit conduct.”¹⁸ The federal definition of sexually explicit conduct makes clear the graphic nature of these images. It includes children engaged in “actual or simulated i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; ii) bestiality; iii) masturbation; iv) sadistic or masochistic abuse; or v) lascivious exhibition of the genitals or pubic area of any person.”¹⁹

Approximately twenty-six percent of all Internet pornography involves children.²⁰ While it is difficult to obtain biographical information of the victims of this exploitation, teenagers are a significant portion of them. Of the juveniles identified as victims of crimes related to child pornography, fifty-nine percent are between the ages of twelve and seventeen, twenty-eight percent are between the ages of six and eleven, and thirteen percent are preschool age.²¹

¹⁸ 18 U.S.C. § 2256(8) (2003).

¹⁹ 18 U.S.C. § 2256(2)(A) (2003). But note, this definition does not apply to virtual child pornography, which is covered by the definition of sexually explicit conduct provided in 18 U.S.C. § 2256(2)(B).

²⁰ Finkelhor & Ormrod, *supra* note 6, at 2 (“The proportion of all pornography incidents with child/juvenile involvement increased from 15 percent in 1997 to 26 percent in 2000.”).

²¹ *Id.* at 2.

B. CHILD PORNOGRAPHY – VOLUME

Child pornography is a multi-billion dollar industry with estimates ranging up to twenty billion dollars profit annually.²² The percentage of victims who are teenagers indicates that there are hundreds of thousands of victimized teens. While a debate exists as to whether child sex crimes are decreasing, child pornography is clearly on the rise.²³ Since 1988 the number of child pornography offenses has increased 1500%.²⁴ Currently there are approximately fourteen million child pornography websites, some of them containing as many as one million images of child pornography per website.²⁵

As noted, the reach of this industry expanded exponentially with the advent of the Internet. Over 20,000 child pornography images are posted on the Internet each week.²⁶ The demand for such images is incessant. For example, there are 116,000 daily requests for child

²² The National Center for Missing and Exploited Children estimates the industry size to be \$20 billion. See *Hearings, supra* note 9 (testimony of Ernie Allen, President of National Center for Missing and Exploited Children) (Child pornography has become a global crisis. A recent report by McKinsey Worldwide estimated that today commercial child pornography is a \$20 billion industry worldwide, fueled by the Internet.).

²³ Roberta Lynn Sinclair & Daniel Sugar, The Nat'l Child Exploitation Coordination Ctr. (NCECC) Strategic Operations Support Servs., *Internet Based Sexual Exploitation of Children and Youth: Environmental Scan 7* (2005).

²⁴ *Internet Porn 'Increasing Child Abuse,'* GUARDIAN UNLIMITED, Jan. 12, 2004, available at <http://society.guardian.co.uk/children/story/0,1074,1121332,00.html> (citing a report by the British children's charity NCH, formerly National Children's Homes); John Carr, *Child Abuse, Child Pornography & the Internet* 12 (2004), available at http://www.make-it-safe.net/eng/pdf/Child_pornography_internet_Carr2004.pdf.

²⁵ Sinclair & Sugar, *supra* note 23, at 34.

²⁶ See Sinclair & Sugar, *supra* note 23, at 34; *Key Tests for a New Children's Bill*, Child Centered: NSPCC's Parliamentary Bulletin (Nat'l Soc'y for the Prevention of Cruelty to Children, London, England), Nov. 2003, at 12, available at http://www.nspcc.org.uk/inform/publications/downloads/childcentred11_gf27285.pdf (citing RENOLD E. & CREIGHTON, S. J., *IMAGES OF ABUSE – A REVIEW OF THE EVIDENCE ON CHILD PORNOGRAPHY* (2003), available at http://www.nspcc.org.uk/Inform/publications/Downloads/Imagesofabuse_wdf48065.pdf).

pornography on the file sharing service Gnutella alone.²⁷ Accessibility is not the only negative aspect of the Internet. The Internet also provides unprecedented validation for offenders. In the past, an offender was not able to easily interact with other like minded people. The Internet itself, however, now “provides positive reinforcement for child pornographers in their beliefs encouraging further exploitation of children.”²⁸

C. CHILD PORNOGRAPHY: THE SOCIAL HARMS CAUSED

Recognizing the character and growth of these images does not provide an adequate assessment of the significance of the problem. One must also appreciate the social harms caused by child pornography and the breadth of the victimization. Child exploitation has expanded in our society to be nearly commonplace, and the minors who comprise these images number in the hundreds of thousands.

The driving force behind the social, legislative, and judicial movement to aggressively combat child pornography is the universal recognition of the breadth and depth of the social harms caused by the mere existence of child pornography. These include harm to the children depicted, to other children exposed to child pornography or sexually assaulted because of the offender’s exposure, and to society as a whole.

1. Harm to Children in the Images

The regulation of child pornography first began with an understanding of the unique and devastating harm child pornography causes children depicted in such images. “Children and youth are . . . abused through child sexual abuse images. An image of child pornography is a permanent record of the sexual abuse of a child.”²⁹ In other words, the social harm to the depicted child is of two forms: the immediate and the long term. The immediate effects on the child are apparent during the abuse in the forms of physical trauma and emotional symptoms including moodiness, fear, anxiety, and hopelessness.³⁰ Being

²⁷ Sinclair & Sugar, *supra* note 23, at 7, 36. Gnutella is one of several file sharing services which allows members to send and receive material directly to each other.

²⁸ Yang, *supra* note 2, at 445.

²⁹ Sinclair & Sugar, *supra* note 23, at 7.

³⁰ Mimi Halper Silbert, *The Effects on Juveniles of Being Used for Pornography and Prostitution*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS* 215, 226 (Dolf Zillman & Jennings Bryant eds., 1989).

used by an adult, often a trusted one,³¹ is harmful to juveniles not only during the abuse, “but also, and often even more so, during their future development.”³² The damage caused by child pornography uniquely affects victims far into the future. Mimi Halper Silbert characterized one effect as “psychological paralysis” in which victims have an inability to separate themselves from the sex exploitation in order to reestablish a positive life.³³ Additionally, it is a crime of perpetuity where every time an image is distributed the victim is revictimized.³⁴ The effects also focus around the disclosure where the parties develop a “silent conspiracy” in which no one discusses the incident either before or after the disclosure.³⁵ Finally, years later, victims of child pornography report that these effects are the most difficult to overcome and are described as a self-concept so eroded that the person cannot disclose and this secrecy creates the paralysis.³⁶

³¹ Of the identified victims of juvenile pornography by law enforcement, sixty-two percent are female; twenty-five percent are members of the offender’s family; fifty-nine percent are between twelve and seventeen years old. Finkelhor & Ormrod, *supra* note 6, at 2. Eighty-three percent of the offenses occur in the home. *Id.* The numbers in the NIBRS are likely lower than the actual national averages, because NIBRS “is still far from a national system.” *Id.* Because local jurisdictions participate in the study on a voluntary basis, “by the end of 2000, jurisdictions in 19 states submitted data, thus providing coverage for 14 percent of the nation’s population and 11 percent of its crime.” *Id.* Additionally, “only 3 cities with populations greater than 500,000 . . . are reporting,” which means that “the crime experiences of large urban areas are particularly underrepresented.” *Id.*

³² Silbert, *supra* note 30, at 216.

³³ Silbert, *supra*, note 30, at 217.

³⁴ See Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, H.R. 3610 § 121.1 (1996).

³⁵ Silbert, *supra* note 30, at 227-28.

³⁶ See Silbert, *supra* note 30, at 225-29; NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, CHILD PORNOGRAPHY FACT SHEET, *available at* http://www.cybertipline.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2451 (“It is important to realize that these images can have a devastating and lasting effect on children. In addition to any physical injuries they might suffer . . . child victims may also experience depression, withdrawal, anger, and other psychological disorders. Such effects may continue into adulthood. . . . Child victims also frequently experience feelings of guilt and responsibility for the abuse and betrayal, a sense of powerlessness, and feelings of worthlessness and low self-esteem.”); Richard Wartly & Stephen Smallbone,

The recognition of these social harms to depicted children is not limited to social science, but legislators and courts recognize it as well. The United States Congress noted the never ending victimization in the Child Pornography Protection Act (CPPA), by stating “the use of children in the production of sexually explicit material . . . is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved.”³⁷ Regarding the perpetuity of the crime, Congress noted that, “where children are used in its production, child pornography permanently records the victim’s abuse, and [the images’] continued existence causes the child victims . . . continuing harm by haunting those children in future years.”³⁸ The CPPA emphasizes how child pornography creates a continual cycle of abuse, explaining that “child pornography is often used as part of a method of seducing other children into sexual activity,” and that children who are “reluctant . . . can sometimes be convinced” to cooperate once they are shown the images of other children participating in sexual activity.³⁹ Similarly, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) states “the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children.”⁴⁰ The Adam Walsh Act, enacted in 2006,⁴¹

U.S. Dep’t of Justice Office of Community Oriented Policing Services, *Child Pornography on the Internet*, at 18, available at <http://www.cops.usdoj.gov/mime/open.pdf?Item=1729> (“In later years, the victims reported that initial feelings of shame and anxiety did not fade but intensified to feelings of deep despair, worthlessness, and hopelessness. Their experience had provided them with a distorted model of sexuality, and many had particular difficulties in establishing and maintaining healthy emotional and sexual relationships.”); Silbert, *supra* note 30, at 225-28; *see also* Kenneth V. Lanning & Ann Wolbert Burgess, *Child Pornography and Sex Rings*, in *PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS* 249 (Dolf Zillman & Jennings Bryant eds., 1989).

³⁷ Child Pornography Prevention Act § 121.1(2).

³⁸ Child Pornography Prevention Act § 121.1(2). Thirty-eight percent of prostitutes report that sexually explicit pictures had been taken of them when they were children either for commercial purposes or gratification of the photographer. Silbert, *supra* note 30, at 225.

³⁹ Child Pornography Prevention Act § 121.1(3).

⁴⁰ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21 §501(12), 18 U.S.C. § 2251 (2006).

⁴¹ Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472, 109th Cong. (2006).

recognizes that “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”⁴² Most recently, the Department of Justice launched Project Safe Childhood.⁴³ This initiative focuses on the problem of child sexual exploitation and the need for training and protections.⁴⁴ It “seeks to enhance the national response to the growing threats to America’s youth posed by online sexual solicitation, abuse, and child pornography”⁴⁵ by creating a national network of law enforcement officers, both federal and local, because “[t]he Department of Justice cannot address [the Internet child exploitation] problem alone.”⁴⁶

The United States Supreme Court has spoken with equal clarity. In *Ferber*, the Supreme Court acknowledged harm to children by the “permanent record” of these images.⁴⁷ The Court later expanded this understanding, explaining that the victimization of the children involved does not end when the pornographer’s camera is put away and “[t]he pornography’s continued existence causes the child victims harm by haunting the children in years to come.”⁴⁸

2. Harm to Children Not in the Images

There remains a second social harm well recognized by social science and the law: the harm to children not used in the production.⁴⁹

⁴² Adam Walsh Child Protection and Safety Act § 501(2)(D).

⁴³ Project Safe Childhood, U.S. Dep’t of Justice, *available at* <http://www.projectsafechildhood.gov/guide.htm>.

⁴⁴ *Id.* at 17.

⁴⁵ *Id.* at 23.

⁴⁶ *Id.* at iii.

⁴⁷ *Ferber*, 468 U.S. at 759-760.

⁴⁸ *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

⁴⁹ Yang, *supra* note 2, at 445 (explaining that possession of child pornography is a serious crime for four additional reasons: “1. The exchange of child pornography by and between child exploiters validates and encourages them in their beliefs and behaviors; 2. The greater availability of child pornography has led to the production, receipt, and distribution of more shocking, graphic images, which are increasingly involving younger children and infants; 3. The compulsion to collect child pornography images may lead to a compulsion to molest children, or may be indicative of a propensity to molest children; and 4. Child pornography is frequently used by molesters as an affirmative tool, either to silence their victims, to blackmail them into further exploitation, or to entice

Social science has fully documented this harm which manifests itself in many ways. Child sexual abuse images are used by offenders for sexual gratification;⁵⁰ to groom children to be sexually molested;⁵¹ to support the idea that adult-child sexually abusive relationships are acceptable; to decrease the inhibitions of potential victims; to demonstrate to victims how to sexually please a sexual offender;⁵² to entrap or control victims; for barter/exchange on the Internet; and for profit.⁵³ Dr. Russell argues that viewing child pornography predisposes some males to sexually desire children, undermining males' internal inhibitions and social boundaries with minors, and undermining children's ability to avoid child sexual victimization.⁵⁴ In fact, whenever new images are created, no matter the source, the market becomes more saturated. This is particularly true on the Internet where "[t]he combination of opportunity, ease, perceived anonymity, and the immediacy of personal rewards created a situation where [accessing child pornography] is not simply common, it actually becomes norm."⁵⁵

i. Other Children Are Harmed When Offenders
Use the Images to Fuel Their Assaults

Exposure to child pornography is a significant factor in child victimization.⁵⁶ One study found that in twenty-two percent of juvenile sexual abuse cases, the abuser used pornography prior to the attack to

other children" (citing MAX TAYLOR AND ETHEL QUAYLE, *CHILD PORNOGRAPHY: AN INTERNET CRIME* (2003)).

⁵⁰ Yang, *supra* note 2, at 447 ("[A]s pedophiles collect more and more images of child sexual abuse, they become desensitized to the horrors contained within their existing collections. They, therefore, seek gratification through novel and yet more disturbing images.") (citing MAX TAYLOR AND ETHEL QUAYLE, *CHILD PORNOGRAPHY: AN INTERNET CRIME* (2003)).

⁵¹ Sinclair & Sugar, *supra* note 23, at 36-37 (citing Margaret Healy, *Child Pornography: An International Perspective*, 7 (August 9, 2004) (working document, prepared for World Congress Against Commercial Sexual Exploitation of Children)), available at http://www.ecpat.net/eng/Ecpat_inter/projects/monitoring/WC1/child_porn.asp.

⁵² Sinclair & Sugar, *supra* note 23, at 37.

⁵³ See Finkelhor & Ormrod, *supra* note 6, at 3; Sinclair & Sugar, *supra* note 23, at 38-39.

⁵⁴ Russell & Purcell, *supra* note 12, at 66.

⁵⁵ Quayle, *supra* note 59, at 27.

⁵⁶ Russell & Purcell, *supra* note 12, at 59, 64.

groom, legitimize, and demonstrate for the victim what to do.⁵⁷ A National Institute of Mental Health study found that out of 193 cases of rape, twenty-four percent of the rapists alluded to pornographic material during the rape.⁵⁸ The presence of child pornography harms children who are abused by offenders exposed to these images on a continuing basis. Ethel Quayle suggests that “the viewing of [child pornography] in and of itself increases the likelihood that children will continue to be abused in the service of providing pictures for people to download.”⁵⁹

ii. Other Children Are Harmed When Children Are Exposed to Child Pornography

The harm is not limited to future victims of child sexual abuse whose perpetrators use these images to facilitate abuse, but also extends to the general exposure of youth to such images. “[C]hildren’s exposure to [child] pornography can undermine their capabilities to avoid, resist, or escape sexual victimization, thereby making them more vulnerable to sexual victimization.”⁶⁰

Children cannot escape being exposed to child pornography. In the United States it is estimated that twenty to thirty million teenagers use the Internet.⁶¹ Thirty-four percent of youth Internet users report exposure to unwanted sexual material, eighty-three percent of which

⁵⁷ See Silbert, *supra* note 30, at 224-25.

⁵⁸ *Id.* at 223.

⁵⁹ Ethel Quayle, *The Impact of Viewing an Offending Behavior*, in CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER (Martin Calder eds., 2004).

⁶⁰ Russell & Purcell, *supra* note 12, at 66.

⁶¹ See *Teens and Technology: Youth are Leading the Transition to a Fully Wired and Mobile Nation*, Report (PEW Internet & American Life Project, Washington, D.C.), July 27, 2005, available at http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf. See also Press Release, Nat’l. Ctr. for Missing & Exploited Children, *Online Enticement Laws Vary Between the States* (October 9, 2006), available at http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2833 (“More than 30 million children younger than age 18, almost half the children in the U.S., use the Internet.”).

occurs when surfing the Internet.⁶² Twenty percent of youth claim this occurs somewhat often.⁶³ Notwithstanding the severe nature of these images, fifty-four percent of teens claim “not to be bothered” at seeing these accidental exposures.⁶⁴

“Today’s youth have access to the Internet and with that access, if unrestricted, they have unlimited access to millions of pornography web sites.”⁶⁵ Professionals are concerned that accessing pictures and text with sexual content may adversely impact the current or future sexual or emotional development of children, or act as a catalyst to engage in a sexually problematic way with a child or children.⁶⁶

When offenders use these images, whether self-produced or otherwise, the damage is the same. In fact, it may be more harmful

⁶² JANIS WOLAK, KIMBERLY MITCHELL, & DAVID FINKELHOR, NAT’L. CTR. FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER, 8, 29 (2006), *available at* http://www.missingkids.com/en_US/publications/NC167.pdf; *see also* Sara Gaines, *Why Sex Still Leads the Net*, GUARDIAN, Feb. 28, 2002, *available at* <http://www.guardian.co.uk/Archive/Article/0,4273,4364626,00.html> (“A study by social psychologists at the London School of Economics last year showed that nine out of ten children, aged 11 to 16 had viewed pornography on the internet.”); SONIA LIVINGSTONE & MAGDALENA BOBER, ECON. & SOC. RESEARCH COUNCIL, LONDON SCHOOL OF ECONOMICS, UK CHILDREN GO ONLINE: FINAL REPORT OF KEY PROJECT FINDINGS 20 (Apr. 2005), *available at* http://www.citizenonline.org.uk/site/media/documents/1521_UKCGO-final-report.pdf (“Nearly six in ten (57%) have come into contact with online pornography.”).

⁶³ LIVINGSTONE, *supra* note 62, at 21 (“Among teens (12-19 years), 68% claim to have seen pornography on the internet, 20% saying ‘many times.’”).

⁶⁴ LIVINGSTONE, *supra* note 62, at 20; *see also* David Finkelhor, Kimberly Mitchell & Janis Wolak, *Online Victimization: What Youth Tell Us*, in 1 MEDICAL, LEGAL, & SOCIAL SCIENCE ASPECTS OF CHILD SEXUAL EXPLOITATION 437, 448-50 (Sharon W. Cooper et al. eds., 2005), *available at* <http://www.unh.edu/ccrc/pdf/jvq/CV47.pdf>; *see also* WOLAK, et al., *supra* note 62, at 29 (nine percent of youth internet users report distressing exposure to unwanted sexual pictures).

⁶⁵ Robert Longo, *Young People with Sexual Behavioral Problems and the Internet*, in CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER, 57 (Martin Calder eds., 2004).

⁶⁶ Ethel Quayle & Max Taylor, *Young People who Sexually Abuse: The Role of New Technologies*, in CHILDREN AND YOUNG PEOPLE WHO SEXUALLY ABUSE OTHERS 115, 117 (Marcus Erooga & Helen Masson eds., 2006).

when these images are self-produced as “many offenders prefer children who are smiling and who appear to be enjoying the abuse.”⁶⁷ The existence of images of child sexual abuse may explain why some juveniles who are sexually aggressive do not have a sexual victimization history.⁶⁸ One study of juveniles with sexual behavior problems reported that eighty percent of “high risk” adolescents use pornography for stimulation.⁶⁹ The Department of Justice estimates that forty-two percent of children charged with sex crimes against other children were exposed to hard-core pornography.⁷⁰ Prolonged exposure to pornography leads to a skewed perception of normal sexual activity and a decreased trust in intimate partners.⁷¹

This social harm has been recognized by the courts as well. In *Osborne v. Ohio*, the Court recognized that the state’s interest in preventing the possession of child pornography is different from the state’s interest in preventing the possession of other pornographic materials.⁷² The state’s efforts to regulate child pornography are not an

⁶⁷ Quayle, *supra* note 59; *see also* Russell & Purcell, *supra* note 12, at 72 (finding that such images “can convince those exposed [sic] to feel that some children want and enjoy sex with males.”).

⁶⁸ Quayle & Taylor, *supra* note 66, at 119.

⁶⁹ *Id.* at 119 (noting that evidence linking pornography to sexual violence is conflicting).

⁷⁰ *See* Kim Curtis, *More Kids Committing Sex Crimes*, VENTURA COUNTY STAR, June 10, 2007, *available at*

<http://www.venturacountystar.com/news/2007/jun/10/more-kids-committing-sex-crimes/> (“42 percent [of juvenile sex offenders] have been exposed to hard core pornography, the Office of Juvenile Justice and Delinquency Prevention . . . said in a 2001 report.”); *see also* Alysse M. El Hage, NORTH CAROLINA FAMILY POLICY COUNCIL, SEXUAL DEGRADATION: HOW PORNOGRAPHY DESTROYS THE FAMILY, 1, 2-3. (2004), *available at* <http://www.ncfpc.org/PolicyPapers/Findings%200407-SexualDegrad.pdf> (“In addition to shaping young people’s attitudes about sex, pornography can influence their behavior. According to [a] 1985 survey . . . 31 percent of high school boys and 18 percent of high school girls who had been exposed to hard-core porn reported actually trying some of the sexual activities they had seen. . . . Finally, early exposure to pornography puts children at a greater risk of developing a sexual addiction and/or of becoming a sexual predator. In fact, most sexual addictions develop during middle childhood or adolescence.”).

⁷¹ Quayle & Taylor, *supra* note 66, at 119.

⁷² *Osborne*, 495 U.S. at 108-09. Although the Court has also acknowledged in its obscenity jurisprudence that the state interest limiting obscene speech

effort to “regulate [the defendant’s] mind. Rather, [the State] has enacted [the statute at issue] in order to protect the *victims* of child pornography; it hopes to destroy a market for the exploitative use of children.”⁷³ Furthermore, the state has a clear interest in protecting children from harmful materials.⁷⁴ However, beginning with *Reno v. ACLU*, the Supreme Court retracted somewhat from that proposition, conceding the potential harm created by exposure to images of sexual abuse, but noting that this alone would not be sufficient to limit certain forms of speech.⁷⁵

3. Harm to Society and Children as a Whole

The last social harm is that to society as a whole.⁷⁶ What does the presence of images which sexually exploit children say regarding that society? Child pornography sexually objectifies children.⁷⁷ “[T]he sexualization and eroticization of minors . . . encourag[es] societal perceptions of children as sexual objects leading to further sexual abuse and exploitation . . . [and] creates an unwholesome environment”⁷⁸

This harm has been well documented in the legislation as well. For example, the House Subcommittee on Oversight and Investigations

includes avoiding exposure to juveniles. *Miller v. California*, 413 U.S. 15, 18-19 (1973).

⁷³ *Osborne*, 495 U.S. at 109 (emphasis added).

⁷⁴ See *Ginsberg v. New York*, 390 U.S. 629, 637-41 (1968); see also PROTECT Act § 501(2) (“The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. ‘The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.’”) (citing *Ferber*, 458 U.S. at 757).

⁷⁵ *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (“[T]he government may not reduce the adult population . . . to . . . only what is fit for children.”) (internal quotation marks omitted).

⁷⁶ Even before addressing Child Pornography, the Supreme Court recognized the broad social harm of similar speech in its obscenity jurisprudence. In wrestling with a test for obscene speech the Court recognized the important public interest in “the quality of life and the total community environment.” *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 58 (1973).

⁷⁷ Russell & Purcell, *supra* note 12, at 66 (“Child pornography transforms children into sexual objects designed to appeal to pedophiles and non-pedophilic child molesters.”).

⁷⁸ Child Pornography Prevention Act § 121.1(1).

conducted hearings in May 2006 on sexual exploitation of children on the Internet,⁷⁹ and subsequently released a report in January 2007, entitled “Sexual Exploitation of Children Over the Internet.”⁸⁰ In addition, with the Adam Walsh Act of 2006, Congress sought to create a “comprehensive effort to counter the pervasive problem of violent and sexual crimes against children.”⁸¹ The Act specifically targets Internet-related exploitation by including Title VII, the Internet Safety Act, which *inter alia* “creates new penalties for child-exploitation enterprises”⁸²

II. THE CONCEPT OF SELF-EXPLOITATION

Some very disturbing social behaviors manifest as a result of this increased access and exposure to child pornography and the increased eroticization of children. One of these is the self-exploitation of children. Four percent of online American youths have been asked to send a sexually explicit photo of themselves on line.⁸³ While a seemingly small number, with twenty-one million juveniles on line,⁸⁴ and ten percent of children believing it is acceptable to post pictures of themselves on the Internet,⁸⁵ this translates into hundreds of thousands of youth.

⁷⁹ See *Hearings*, *supra* note 9 (statement of Alice S. Fisher, Assistant Attorney General, Criminal Division, U.S. Dep’t of Justice), available at <http://www.usdoj.gov/criminal/ceos/AAG%20Testimony%205032006.pdf>.

⁸⁰ See Staff of H. Comm. on Energy and Commerce, 109th Cong., *Sexual Exploitation of Children over the Internet (2007)* (“Sexual exploitation of children over the Internet has reached a crisis point, concludes a bipartisan report released Tuesday The report is the culmination of a one-year investigation by the Subcommittee on Oversight and Investigations.”).

⁸¹ Adam Walsh Child Protection and Safety Act of 2006, H.R. Legislative Notice 4472, 109th Cong., (U.S. Senate Republican Policy Committee), July 20, 2006, at 2, available at http://rpc.senate.gov/_files/L49HR4427ChldprotBB072006.pdf.

⁸² *Id.* at 5.

⁸³ Kimberly J. Mitchell, David Finkelhor, & Janis Wolak, *Online Requests for Sexual Pictures from Youth: Risk Factors and Incident Characteristics*, 41 J. OF ADOLESCENT HEALTH 196, 199 (2007).

⁸⁴ Amanda Lenhart, Mary Madden & Pat Hitlin, *Teens and Technology: Youth are Leading the Transition to a Fully Wired and Mobile Nation*, PEW Internet & American Life Project, July 27, 2005, at 1.

⁸⁵ The i-SAFE Times, Nov. 2004, at 3 (citing I-SAFE America Assessments 2003-04, I-SAFE survey of 19,000 students grades 5-8).

The National Center for Missing and Exploited Children reports that 5.4% of the images of child pornography observed on the Internet appear to be self-produced.⁸⁶ With “in excess of 20,000 child pornography images [] posted on the Internet each week,⁸⁷ this figure represents hundreds of thousands of images. Moreover, Dr. Kimberly Mitchell, author of the 2006 Youth Internet study, notes that those “numbers might even be higher today with the availability of camera phones or other photo-capturing gadgets.”⁸⁸ In a recent study of child pornography victims, fourteen percent of the images viewed were produced by juveniles.⁸⁹

Initially, one might conclude that these instances are all the result of grooming by adult predators. Research suggests otherwise, as the request to create images is more likely to occur when youths are with friends.⁹⁰ “A lot of kids are using the Internet in groups When they are with friends, maybe they are egging each other on to do something they wouldn’t normally do.”⁹¹ Yet, when doing so they are producing, distributing, and possessing child pornography which is a violation of state and local laws with significant penalties.⁹²

⁸⁶ Interview with Christine Feller, Supervisor, Child Exploitation Division, National Center for Missing and Exploited Children (July 21, 2007). NCMEC is the organization tasked with accepting complaints of child pornography on the Internet and identifying victims of child sexual exploitation in the United States. *See also* Anderson Cooper 360 Degrees: Sex, Teens and the Web (CNN television broadcast Apr. 4, 2006), *available at* <http://transcripts.cnn.com/TRANSCRIPTS/0604/04/acd.02.html> (interview with Ernie Allen, National Center for Missing and Exploited Children) (“Five percent of our confirmed child pornography reports have involved self-produced [images] . . . produced by kids.”).

⁸⁷ Sinclair & Sugar, *supra* note 23, at 7.

⁸⁸ Anick Jesdanun, *Study: 1 in 25 Youths Asked for Sex Pics*, ASSOCIATED PRESS, July 19, 2007, *available at* <http://www.msnbc.msn.com/id/19857632> (last visited July 25, 2007).

⁸⁹ Finkelhor & Ormrod, *supra* note 6, at 6 (ten percent of 108 offender patterns were lone juvenile offenders, and four percent were multiple juvenile offenders).

⁹⁰ Mitchell, Finkelhor & Wolak, *supra* note 83, at 200 (“[Y]outh were more likely to receive requests for sexual pictures if they were using the Internet in the physical presence of peers when the incident happened . . .”).

⁹¹ Jesdanun, *supra* note 88.

⁹² *See, e.g.,* A.H. v. State, 949 So.2d 234, 235 (Fla. Dist. Ct. App. 2007); *see also* 18 U.S.C. § 2256(8) (2007).

A. *DEFINING THE TERM*

This social phenomenon of self-exploitation by minors is both expanding and novel. It is modern and the behavior lacks a clear definition. As a general matter, this activity is the creation by a minor of visual depictions of that minor and/or other minors engaged in sexually explicit conduct, including the lascivious display of genitals.⁹³ Certainly each of these behaviors likely contains an element of the immaturity and possibly earlier victimization of the minor, in varying degrees. No matter what the scenarios, any societal response should address these elements.

B. *BREADTH OF THE SELF-EXPLOITATION PROBLEM IS ONLY EXPECTED TO INCREASE*

While a myriad of scenarios exist which can lead to self-produced child pornography, the increase in production is well documented.⁹⁴ These instances are best understood when placed in the context of how large the juvenile presence is on the Internet, and in child pornography.

Several international studies have documented that juveniles are a significant portion of child pornography offenders. The Department of Internal Affairs in New Zealand found the largest group of child pornography offenders to be between the ages of fifteen and nineteen years old.⁹⁵ This constituted almost one quarter of all child pornography offenders, 74.5% of whom have no criminal background.⁹⁶

⁹³ See Mitchell, Finkelhor & Wolak, *supra* note 83, at 196-97; 18 U.S.C. § 2256(2), (8) (2003).

⁹⁴ See *supra* notes 9-15.

⁹⁵ CAROLINE SULLIVAN, INTERNET TRADERS OF CHILD PORNOGRAPHY: PROFILING RESEARCH 3 (2005), http://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-Our-Research-and-Reports-Index?OpenDocument (follow “Censorship Offenders Update – November 2004” hyperlink under “Gaming and Censorship Information”; then follow “Update-November 2005” hyperlink).

⁹⁶ *Id.* at 3, 5. Also, in New Zealand, thirty-three percent of offenders convicted of Internet trading of child pornography were students. See Sinclair & Sugar, *supra* note 23, at 15 (citing Angela Carr, *Internet Traders of Child Pornography and Other Censorship Offenders in New Zealand* (Department of Internal Affairs) (2004)).

These statistics naturally parallel the access of juveniles to both the Internet and pornography.⁹⁷ Not only are the numbers of youths online increasing, but the amount and activity done online is also on the rise.⁹⁸ Youth Internet activity is not innocuous. Eleven million youth regularly view pornography on line.⁹⁹ Adolescents regularly use the Internet to solicit sex with peers.¹⁰⁰ “Eighty-seven percent of university students have virtual sex mainly using Instant Messaging,¹⁰¹ web cameras and the telephone.”¹⁰²

⁹⁷ Lenhart, Madden & Hitlin, *supra* note 84, at 1 (In 2004, twenty-six percent of youth between the ages of twelve and seventeen accessed the internet from a private area like a bedroom. Eighty-seven percent of youth between twelve and seventeen, roughly twenty-one million, were “Online.”).

⁹⁸ Lenhart, Madden & Hitlin, *supra* note 84, at 1 (“Not only has the wired share of the teenage population grown, but teens’ use of the internet has intensified. Teenagers now use the internet more often and in a greater variety of ways than they did in 2000.”).

⁹⁹ Editorial, *Protecting Kids Online*, WASH. POST, July 1, 2004, at A22.

¹⁰⁰ Sinclair & Sugar, *supra* note 23, at 24.

¹⁰¹ Instant messaging (IM) is “a communication tool that combines the live nature of Chat with the direct contact of e-mail. Instant messaging differs from Chat in that the sender in IM can choose who in their contact list will receive the message.” Sinclair & Sugar, *supra* note 23, at 22; PCMAG.com, http://www.pcmag.com/encyclopedia_term/0,2542,t=instant+messaging&i=45045,00.asp (last visited June 30, 2007) (“Definition of instant messaging[:] Exchanging text messages in real time between two or more people logged into a particular instant messaging (IM) service. Instant messaging is more interactive than e-mail because messages are sent immediately, whereas e-mail messages can be queued up in a mail server for seconds or minutes.”). Forty-five percent of teens use instant messaging to send photos or documents. Lenhart, Madden & Hitlin, *supra* note 84, at 24.

¹⁰² Protectkids.com, <http://www.protectkids.com/dangers/stats.htm#childporn> (follow “Click here to be taken to the statistics page” hyperlink) (citing “Campus Kiss and Tell” University and College Sex Survey (Feb. 14, 2006), available at <http://www.campuskiss.com/default.aspx?survey=show&homepage=true>); *see also*, Sinclair & Sugar, *supra* note 23, at 15 (Fifteen percent of Canadian youth reported going to meet someone in person whom they initially met in a chat room. “More disturbing is the fact that 32% went to their meeting alone while almost 50% told no one about their meeting.”) (citing Albert Benschop, *Child Pornography in Cyberspace: Traces of Crime* (2003), available at http://www2.fmg.uva.nl?sociosite/websoc/pornography_child.html).

The number of minors engaged in destructive behavior, including self-exploitation, is set only to increase with the growth of the Internet. While accurate numbers are difficult to determine, many indicators suggest that sexual exploitation is on the rise. The 2005 University of New Hampshire study indicates that more minors are being asked to send pornographic pictures.¹⁰³ This increase is due not only to the increase in size of the Internet, but also to its many technological and social developments.

Chat rooms contribute to this increase. Chat rooms are virtual “rooms” online where people with similar interests can chat in real-time about that interest.¹⁰⁴ These chat rooms have been understood as dangerous locations to meet strangers. The National Child Exploitation Coordination Centre in Canada reports that the Greater Manchester Police studied a chat room and identified several persons posting indecent photographs of children. Several of the individuals posting were under eighteen years old.¹⁰⁵

Of course, the mainstay of youth interaction on the Internet is no longer chat rooms but social networking sites.¹⁰⁶ Social networking sites are “places on the Internet where people meet in cyberspace to chat,

¹⁰³ Mitchell, Finkelhor, & Wolak, *supra* note 83, at 196-97. This suggests an increase in the use of child pornography to blackmail or coerce victims.

¹⁰⁴ See *Reno v. ACLU*, 521 U.S. 844, 851-52 (1997) (“[T]wo or more individuals wishing to communicate more immediately can enter a chat room to engage in real-time dialogue—in other words, by typing messages to one another that appear almost immediately on the others’ computer screens.”); *United States v. Crow*, 164 F.3d 229, 231 n.1 (5th Cir. 1999) (“A chat room is a service provided by Internet service providers, such as America Online Inc., where individuals can correspond with each other simultaneously.”); *Cyberspace, Commc’ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 743 (“Chat rooms provide additional online discussion forums that allow users to engage in real time dialogue with one or many other users by typing messages and reading the messages typed by others participating in the chat, analogous to a telephone party line There are thousands of different chat rooms available ‘in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects.’”) (citations omitted).

¹⁰⁵ Sinclair & Sugar, *supra* note 23, at 24.

¹⁰⁶ See NAT’L SCH. BOARDS ASS’N, *Creating & Connecting/Research and Guidelines on Online Social – and Educational – Networking*, 1 (July 2007), available at <http://www.nsba.org/site/docs/41400/41340.pdf>.

socialize, debate, and network.”¹⁰⁷ Examples of social networking sites include MySpace, Friendster, and Facebook.¹⁰⁸ These sites bring with them an entirely new set of potential victimizations.¹⁰⁹ Moreover, over half of online teens create their own content and post it on the Internet amounting to approximately 12 million youth.¹¹⁰

¹⁰⁷ OnlineCyberSafety, http://www.bsacybersafety.com/threat/social_networking.cfm (last visited June 30, 2007) (“Social Networking Sites are immensely popular with teenagers and young adults. These sites have become the in-place to meet people and begin to explore something more than chatting online. On these sites, the young person begins by describing his or her likes and dislikes in movies, television programs, books, and music. They post a photo of themselves and upload music files. They give general information on age, sex, and city of residence. Each visitor has a screen name that protects their identity.”); *see also* Elizabeth P. Stedman, Comment, *MySpace, But Whose Responsibility? Liability of Social-Networking Websites When Offline Sexual Assault of Minors Follows Online Interaction*, 14 VILL. SPORTS & ENT. L.J. 363, 371-72 (2007) (“Social-networking sites are replacing the malls and burger stands of past generations and serving as forums for persons to communicate with others and develop self-identities. Described as ‘infinite scrapbook[s],’ social-networking sites allow users to forge ‘a sense of self [by] creating a distinct identity and [allowing self-promotion] outside the usual strictures of family, peers and colleagues.’”).

¹⁰⁸ *See* OnlineCyberSafety, *supra* note 107.

¹⁰⁹ *See, e.g.,* Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007) (dismissing minor’s suit against social networking site for meeting sexual assailant online); Monica Rhor, *Police Track Offenders on MySpace*, ABC NEWS, June 14, 2007, (“Seven convicted sex offenders with profiles on MySpace.com [were] arrested in what Texas officials said was the country’s first large-scale crackdown of registered offenders who use the social networking Web site.”); David Hench, *State Seeking Online Records: MySpace.com Says it Will Provide Information to Identify Sex Offenders Who Have Created Profiles*, PORTLAND PRESS HERALD, June 28, 2007, at A1 (“Maine public safety and corrections officials plan to use information provided by MySpace.com to find registered sex offenders who used the social networking site to contact children. . . . Software to identify and remove sex offenders from the site was launched in early May, leading to the removal of about 17,000 profiles. MySpace said it could not provide information about the offenders without a court order. Rowe obtained that order . . . joining other states’ attorneys general in seeking the information.”).

¹¹⁰ Amanda Lenhart & Mary Madden, *Teen Content Creators and Consumers*, Pew Internet American Life Project, Nov. 2, 2005, at 1-2.

The new frontier for the production and or distribution of child pornography, including self-produced images, is the cellular camera phone. “[T]he development of camera phones also introduces new risks. Camera phones enable a user to take a photograph anywhere a mobile phone works and send it over the internet immediately.”¹¹¹ One third of all youth ages eleven to seventeen reported having their own cellular phone in 2005.¹¹² Thirty-three percent of youths have used a cell phone to send a text message.¹¹³ Revenue from the mobile phone pornography is expected to rise to one billion dollars, and then three times that in the future.¹¹⁴ In addition to the problem of uploading commercial child pornography onto cell phones, phones with the capability of creating an image to be immediately uploaded to the Internet where the image can then be circulated in perpetuity will only enhance the problem.¹¹⁵ Children with these phones have increased opportunities to create images and immediately send, download, or forward them via mobile phones.¹¹⁶

Finally, a specific movement has sprouted around the technology of the web camera and online payment services such as Pay Pal. This activity is referred to as the “Cam Girl” or “Cam Boy” phenomena in which teenagers benefit materially from the admiration of strangers. “A cyber community of teen self-exploitation has sprung up around the ubiquitous and ever-watchful web-cam.”¹¹⁷ Essentially a minor creates

¹¹¹ Sinclair & Sugar, *supra* note 23, at 19.

¹¹² Bella English, *The Secret Life of Boys: Pornography is a Mouse Click Away, and Kids Are Being Exposed to it in Ever Increasing Numbers*, BOSTON GLOBE, May 12, 2005, at D1.

¹¹³ Lenhart, Madden & Hitlin, *supra* note 84, at iii, 27.

¹¹⁴ Cassell Bryan-Low & David Pringle, *Sex Cells: Cellphone Operators Find That Sex Sells Broadband*, WALL ST. J., May 12, 2005, at B1.

¹¹⁵ In Japan, mobile phones with such capabilities have been in existence for some time. In 2004, eighty-three percent of high school students had this capability and one in five used “Dating Sites” to “post adds” for a date, accessing them most commonly through cell phones. Rachel O’Connell, *From Fixed to Mobile Internet: The Morphing of Criminal Activity Online*, in CHILD SEX ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER 37 (Calder ed., 2004).

¹¹⁶ *Id.* at 49.

¹¹⁷ Lisa Cunningham, *Camgirls and Sugar Daddies*, The i-SAFE Times (i-SAFE Inc., Carlsbad, Cal.), Nov. 2004, at 1., <http://www.isafe.org/imgs/pdf/newsletter/2004/newsletter-11.pdf>.

an account on an Internet payment service such as Pay Pal in which she creates a “wish list” of items she would like to have purchased for her. She then creates web access to herself through her web camera and will engage in certain online sexual depictions, broadcasting these images through the Internet with her web camera. The payment for these actions will be a viewer purchasing an item on her wish list.¹¹⁸

Further evidence of this phenomenon is found in the reported cases of self-production. These are ever increasing in the mainstream media and create a large social problem as they implicate more social harms which must be addressed.¹¹⁹

III. THE BASIS FOR GOVERNMENTAL INTERVENTION IN RESPONSE TO JUVENILE SELF-EXPLOITATION IS SOUND¹²⁰

Having identified the growing problem of self-exploitation, and the social harm caused by this material, the challenge for society is to

¹¹⁸ See *id.* (“Creating personal webpages using webcams, teens are providing provocative images to absolute strangers in return for gifts.”).

¹¹⁹ See Quayle & Taylor, *supra* note 66, at 125 (describing various news stories in which teenage girls took nude or other sexually suggestive photographs of themselves and sent them via instant messaging or posted them on a website); *13-Year-Old Faces Child Pornography Rap*, UNITED PRESS INT’L, Oct. 15, 2004,

http://www.upi.com/NewsTrack/Top_News/2004/10/15/13yearold_faces_child_pornography_rap/5111/ (“A 13-year-old boy in Washington State has been charged with posting sexually explicit pictures of himself on the Internet along with other kiddie porn.”); 6abc.com, *Blog Prank Leads to Child Porn Charge*, Mar. 29, 2006,

http://abclocal.go.com/wpvi/story?section=sci_tech&id=4034897&ft=print (last visited Oct. 23, 2007) (“A Michigan high school student faces child pornography charges . . . Prosecutors charge [that the student] posted a picture of two teens having sex on his blog.”); *Girl Charged with Posting Nude Photos on Internet*, PITT. TRIB.-REV., Mar. 27, 2004, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_186625.html (describing the arrest of a 15-year-old girl for taking “sexually explicit photos of herself and posting them on the Internet”).

¹²⁰ The use of the term “governmental” is intended to be conceptual. The terms “societal,” “state,” or “statutory” could have been used to convey the concept. However, because the regulation of child pornography is a societal matter legislated through both state and federal law, “governmental” was chosen and will be used interchangeably with “societal.”

determine the appropriate response. This activity is a crime for which there is no statutory defense of minority.¹²¹ The specific question facing justice systems is whether the arsenal for combating child pornography should include juvenile prosecution for minors who commit such crimes.

The importance of this question cannot be underestimated. As stated by the National Child Exploitation Coordination Centre (in the context of juveniles producing child pornography images of each other), “[t]he way in which law enforcement . . . deal[s] with these cases is very important The sexual development of both youth (victims and offenders) is underway and if these incidents are not handled appropriately both . . . may be harmed[] developmentally.”¹²² Because this governmental intervention implicates the sexual and emotional development of young people, whatever the government response is should be multidisciplinary, including input from mental health professionals, child protective services, and social workers, as well as law enforcement, and the judiciary.

A. *DOCTRINAL BASIS FOR GOVERNMENT INTERVENTION IN THE LIVES OF MINORS IS LONGSTANDING*

Governmental intervention is compelled by both the doctrine of *parens patriae* as well as governmental police powers. With regard to children and the state, the government has two main doctrinal bases for interference in children’s lives. The first is the doctrine of *parens patriae*. This doctrine originated in Great Britain and gave the crown the right and responsibility to protect persons deemed incapable of caring for themselves. American jurisprudence retained this doctrine as the basis for government intervention in the lives of children who were exposed to danger because of the failure of those responsible for the children’s safety to protect them.¹²³ Parents have a fundamental right to raise their

¹²¹ See, e.g., *A.H. v. State*, 949 So.2d 234, 236 (Fla. Dist. Ct. App. 2007); *State v. Vezzoni*, 127 Wash. App. 1012 (Wash. Ct. App. 2005).

¹²² Sinclair & Sugar, *supra* note 23, at 25.

¹²³ *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 57 (1890) (“This prerogative of *parens patriae* is inherent in the supreme power of every State [I]t is a most beneficent function, and often necessary to be exercised in the interest of humanity, and for the prevention of injury for those who cannot protect themselves.”); JOSEPH STORY, *COMMENTARIES ON EQUITY JURISPRUDENCE* 1314 (3d. ed. 1843) (“Parents are entrusted with the custody . . . of their children[;] yet this is done upon the

children, but “these interests have never been seen to be without limits.”¹²⁴ The limitations on a parent’s right “have arisen, not simply out of the definition of parenthood itself, but because of [the Supreme Court’s] assumption that a parent’s interest in a child must be balanced against the State’s long-recognized interests as *parens patriae*.”¹²⁵ This doctrine formed a basis of the child protection movement as well as the juvenile court system.¹²⁶ The second source of governmental regulation of juvenile behavior is the police powers.¹²⁷ This source encompasses the state’s power to promote public health, safety, and general welfare.

The threshold question becomes what doctrinal basis exists for a government response. The answer is that both doctrines apply. Under

natural presumption that the children will be properly taken care of But, whenever . . . a father . . . acts in a manner injurious to the morals or interests of his children[,] in every such case, the court of chancery will interfere”)

¹²⁴ *Troxel v. Granville*, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting); *see also*; *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[T]he state has a wide range of power for limiting parental freedoms and authority in things affecting child welfare.”).

¹²⁵ *Troxel*, 530 U.S. at 87 (Stevens, J., dissenting) (citing *Reno v. Flores*, 507 U.S. 292, 303-04 (1993); *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Parham v. J.R.*, 442 U.S. 584, 605 (1979); *Prince v. Massachusetts*, 321 U.S. at 158, 166 (1944)).

¹²⁶ *See Prince v. Massachusetts*, 321 U.S. at 166 (“[N]either rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”) (footnotes omitted); *Schall v. Martin*, 467 U.S. 253, 263 (1984) (“The State has ‘a *parens patriae* interest in preserving and promoting the welfare of the child.’”) (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)); *Wisconsin v. Yoder*, 406 U.S. 205, 229-34 (1972) (holding that the state’s role as *parens patriae* is not unlimited).

¹²⁷ *See Chicago, B & O Ry. Co. v. Illinois*, 200 U.S. 561, 592 (1906) (“We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety.”); *Gibbons v. Ogden*, 22 U.S. 1, 203-04 (1824) (describing police powers as “that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves,” and specifically mentioning, by way of example, “[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State.”).

parents patriae, child pornography clearly calls the state to protect these children even from themselves.¹²⁸ Because of the social harm child pornography poses to other children, it also is an issue of promoting safety and the general welfare, thus it can be based in the police powers as well.

Given that the state has both the power and obligation to respond to this destructive production, this article analyzes what the appropriate governmental response is to this criminal behavior and offers guidance to jurisdictions that face the decision of how to address such juveniles. Looking to previous models of intervention is instructive.

B. MODELS FOR GOVERNMENTAL RESPONSE TO JUVENILE VICTIMIZATION

When a child engages in criminal activity the government can respond in a number of ways, including through juvenile adjudication or through the civil child protection system. When this behavior is self-destructive, the government may or may not choose juvenile adjudication. There are three models of governmental intervention that can be instructive in assessing the question of juvenile sexual victimization. Two of these models are similar in that they address juveniles engaged in criminal behavior which is also self-destructive. The third model of criminal sanctions for adult child pornography offenders must be assessed, as these laws form the basis for the societal stance against child pornography. Opponents of prosecution for self-exploitation will likely look to the child prostitution model to argue these children should not be treated as offenders. However, the statutory rape and child pornography models provide support for the prosecution option.

1. Child Prostitution

Child Prostitution occurs when a minor performs sexual intercourse in exchange for money.¹²⁹ The fact that society originally treated this

¹²⁸ See, e.g., *Gilmour v. Rogerson*, 117 F.3d 368, 372 (8th Cir. 1997) (“The State may legitimately protect children from self-destructive decisions reflecting the youthful poor judgment that makes them, in the eyes of the law, ‘beneath the age of consent.’”).

¹²⁹ See *Cleveland v. United States*, 329 U.S. 14, 17 (1946); *Depasquale v. Gonzales*, 196 Fed. Appx. 580, 582 (9th Cir. 2006) (“The federal definition of

behavior as criminal and prosecuted the minors created a rather remarkable dichotomy.¹³⁰ On the one hand, it was illegal for an adult to engage in sexual acts with a minor. However, once money was exchanged, the minor was treated as an offender, rather than a victim.¹³¹

In modern criminal justice systems, many have recognized this dichotomy and moved beyond treating minors as offenders. Notwithstanding that, as a technical matter, the juvenile engaged in prostitution is performing an illegal act, fortunately, many jurisdictions have recognized that these minors are the victims of sexual abuse and exploitation by adult offenders. No longer are these juveniles referred to as “child prostitutes,” but rather as victims of commercial child sexual exploitation.¹³²

This shift in policy resonates in both the social service world as well as the criminal justice world. In the social services, programs have developed throughout the country for juvenile victims of commercial child sexual exploitation. There is a recognition that often these minors are working because of a complex dependency on the pimps who employ them, a lack of resources, being the victim of previous abuse,

prostitution is ‘engaging in promiscuous sexual intercourse for hire.’”) (citing 22 C.F.R. § 40.24(b)); *see also* Model Penal Code § 251.2.

¹³⁰ *See* Pantea Javidan, Comment, *Invisible Targets: Juvenile Prostitution, Crackdown Legislation, and the Example of California*, 9 CARDOZO WOMEN’S L.J. 237, 239-40 (2003) (“[C]hild prostitutes . . . are arrested, prosecuted, and incarcerated under laws such as California Penal Code section 647 for disorderly conduct, and viewed as wrongdoers from whom the public needs protection. . . . The laws against solicitation and prostitution punish individuals who need legal protection the most.”); Nesheba Kittling, *God Bless the Child: The United States’ Response to Domestic Juvenile Prostitution*, 61 NEV. L.J. 913, 913 (2006) (“The laws surrounding this issue reflect the country’s internal strife, as the United States takes two very distinct positions with respect to juvenile prostitution. On the one hand, the country has taken a strong stance against those who traffic juveniles across international borders. On the other hand, the Government criminalizes domestic juvenile prostitutes.”). *But see* *People v. Yang*, 2003 WL 22793095, at *20 (Cal. App. Nov. 24, 2003) (“[W]e believe as a matter of public policy that child prostitutes are victims of conspiracies to procure/pimp/pander them and are not coconspirators or accomplices.”).

¹³¹ Kittling, *supra* note 130, at 926.

¹³² *See* Child Exploitation and Obscenity Section (CEOS) Website, U.S. Dep’t of Justice, *available at* <http://www.usdoj.gov/criminal/ceos/prostitution.html>.

and/or being a runaway or throwaway child.¹³³ Therefore, society has recognized that these minors should be given services.¹³⁴ Thankfully, in many jurisdictions, the criminal justice system shares this recognition

¹³³ See Children of the Night, <http://www.childrenofthenight.org/tragedy.html> (last visited July 2, 2007) (“Children are recruited by pimps in arcades, malls, entertainment centers, at tourist attractions and concerts. The pimp seduces a new recruit with the lure of wealth and the luxury of designer clothes, fancy cars, and exclusive nightclubs. Pimps move from city to city looking for children who are easy prey: alone, desperate, and alienated. Once he moves a child from her hometown into a strange city, the pimp can easily force her to work as a prostitute.”). Throwaway children are children “who have been ‘pushed out’ of their homes by parents or other family members or are fleeing physical or sexual abuse.” Bruce J. Winick, Ken Kress, & Jan C. Costello, “Wayward and Noncompliant” People with Mental Disabilities: What Advocates of Involuntary Outpatient Commitment Can Learn from the Juvenile Court Experience with Status Offense Jurisdiction, 9 PSYCHOL. PUB. POL’Y & L. 233, 238 (2003).

¹³⁴ In Connecticut, for example, the Paul & Lisa Program was created “in order to increase public awareness of child sexual exploitation while continuing to aid those who had already fallen victim to exploitation by helping them to leave the streets.” The Paul & Lisa Program, <http://www.paulandlisa.org/about.htm>. The Paul & Lisa Program includes programs aimed at prevention, assistance, redirection, and support. See The Paul & Lisa Program, <http://www.paulandlisa.org/ourprograms.htm>. San Francisco has also initiated programs to combat teen prostitution. These programs, collectively entitled the SAGE (Standing Against Global Exploitation) Project, include prevention services, a resocialization program for men and boys who have been arrested for prostitution, an empowerment program for teen girls “involved in the criminal justice system” for various reasons, and a training program for probation officers who work with juvenile offenders. Norma Hotaling, *San Francisco’s Successful Strategies: Prevention Services for Girls and the First Offender Prostitution Program*, reprinted in PROSTITUTED TEENS: MORE THAN A RUNAWAY PROBLEM, Michigan Family Impact Seminars, available at <http://www.icyf.msu.edu/publicats/briefs.html>, 35-36 (2002). Similarly, Breaking Free was established in Minnesota in 1996, and “serves women and girls involved in systems of prostitution/sex trafficking and other battered women who have been involved in the criminal justice system.” Breaking Free, <http://www.breakingfree.net/>. Breaking Free’s philosophy statement states: “We understand prostitution is a vicious cycle of violence, incarceration, and addiction. We understand how repeated experiences of violence undermine women’s and girls’ capacities to avoid further victimization and how prostitution distorts the lives of prostituted women and girls.” Breaking Free, <http://www.breakingfree.net/>.

and offers minors alternatives to punishment. These are provided either through the civil protection system or the juvenile court system, and do not require a delinquency finding.¹³⁵

While this change in policy has been effective in child prostitution, it does not translate to child pornography. The sole victim in child prostitution is the child. While presumably there may be other more minor social harms such as deterioration of neighborhoods, these are harms related to the broader issue of prostitution. The more accurate analogy would be between the juvenile exploitation offender and the pimp, in that the producer of these images encourages others to become involved in the child exploitation industry. In such an instance where a child prostitute recruits others to engage in prostitution, she is no longer

¹³⁵ For example, in Brooklyn, the District Attorney's Office has developed a program entitled GRASP (Girls Re-entry Assistance Support Project), which is "a Faith Based Re-entry Initiative for female youth." See http://www.brooklynda.org/toc/school_youth.htm. Under GRASP, 13 to 18 year old girls who have been convicted of crimes and are "[c]urrently housed in various detention, placement, or correctional facilities" are given services to assist them in their transition back into the community. See <http://www.brooklynda.org/grasp/grasp.htm>. "Services for GRASP participants begin prior to their release with a . . . complete psychosocial assessment of the youth's individual needs. Subsequent to re-entry into the community, continued monitoring and support are provided through a year long process involving case management, intensive mentorship and comprehensive services." *Id.* Similarly, in San Francisco, the SAGE (Standing Against Global Exploitation) Project "is a unique collaboration between law enforcement, public health, social services, and private agencies." See http://www.sagesf.org/html/about_main.htm. This program works to "help bring about the end of commercial sexual exploitation" through "localized survivor-centered programs, services, outreach, and collaboration. . . . The SAGE Project works closely with law enforcement, public health and social service agencies, and the District Attorney's office, on restorative justice programs, trauma and drug recovery programs, wellness and vocational programs, education and outreach." See http://www.sagesf.org/html/about_vision.htm. In Atlanta, the Center to End Adolescent Sexual Exploitation (CEASE) "advocates on behalf of adolescent girls identified in Juvenile Court proceedings as being victims of sexual exploitation." See http://www.juvenilejusticefund.org/initiatives_cease.asp; see also Errin Haines, *Atlanta Continuing To Fight Child Prostitution*, ASSOCIATED PRESS, Aug. 22, 2007, available at, <http://www.firstcoastnews.com/news/georgia/news-article.aspx?storyid=89566&ref=rss>.

regarded as a victim of sexual exploitation and specific other charges exist for people who play such a role.¹³⁶

2. Statutory Rape Model

A second more analogous model to which the government can turn is the statutory rape model. Society has had to address the situation of two minors engaging in sexual intercourse with one another and whether, because both are committing statutory rape, it is appropriate to charge one (or both) with that crime.

As a legal matter, it is permissible to charge a minor with statutory rape as such falls within the definition of a delinquent act: an act which, if committed by an adult, would be criminal.¹³⁷ As a practical matter, therefore, the government has used its discretion to prosecute these cases. Courts have generally rejected challenges by juveniles based on their status as juveniles, as no “age of minority defense” to statutory rape is generally recognized.¹³⁸ Although juveniles lack the capacity to consent, they do not necessarily lack the ability to intentionally have sexual contact.¹³⁹ Therefore, prosecution of juveniles for actions which among other harms, also harms them, has great precedent.

¹³⁶ See 18 U.S.C. § 2422(b) (2006); 18 U.S.C. § 1591 (2006).

¹³⁷ See *Swisher v. Brady*, 438 U.S. 204, 207 n.2 (1978) (“Maryland, like 39 other States, defines a delinquent act as one that, if committed by an adult, would violate a criminal statute.”) (citing Francis Barry McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093, 1093 n.2 (1977)).

¹³⁸ *E.g.*, *Z.C. v. State*, 128 P.3d 561, 562 n.2 (Utah Ct. App. 2005) (13 year old now pregnant female and 12 year old boy both charged with delinquency for sexual intercourse); *A.H. v. State*, 949 So.2d 234 (Fla. Dist. Ct. App. 2007); *In re T.A.J.*, 62 Cal. App. 4th 1350 (1998) (rejecting sixteen year old juvenile’s challenge to the statutory rape adjudication based on claim that he was within the class protected by the statute). *Contra e.g.*, *In re G.T.*, 758 A.2d 301 (Vt. 2000) (statutory rape statute is inapplicable in cases where perpetrator is a minor).

¹³⁹ See Sandy Nowack, *A Community Prosecution Approach to Statutory Rape: Wisconsin’s Pilot Policy Project*, 50 DEPAUL L. REV. 865, 874 (2001) (“The fact that prosecutors need not prove a lack of consent in sex offenses against children assists prosecutors to carry out the legislature’s intent, that an adult may not engage in sexual activity with a child, even if the child does not object to the sexual contact.”).

3. Child Pornography Model

This model, like that of the statutory rape model, supports the option of juvenile prosecution. It recognizes the multiple social harms of child pornography and demands aggressive prosecution of all those who possess, share in any way, or create images of children engaged in sexually explicit conduct.

We have evolved as a society to recognize child pornography as an extremely serious crime which must be handled aggressively because of the massive social harm.¹⁴⁰ While the severity of penalties for child pornography varies throughout the nation, an unquestionable movement continues toward the uniform recognition of the significant harm of child pornography.¹⁴¹ “The existence of and traffic in child pornographic images . . . presents a clear and present danger to all children...[T]he sexualization and eroticization of minors . . . encourag[es] societal perceptions of children as sexual objects leading to further sexual abuse and exploitation,...[and] creates an unwholesome environment which affects the psychological, mental, and emotional development of children”¹⁴² This was not always the case. In 1970, the National President’s Commission on Obscenity and Pornography did not even

¹⁴⁰ See Adam Walsh Child Protection and Safety Act (the purpose of the act is “[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety. . . .”); see also Fact Sheet: Department of Justice Project Safe Childhood Initiative, available at http://www.usdoj.gov/opa/pr/2006/February/06_opa_081.html (last visited July 2, 2007) (“The growing threat of sexual exploitation crimes committed against children through the Internet is a disturbing and unacceptable trend. The Department of Justice is committed to the safety and well-being of every child and has placed a high priority on protecting and combating sexual exploitation of minors. Much has been accomplished, but more must be done.”).

¹⁴¹ See, e.g., 18 U.S.C. § 2252(b)(1) (2006) (setting the minimum for possession of child pornography at 5 years for first-time offenders, and 15 years for repeat offenders); ARIZ. REV. STAT. § 13-604.01(D) (2007) (stating that adults convicted of sexual exploitation of a minor receive a presumptive 17-year prison term); LA. REV. STAT. ANN. § 14-81.1(E) (2006) (regulating minimum sentences for child pornography at not less than 25 years if committed with a child under the age of 13); TEX. PENAL CODE § 21.11 (2001) (Indecency With a Child) and § 12.33-34 (describing punishments for felonies under § 21-11 as not more than 20 but not less than two years imprisonment).

¹⁴² Child Pornography Prevention Act § 121.1(1).

mention child pornography in its report.¹⁴³ These crimes originally were prosecuted under obscenity provisions. However, this too was an area in which the courts struggled. Not until the *Miller* test was developed by the Supreme Court was there a workable definition of obscene speech.¹⁴⁴ Then in 1982 the Supreme Court declared child pornography was unprotected speech.¹⁴⁵ In so doing it recognized the harms of child pornography and allowed for state elimination of child pornography not deemed obscene. “The prevention of child sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”¹⁴⁶ Soon thereafter, even possessing such material became illegal.¹⁴⁷ *Ferber* and *Osborne* recognize that this material is so terrible, the only way to eradicate it was to eliminate the market for it.¹⁴⁸ “The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”¹⁴⁹

¹⁴³ See Richard Nixon: Statement About the Report of the Commission on Obscenity and Pornography, (Oct. 24, 1970), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=2759>.

¹⁴⁴ See *Miller v. California*, 413 U.S. 15, 24 (1973) (“The basic guidelines for the trier of fact must be: (a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”) (citations omitted).

¹⁴⁵ *Ferber*, 458 U.S. at 764.

¹⁴⁶ *Id.* at 757; see also *State v. Vezzoni*, 127 Wash.App. 1012, 2005 WL 980588, at *1 (Wash.App. 2005).

¹⁴⁷ *Osborne*, 495 U.S. at 111.

¹⁴⁸ *Id.* at 109 (citing *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)) (contrasting the Ohio statute at issue, which prohibited the possession of child pornography, with a Georgia statute previously found unconstitutional which restricted the possession of adult pornography, stating “The difference here is obvious: The State does not rely on a paternalistic interest in regulating Osborne’s mind. Rather, Ohio has enacted [the statute] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.”).

¹⁴⁹ *Ferber*, 458 U.S. at 760; see also PROTECT Act, S. 151 § 501. Among the states there is less uniformity. In Arizona, for example, the mere possession of one image of child pornography carries with it a ten year mandatory minimum sentence. See ARIZ. REV. STAT. § 13-3553 (describing sexual exploitation of a minor as including the possession of “any visual depiction in which a minor is

The movement to stiffen penalties is quite strong on both the federal and state levels. Federally, the recently enacted Adam Walsh Act stiffened penalties in many areas of child sexual exploitation including coercing children into illegal sexual activity and concealing the production of child pornography in records. It also expanded the type of crime subject to civil forfeiture¹⁵⁰ and created regional Internet Crimes Against Children Task Forces, which “will provide funding and training to State and local law enforcement to help combat crimes involving sexual exploitation of children on the Internet.”¹⁵¹ Prior to 2006, the state of Florida remarkably was among those states where possession of child pornography was a misdemeanor. However in 2006, it passed the

engaged in exploitative exhibition or other sexual conduct,” and characterizing sexual exploitation of a minor as a “class 2 felony.”); *see also* State v. Berger, 134 P.3d 378, 383 (Ariz. 2006), cert. denied, 127 S. Ct. 1370 (2007) (“In 1983, lawmakers extended this criminal ban to include possession itself, an amendment that prosecutors claimed would aid in prosecuting child molesters. Such legislation also recognizes the fact that producers of child pornography exist due to the demand for such materials. ‘The consumers of child pornography therefore victimize the children depicted . . . by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects.’”) (citing United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998)). However in some other states, the mere possession of child pornography without any additional element is a misdemeanor. *See* IOWA CODE § 728.12(3) (“It shall be unlawful to knowingly purchase or possess [any material] which depicts a minor engaged in a prohibited sexual act or the simulation of a prohibited sexual act. A person who commits a violation of this subsection commits an aggravated misdemeanor for a first offense”); OR. REV. STAT. § 163.687 (“A person commits the crime of encouraging child abuse. . . if the person [k]nowingly possesses or controls [any visual material] of sexually explicit conduct involving a child for the purpose of arousing or satisfying the sexual desires of the person”); *see also* *Hearings, supra* note 9 (statement of Grier Weeks, Executive Director, National Association to Protect Children), *available at* <http://www.protect.org/newswire/pdf/PROTECTtestimony4-6-06.pdf>.

¹⁵⁰ Adam Walsh Child Protection and Safety Act §§ 113-128; *see also* Rachel L. Brand, Assistant Attorney General for Legal Policy, U.S. Dept. of Justice, Address at the NOVA Crisis Response Conference (Nov. 13, 2006), *available at* http://www.usdoj.gov/olp/pdf/dojaag_brand_111306.pdf.

¹⁵¹ Press Release, White House, Fact Sheet: The Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/07/20060727-7.html>.

Sexual Predator Punishment and Control Act¹⁵² which not only amends that provision to make the possession of child pornography a felony, but also requires that sexual predators be placed on a GPS tracking system for life, allows local governments to determine where offenders cannot live (such as near certain areas populated with children, near parks, near schools, etcetera), and removes the requirement that an offender commit two sexual offenses before being placed on the sexual predator registry.¹⁵³ Florida also recently passed the Cyber Crimes Against Children Act of 2007 which enhances penalties for offenders possessing ten or more images of child pornography.¹⁵⁴

Because we as a society have acknowledged child pornography's harm extends beyond those children depicted, we cannot ignore this harm when the producer is a juvenile. Thus, our child pornography jurisprudence supports juvenile prosecution as an option to stem its proliferation.

C. REALITY OF SELF-EXPLOITATION IMPLICATES ALL MODELS

While juvenile prostitution suggests prosecuting minors is not appropriate, statutory rape and child pornography models lead to the opposite conclusion. The reality, however, is that these models converge when juveniles produce or disseminate pornographic images of themselves or other minors. The classic example of this is that of Justin

¹⁵² Sexual Predator Punishment and Control Act (Jessica Lundsford Act), ch. 2005-28, 2005 Fla. Sess. Law Serv. (West) (codified in various sections throughout the FLA. STAT.); *see also* H.B. 1877, Ch. 2005-28 (Fla. 2005), *available at* http://election.dos.state.fl.us/laws/05laws/ch_2005-028.pdf.

¹⁵³ For a comparison of the old sexual predator laws in California with the new Sexual Predator Punishment and Control Act, *see* Press Release, Cal. Dept. of Mental Health, Current Law vs. The Sexual Predator Punishment and Control Act (2005), *available at* <http://www.dmh.cahwnet.gov/press/docs/2005/dedication/SVP%20Current%20vs%20Proposed%20Law.pdf>.

¹⁵⁴ Cyber Crimes Against Children Act, ch. 2007-143, Fla. Sess. Law Serv. (West) (codified in various sections throughout the FLA. STAT.), *available at* http://election.dos.state.fl.us/laws/07laws/ch_2007-143.pdf. Another example of this reform is the growth of online luring statutes. These statutes make illegal efforts by sexual offenders to utilize the computer to solicit or lure a child to perform sexually explicit conduct. Ten years ago, only a handful of states had these provisions. Today over 40 states do.

Berry whose participation in self-exploitation was the subject of Congressional Testimony and a New York Times series.¹⁵⁵

Mr. Berry was a seemingly successful California high school student. President of his class, he lived with his mother, his parents having divorced years earlier.¹⁵⁶ At thirteen, he received a web camera and went on line with the intent of “meeting girls” and making new friends.¹⁵⁷ However, while online he was immediately exposed to people claiming friendship, but actually requesting him to engage in certain acts on his web camera.¹⁵⁸ What began as seemingly innocuous requests for Mr. Berry to remove his shirt eventually evolved to his performing sexual acts.¹⁵⁹ He received so much income and enjoyed both the attention and the funding, that soon he expanded his activity.¹⁶⁰ It

¹⁵⁵ Eichenwald, *supra* note 11; *see also* Joshua Brockman, *Child Sex as Internet Fare, Through the Eyes of a Victim*, N.Y. TIMES, April 5, 2006, at A20, available at

<http://www.nytimes.com/2006/04/05/washington/05porn.html?ex=1301889600&en=8ef889b18a19917e&ei=5088&partner=rssnyt&emc=rss>.

¹⁵⁶ *See Hearings, supra* note 9 (testimony of Justin Berry) (“My experience is not as isolated as you may hope. This is not the story of a few bad kids whose parents paid no attention. . . . I was an honor student, and I was class president.”); Eichenwald, *supra* note 11; *The Oprah Winfrey Show*, June 6, 2006 (“[F]ive years ago, you were an honor student. . . . [F]ive years ago, [if] we were going to look into your life from . . . the outside, we’d say, ‘Boy, that’s the perfect kid.’”).

¹⁵⁷ *Hearings, supra* note 9 (testimony of Justin Berry) (“I obtained a webcam at 13 after signing up for an account with earthlink.net. The company, as a promotion, sent me a free Logitech webcam. As a child drawn to computers, I was enthralled. . . . Like many young teenagers, I hoped my webcam would improve my social life. I didn’t have a lot of friends and I was very lonely. I hoped the webcam would help me meet other teenagers online, maybe even a few girls my age.”); Eichenwald, *supra* note 11.

¹⁵⁸ Eichenwald, *supra* note 11.

¹⁵⁹ *Hearings, supra* note 9 (testimony of Justin Berry) (“One afternoon, a few weeks after setting up my webcam, one of these men approached me online with a proposal. He would pay me \$50 if I took off my shirt for a few minutes while sitting in front of my webcam. He explained to me how to set up an account on Paypal.com - an instant online money payment system. . . . The money arrived, and I took off my shirt. My viewers complimented me and it felt good.”); Eichenwald, *supra* note 11.

¹⁶⁰ *Hearings, supra* note 9 (testimony of Justin Berry) (“I wish I could say I hated what was happening. . . . But the truth is, I did not. As more clothes came off, more people contacted me. The compliments were endless, the gifts and

eventually grew to a series of websites which he created and performed the starring role.¹⁶¹ People paid forty-five dollars a month to join his fan base and additional fees of up to three hundred dollars to observe certain acts.¹⁶² In the final stages of his business, Mr. Berry engaged in live broadcasts of sexual acts with prostitutes and was bringing other minors into his productions.¹⁶³ He made thousands of dollars and also turned eighteen years of age during the process.¹⁶⁴ While it is clear that Mr. Berry began his activity as a misguided minor, he ended it as a highly commercialized entrepreneur who exploited other minors both as a juvenile and as an adult. Although he ultimately received immunity for his action, this was not without controversy and only after he provided the Department of Justice with approximately one thousand names and credit card numbers of adults who paid him for sexual performances over the Internet on his many websites.¹⁶⁵

payments terrific. . . . I was popular. Everyone wanted to know my thoughts. Everyone wanted to give me things. I was the king of my own universe. All I had to do in exchange was strip and masturbate, while alone in my room.”).

¹⁶¹ *Hearings, supra* note 9 (testimony of Justin Berry) (“Men began to reach out to me. One man, Ken Gourlay, approached me online to discuss my interest in computers. He operated his own web hosting company Ken raised the possibility of hiring me . . . as an executive director of sales and marketing. It seemed like a dream come true. . . . By this time, I had formalized my webcam business. I had opened a site called justinscam.com, where child predators could come and watch, and offer me money and gifts to do what they wanted. . . . The next stage emerged with the help, once again, of Ken Gourlay. I decided I should sell monthly memberships for a new site, called jfwy.com.”); Eichenwald, *supra* note 11.

¹⁶² Eichenwald, *supra* note 11.

¹⁶³ *Id.* (“Justin created a new Web site It featured Justin having live sex with prostitutes.”).

¹⁶⁴ *Id.*

¹⁶⁵ See Kurt Eichenwald, *Congress Identifies Pornography Purchasers*, N.Y. TIMES, July 14, 2006, available at <http://www.nytimes.com/2006/07/14/us/14porn.html?ex=1310529600&en=b857125377b5fc19&ei=5088&partner=rssnyt&emc=rss> (“As part of his [Congressional] testimony, Mr. Berry provided the subcommittee with 1,071 credit card transactions for one of his Web sites.” The actual number of purchasers “were fewer . . . than [the number of] transactions, because the documents included renewals and names of people who tried to sign up several times with different credit cards.”); Kurt Eichenwald, *Virginia Man Gets 150-Year Term in Child Pornography Case*, N.Y. TIMES, July 16, 2006, available at <http://www.nytimes.com/2006/07/16/technology/16kids.html?ex=1184040000&>

This history illustrates the ripple effect of a juvenile's self-exploitive actions. Such activity increased the market for child pornography, validated his customers' actions, and increased the sexualization and eroticization of children. Moreover, while there are elements of misguided youth, there are also elements of criminality. Precisely because these crimes and these offenders are so complex, society must have a protocol to address this type of crime and juvenile prosecution must be included in that protocol.

IV. PROSECUTION IS A NECESSARY RESPONSE

When teens exploit themselves it is tragic. However, we must resist the temptation to regard this problem as purely one for parental intervention. The Berry case demonstrates that one cannot do so. While there are components of immaturity and victimization in this activity, there are also components of profit, exploitation of others, and the creating of child pornography which harms other children.

Indeed these aspects of child pornography, the harm to others and to self, compel society and the government to intervene in a mandatory way. Phrased another way, the social harm these actions cause, as well as the very purpose of the juvenile court system, demand that prosecution be included as a societal tool to combat this societal ill.

A. *THE SOCIAL HARMS CAUSED COMPEL SIGNIFICANT AND BINDING GOVERNMENT INTERVENTION*

When a juvenile engages in the production or dissemination of child pornography through either self-exploitation or the distribution of self-exploitive images, society must respond in a manner befitting the social harm caused. These social harms are not diminished when the producer happens to be another juvenile or the juvenile herself. Because of the vast harm caused by this material, juvenile prosecution is a befitting response.

en=6d4c531e21ea3231&ei=5070 (explaining that, after Mr. Berry ended his online business, "he was granted immunity by the government and became a federal witness").

The harm the child does herself cannot be minimized. One might argue that, because these images are not a product of a forceful sexual assault, the social harm of these images is less. However, the Supreme Court rather insightfully articulated one harm of child pornography as the creation of a “permanent record of [the child’s] participation.”¹⁶⁶ The use of the word “participation” is significant. That word includes both voluntary and involuntary participation. That a minor lacks the understanding of the destructiveness of her actions at the time of the crime does not mean she forfeits the harm she will more tangibly experience when she realizes the permanency of her actions. In upholding prosecution in such circumstances, courts recognize the “compelling state interest in protecting children from sexual exploitation This compelling interest exists whether the person sexually exploiting the child is an adult or minor”¹⁶⁷

With coerced images the immediate harm to the child may be more violent because the child is sexually assaulted in production. However, as recognized by the Florida Court of Appeals, that does not justify the government failing to prosecute a self-exploiting juvenile. “Not prosecuting the child would do nothing to further society’s interests [in protecting children from sexual exploitation]. Prosecution enables the state to prevent further illegal exploitation by supporting and providing any necessary counseling to the child.”¹⁶⁸ Moreover, as discussed, the child is victimized not only at the time of production, but also throughout life as the images are repeatedly viewed. Later in life a minor becomes aware of that continued exploitation and deserves the same protection from further victimization. Indeed, to treat the possession of these images so differently than that of non-self-produced images would suggest these victims are less worthy of societal protection.

The way molesters use this contraband to harm other children further compels juvenile prosecution being considered. As discussed, child molesters use these images for their sexual gratification; as a tool to groom children to participate in sexual conduct; to affirm the notion that abusive relationships are acceptable; to lower the inhibitions of potential

¹⁶⁶ *Ferber*, 458 U.S. at 757-59 (emphasis added).

¹⁶⁷ *A.H. v. State*, 949 So.2d 234, 236 (Fla. Dist. Ct. App. 2007).

¹⁶⁸ *Id.*

victims, and to obtain money and profit.¹⁶⁹ “[C]hild pornography offending is a valid diagnostic indicator of pedophilia. Child pornography offenders were significantly more likely to show a pedophilic pattern of sexual arousal during phallometric testing than were comparison groups of offenders against adults or general sexology patients...[or] a combined group of offenders against children.”¹⁷⁰ In fact, this recent study concludes that child pornography possession may be a “stronger indicator of pedophilia than is sexually offending against a child.”¹⁷¹ A University of New Hampshire study of child pornography offenders found that forty percent of those arrested for child pornography did possess such images and had molested children.¹⁷² Of these, eighty-three percent had images of children between the ages of six and twelve years old.¹⁷³ Additionally, Dr. Andres Hernandez has found that more than eighty-five percent of child pornography offenders have committed sexual crimes against children.¹⁷⁴ The market for these images must be terminated. Therefore, producers who supply the market must be exposed to prosecution in order to end the supply.

Finally, juvenile producers cause the exposure of other children to these images which has several deleterious effects. In addition to encouraging a societal perception of children as sexual objects, “[e]xposure to the sex industry . . . [including] live sex shows . . . may introduce such industries as viable employment options for some youth.”¹⁷⁵ The consequences of producing images, i.e. their use by child

¹⁶⁹ Sinclair & Sugar, *supra* note 23, at 36-37.

¹⁷⁰ Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses are a Valid Diagnostic Indicator of Pedophilia*, 115 J. OF ABNORMAL PSYCHOL. 610, 613 (2006).

¹⁷¹ *Id.*

¹⁷² See JANIS WOLAK, DAVID FINKELHOR, & KIMBERLY J. MITCHELL, CHILD PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY vii (2005).

¹⁷³ *Id.*

¹⁷⁴ The sample in this study voluntarily participated in his research making them somewhat distinct from most child sex offenders, This fact suggests, if anything, the numbers are conservative and more child pornography offenders may be in the United States. See Julian Sher & Benedict Carey, *Debate on Child Pornography's Link to Molesting*, N.Y. TIMES (July 19, 2007), available at <http://www.nytimes.com/2007/07/19/us/19sex.html>.

¹⁷⁵ Sinclair & Sugar, *supra* note 23, at 24; see also Child Pornography Prevention Act, Congressional Findings § 1(3)-(6), (8), (10)-(14).

molesters, and their exposure to children are equally as devastating when the source is self-exploitive or assaultive. As a society, we talk of the sexual objectification of children seriously, we must act seriously and consistently, notwithstanding the age of the creator.

*B. UNDERLYING DOCTRINES OF THE JUVENILE SYSTEM DEMAND
INTERVENTION*

While a multi-disciplinary response is critical to all child abuse cases, state intervention grounded both in *parens patriae* and the state's police powers to protect the general welfare remains a valid response. "[C]hild pornography statutes are unambiguous and do not make age-based distinctions when defining specific criminal conduct."¹⁷⁶ As recognized by the United States Supreme Court, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."¹⁷⁷ "The Legislature is well within its rights to come down solidly against sexual activity with children of such tender years – anywhere, anytime and – by anyone. . . . Such protection has a rational relationship to the legitimate legislative objective of protecting health and safety of young children not only from older predators, but also from each other."¹⁷⁸

The police power also compels the allowance of juvenile prosecution, given the harm of these images to generations of the millions of teens who would be exposed to them. Child pornography is an epidemic problem. Indeed, courts have recognized that one compelling interest of the state is seeing that pictures of sexual conduct of children never produced.¹⁷⁹

An important doctrinal underpinning in criminal justice is deterrence. Juveniles predisposed to reckless activity without regard for long term consequences have often been deterred by understanding the

¹⁷⁶ *State v. Vezzoni*, 2005 WL 980588, at *6 (Wash.App. 2005); *see also* *A.H. v. State*, 949 So.2d 234, 236 (Fla. Dist. Ct. App. 2007).

¹⁷⁷ *Ferber*, 458 U.S. at 757; *Vezzoni*, 2005 WL 980588, at *1.

¹⁷⁸ *Z.C. v. State*, 128 P.3d 561, 566 (Utah App. 2005), *rev'd* 165 P.3d 1206 (Utah 2007).

¹⁷⁹ *A.H. v. State*, 949 So.2d 234, 238 (Fla. Dist. Ct. App. 2007).

penalty for such actions. If juveniles understood that this activity is criminal behavior, presumably some would be deterred.¹⁸⁰

C. THE NATURE OF THE JUVENILE SYSTEM SUPPORTS JUVENILE
PROSECUTION

Unlike the criminal system, the juvenile system is intended to rehabilitate, not punish, the child. “[T]he juvenile court’s ‘main objective is to inquire into bad behavior and its causes, and to seek remedies and adjust the child, rather than merely to accuse, convict and punish’”¹⁸¹ The juvenile court is tasked with taking actions in the “juvenile’s best interests.”¹⁸² Indeed, it is far better for the juvenile if the government intervenes in this climate, rather than after the child turns eighteen years old and faces severe mandatory minimum sentences if he were to distribute an image of a child or an obscene image.¹⁸³

¹⁸⁰ See, e.g., Nok-Noi Ricker, *Boy, 15, Faces Child Porn Charge*, BANGOR DAILY NEWS, Mar. 2, 2007, available at <http://www.bangordailynews.com/news/t/news.aspx?articleid=146992&zoneid=500> (quoting noted researcher David Finkelhor as stating, “[w]e also know many kids are taking sexual photos of themselves and friends and sending them to people That is child pornography production that is criminal.”).

¹⁸¹ *Z.C. v. State*, 128 P.3d at 565 (quoting *In re Lindh*, 359 P.2d 1058, 1059 (Utah 1961)).

¹⁸² *Id.* at 565; see also *Carson P. ex rel. Foreman v. Heineman*, 240 F.R.D. 456, 468-69 (Neb. 2007); *D.S. v. State*, 829 N.E.2d 1081, 1085 (Ind. 2005) (“A juvenile court has wide latitude and great flexibility in dealing with juveniles; however, its goal is to rehabilitate rather than punish.”).

¹⁸³ See, e.g., 18 U.S.C. § 2252A (2007) (“(a) Any person who (1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography (b)(1) . . . shall be fined under this title and imprisoned not less than 5 years and not more than 20 years.”); ARIZ. REV. STAT. ANN. § 13-604.01(D) (“[A] person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving . . . commercial sexual exploitation of a minor, sexual exploitation of a minor . . . shall be sentenced to a presumptive term of imprisonment for seventeen years.”); LA. REV. STAT. ANN. § 14-81.1(E) (2006) (“Whoever commits the crime of pornography involving juveniles by violating the provisions of Paragraph (A)(2) of this Section [which prohibit the coercion of minors for the purposes of creating pornography] on a victim under the age of thirteen years . . . shall be punished by imprisonment at hard labor for not less than twenty-five years nor more than life imprisonment.”).

While it is correct that self-exploitation would, in fact, not be criminal once the individual reaches the age of majority (as long as not obscene); it is equally true that no matter how self-destructive or destructive to others this material may be, the government can do nothing to help this individual once he reaches the age of majority. Should not the state, given its duty to protect its citizens, intervene when it has the opportunity? The juvenile justice system, fueled by the *parens patriae* doctrine, compels such a response to protect the child from his own self-destructive behavior.¹⁸⁴ Society cannot turn a blind eye to a juvenile causing such recognized social harms and then act surprised when he becomes an adult manifesting the effects of having exploited himself and ultimately others. Society cannot ignore this activity simply because the source is a juvenile.

1. *Juvenile Sex Offender Model Demonstrates Success*

Society is constantly searching for successful interventions in juvenile criminal and harmful activity. Examining what successes exist for juvenile sexual offenders also informs the debate as to the appropriate governmental response to self-exploitive pornography. Thirty to fifty percent of child sexual assaults are estimated to have been committed by juveniles.¹⁸⁵ While no cookie-cutter response has emerged, it is clear that successful juvenile offender programs hold the juvenile *accountable* for his actions *and* provide an opportunity for rehabilitation.¹⁸⁶ A characteristic of the appropriate state response to

¹⁸⁴ See, e.g., *N.G. v. Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004) (“[The state’s] responsibility to act in the place of parents . . . obliges it to take special care to protect those in its charge, and that protection must be concerned with dangers from others *and self-inflicted harm*. ‘Children . . . are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae* In this respect, the juvenile’s liberty interests may, in appropriate circumstances, be subordinated to the State’s *parens patriae* interest in preserving and promoting the welfare of the child.’”) (citing *Schall v. Martin*, 467 U.S. 253, 265 (1984)) (internal quotation marks omitted) (emphasis added).

¹⁸⁵ Robert E. Longo & Martin C. Calder, *The Use of Sex Offender Registration with Young People Who Sexually Abuse*, in *CHILDREN AND YOUNG PEOPLE WHO SEXUALLY ABUSE* 334 (Martin C. Calder ed., 2005) (noting that “[c]onservatively, this means that over 150,000 juvenile sex offenders appear on sex offender registries”).

¹⁸⁶ See Edward Wieckowski, Dennis Waite, Relana Pinkerton, Elizabeth McGarvey & Gerald L. Brown, *Sex Offender Treatment in a Juvenile*

juvenile self-exploitation, therefore, must include the accountability for the criminal component of the activity.

Similarly, the relative success of juvenile sex offender treatment furthers this claim. “[R]esearch studies have found that sexual offense recidivism rates are lower than commonly believed.”¹⁸⁷ One study by the Virginia Department of Juvenile Justice found that recidivism rates for juvenile sexual offenders, when measured by re-arrest, was much less than that of other juvenile offenders.¹⁸⁸ “[C]ontrary to the generally held belief that juvenile sex offenders go on to become adult sex offenders . . . this finding [of projected 7.7% re-arrest rate] demonstrates that most juvenile sex offenders do not continue their sex offending behavior.”¹⁸⁹ Notably, this statistic speaks to offenders in treatment.

Therefore, sex offender treatment is critical to the juvenile’s success. The importance of offenders actually taking responsibility for their actions cannot be underestimated. This often can only occur in a court setting which mandates treatment and monitoring. For many juveniles this may be the only path toward treatment and rehabilitation. Failure to do so will also eliminate the deterrent effect of the law.

2. Sex Offender Registration and Community Notification

The mandatory registration of sex offenders, especially juveniles, is controversial but should not act as a bar to this potential response. In 2006, Congress passed legislation intended to affect uniformity among sex offender registration programs throughout the states. The Adam Walsh Act created a tiered system for sexual offenders and, for the first

Correctional Setting: Programme Description and Nine-Year Outcome Study, in CHILDREN AND YOUNG PEOPLE WHO SEXUALLY ABUSE 374 (Martin C. Calder ed., 2005) (“The principal aims of treatment are to reduce the juvenile’s probability of re-offending once released into the community and to provide him with the skills needed to make a positive contribution to society.”).

¹⁸⁷ Jill S. Levenson & Leo P. Cotter, *The Effect of Megan’s Law on Sex Offender Reintegration*, 21 J. OF CONTEMP. CRIM. JUSTICE 49, 50 (2005) (citing Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994* (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>).

¹⁸⁸ Wieckowski et al., *supra* note 186, at 382.

¹⁸⁹ *Id.* at 383.

time, included some juvenile sexual offenders in those who must register.¹⁹⁰ The provision was one of heated debate.¹⁹¹

Many researchers find sex offender registries problematic because they are not effective in preventing further sexual crimes; they give the public a false sense of safety, and they damage the lives of juvenile sexual offenders.¹⁹² Researchers Longo and Calder make the most persuasive argument against the use of sex offender registration with juveniles. They note that when the sex offender registration is applied to juveniles, issues regarding cognitive ability, mental illness, and development are not considered. Yet, these play large roles in juvenile offending. Additionally, Calder notes the role of denial in juvenile sex offending is unique. Most juvenile sex offenders do not understand their behavior, and they must overcome that denial and work through that fear to create behavioral changes. One of the largest fears is that the reaction of the community and sex offender registration validates that fear, allowing the juvenile to believe there is no possibility of change.¹⁹³

¹⁹⁰ Adam Walsh, Pub. L. 109-248 § 111(7) (codified at 42 U.S.C. § 16911(7) (2006)) (“Expansion of Definition of ‘Specified Offense Against a Minor’ to Include All Offenses by Child Predators”).

¹⁹¹ See American Bar Association, Comments on the Interim Regulations to Adam Walsh Child Protection and Safety Act of 2006, *available at* http://www.abanet.org/poladv/letters/crimlaw/2007apr30_adamwalsh_1.pdf (“ABA juvenile justice policy is set forth in 20 volumes of IJA-Juvenile Justice Standards (‘Standards’) developed by the Association in conjunction with the Institute of Judicial Administration. . . . The Standards, as well as accepted research in developmental science, recognize that juveniles are generally less culpable than adults, and that their patterns of offending are different from those of adults. Thus, ABA policy supports sanctions that vary in restrictiveness and intensity, and are developmentally appropriate and limited in duration. . . . The ABA opposed those provisions of the Adam Walsh Act that apply to juvenile offenders. . . . The ‘Lifetime Registration’ provisions of the Act are likely to have a chilling effect on the reporting of these crimes and will reduce admissions (guilty pleas) to the charges in the cases that do get reported. . . . Furthermore, sex offending in adolescence has limited correlation to adult sex offending (the number of false positives close to 90 percent).”).

¹⁹² See Longo & Calder, *supra* note 184, at 334 (noting that “[c]onservatively, this means that over 150,000 juvenile sex offenders appear on sex offender registries”); Levenson & Cotter, *supra* note 187, at 51- 52.

¹⁹³ See Longo & Calder, *supra* note 185, at 341.

These criticisms of sex offender registration and its particular impact on juveniles have some validity,¹⁹⁴ and the author agrees that registration and notification should not be necessary for all juvenile offenders. However, the effects of registration and notification are not wholly negative and, in fact, have several positive characteristics.

As a matter of public safety, there is a value in sex offender registration in that school officials, classmates, and law enforcement are aware of the presence of a sexual offender and can increase safety measures to prevent future victimization. Concededly, the self-exploitation offender harms himself and other unknown children who will be exposed to the images. Sex offender registration, therefore, seems not to protect these victims. However, when a case involves the production of images with both the offending minor and other minors, there are some safety concerns. There are also benefits to the offender himself. In a study of those affected by Megan's Law, less than one third experienced the most discussed negative effects including loss of a job, threats, or property damage.¹⁹⁵ In fact, many of the offenders said the law had some positive effects, including assisting in preventing re-offending, decreasing access to victims, assisting in being honest with others, and finding that most people were supportive of recovery.¹⁹⁶

¹⁹⁴ Another common criticism of sex offender registration, the author does not find has merit. Martin Calder and Robert Longo argue that there is no need for juveniles to register because, unlike adults, juveniles "have not been offending for long enough to develop a clear pattern of abusing. . . . With appropriate intervention, the risk of long-term offending is low for a majority of young people." Longo & Calder, *supra* note 185, at 340. This argument, taken to its logical extension, suggests the state wait until an offender establishes a pattern of offending before intervention. This policy only increases the safety risk to the offender and others. Rather, a more appropriate policy may be to shorten the time of a juvenile on the registry. Some models lessens the time to half to accommodate for the juvenile's age. *See also* Levenson & Cotter, *supra* note 187, at 63 (advocating for a "tier system of notification . . . [to] allow communities to more accurately identify those sex offenders who pose the greatest threat" and to "decrease some of the negative effects of community notification on lower risk offenders").

¹⁹⁵ Levenson & Cotter, *supra* note 187, at 56. However, a majority experienced increased stress, loss of relationships, embarrassment, fear, and hopelessness. Levenson & Cotter, *supra* note 186, at 56.

¹⁹⁶ Levenson & Cotter, *supra* note 187, at 56-57.

Therefore, the existence of possible registration as a sex offender does not preclude juvenile prosecution as a proper solution to self-exploitation. The current federal model demands registration only of these most severe offenders. It is unlikely that a self-exploiter, without involvement of other victims, would fall into the same category. The author would agree that self-exploitation alone should not be an adequate basis for registration, but only in the most egregious cases, such as an offender filming his sexual assault on a minor or a repeat offender, would registration be appropriate.

D. IMPLEMENTATION OF A JUVENILE PROSECUTION PROTOCOL

This article does not suggest that juvenile prosecution be a mandatory consequence. Rather, jurisdictions should develop a protocol which includes: (1) juvenile prosecution as an option, and (2) factors to consider in determining if an individual case deserves that response. These cases are on the increase and offices cannot effectively address them without a well thought out protocol in deciding when to prosecute. Factors must be determined not only from a law enforcement investigation, but from also a multi-disciplinary inquiry as is the model for all child abuse cases. This would shed light not only on the crime itself, but also on the possible reasons for the juvenile's actions.

The notion that the government review several factors prior to deciding on prosecution is not new. The United States Attorneys' Manual, charges prosecutors with considering "the recommendations for prosecution of the specific offense" as described in each of the substantive-offense chapters of the Manual in determining whether to proceed with a case.¹⁹⁷ For example, in sexual exploitation crimes, the Manual suggests that prosecutors consider "characteristics of the material, . . . the conduct depicted, . . . whether the target is making money from the conduct, . . . and the safety of the community," among other factors, when deciding whether to prosecute.¹⁹⁸ Additionally, the Federal Sentencing Guidelines consider the following factors in determining the gravity of a child sexual exploitation offense: age of

¹⁹⁷ United States Attorneys' Manual, Authorizing Prosecution § 9-2.030, *available at*

http://www.usdoj.gov/usao.eousa/foia_reading_room/usam/index.html.

¹⁹⁸ General Prosecution Policies and Priorities § 9-75.020, *available at* http://www.usdoj.gov/usao.eousa/foia_reading_room/usam/index.html.

child, character of sexual act, severity of images, distribution, use of computer, intent, distribution to a minor, and volume of images.¹⁹⁹

Other professions suggest some distinct factors. In the context of adult possession of child pornography, the NCECC analyzes several factors to determine the severity of a case. These include whether the images are “hard core” images, the number of images, the length of time the offender possessed the images, the process by which he or she organized them, whether the offender produced the images, and whether the offender has access to children.²⁰⁰ Taylor and Quayle, leading researchers in this area, have also created indicators for serious offending which include: the possession of extreme or recent images, the participation in online communities, the participation in trading images, the cataloging of images, and whether the offender has access to children.²⁰¹

The notion, therefore, of considering different factors in determining the prosecution decision is not novel. States should develop policies which clearly allow for juvenile prosecution but also include the factors to consider. These fall into offender specific factors and crime specific factors. Regarding the offender specific factors, the state should assess the cause behind the juvenile engaging in this activity, the age of the juvenile, the presence or absence of a support network to prevent re-offending, the juvenile’s amenability to rehabilitation, the frequency of exploitation, and the likelihood of rehabilitative success. Regarding the crime itself, the prosecutor should look to the circumstances surrounding the exploitation, whether the offender involved other juveniles, the role of this juvenile in the production, whether the production was commercial, whether it was for profit, the extent of the dissemination, the theme of the images, and the severity of the content.

Such a system will accomplish many important social functions. First, it will send a clear deterrent message to all people, even juveniles, that self-exploitation is the creation of child pornography and, therefore, is illegal and prosecutable. It will also recognize the severe social harm caused by the creation of such images and their circulation throughout the world. Finally, it will allow the state to have an array of alternative

¹⁹⁹ USSG 2G2.1, USSG 2G2.2.

²⁰⁰ Sinclair & Sugar, *supra* note 23, at 32.

²⁰¹ *Id.* at 33.

responses to this significant social ill, thus affording the state the discretion to determine if prosecution is required another remedy is more appropriate.

CONCLUSION

The creation of child pornography through juvenile self-exploitation is a growing phenomenon with severe social harms, similar to that of other forms of child pornography possession, production, and distribution. Yet, the crime is that much more complex because of the nature of the minors exploiting themselves in their criminal acts. The fact of self-harm, alone, however, cannot justify a refusal to prosecute juveniles for self-exploitation. Once those images are created, they create vast social harm as they are used by offenders to sexually assault children, they aid in the creation of juvenile sex offenders, and they further support the sexualization and eroticization of children.

Given these social harms, appropriate government intervention under both the *parens patriae* doctrine and the state police powers includes juvenile prosecution. Such a provision will aid in the deterrence of such behavior, and will mandate rehabilitation under the juvenile court model. While prosecution may not be necessary in every instance of self-exploitation, prosecutors should include it in their arsenal to prevent child sexual exploitation. Using both social science as well as legislative guidelines, prosecutors should develop a policy of addressing self-exploitation which considers factors such as the motive of the offense, the age of the juvenile, the likelihood of successful rehabilitation, the severity of the images, the number of the images, whether other juveniles were involved, the circumstances surrounding the crime, and the commercial or non commercial nature of the activity. By developing an even-handed approach, but one which recognizes the complex social harms these images create, society will be better served as the sexual objectification of children will be diminished.