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Jail for Juvenile Child Pornographers?: A Reply to Professor Leary

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JAIL FOR JUVENILE CHILD PORNOGRAPHERS?: A
REPLY TO PROFESSOR LEARY

Stephen F. Smith*

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INTRODUCTION

In a provocative article recently published in this Journal, Professor Mary Graw Leary advocates a new role for the criminal law to play in the effort to eradicate child pornography.¹ The criminal law, of course, has been widely and aggressively used against those who produce, distribute, or possess pornographic depictions of children.² These

* Professor of Law and John V. Ray Research Professor, University of Virginia. This Comment is based on oral remarks presented at the Virginia Journal of Social Policy and the Law’s February 2008 symposium on “self-produced child pornography.” I am grateful to the Journal for inviting me to participate in the symposium and to publish this Comment. Special thanks to Mary Leary, of the Columbus School of Law at The Catholic University of America, for sharing with us the benefit of her research and her passion for protecting children against sexual abuse.

¹ Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL’Y & L. 1 (2007).

² For example, in fiscal year 2005, the federal government charged 1,503 defendants with child pornography offenses and other offenses involving the sexual abuse of children. See U.S. Dep’t of Justice, *Fact Sheet: Department of Justice Project Safe Childhood Initiative*, (Feb. 15, 2006) [hereinafter “*Safe Childhood Fact Sheet*”], available at <http://www.usdoj.gov/opa/pr/>

enforcement efforts, however, have largely focused on cases involving images in which adults coerced or enticed young minors into performing sexual acts.³

Although it makes sense to focus limited enforcement resources on pornography produced through the sexual abuse of children, Professor Leary notes that a nontrivial amount of the child pornography available today is not produced by adults. Instead, without any involvement by adults, teenagers are increasingly choosing to create and disseminate sexually explicit images of themselves. Professor Leary advocates extirpating this type of pornography, which she terms “self-produced child pornography,” by prosecuting the minors who create and distribute it.⁴

In this Comment, I respectfully take issue with Professor Leary’s thesis that criminal prosecutions are an appropriate response to the problem of self-produced child pornography. Before doing so, it is worth noting the substantial common ground that lies between us. We are both deeply troubled by the proliferation of child pornography of all forms (including the “self-produced” variety) and the sexual exploitation of children. We agree that it would be better for the individuals involved, and for society as a whole, if minors did not produce or distribute pornographic images of themselves. Where some might see the “sexual

2006/February/06_opa_081.html. During the following year, the Justice Department launched “Project Safe Childhood,” a new crackdown on child pornography and related offenses. *Id.* The results have been dramatic. As a recent *Washington Post* story reported:

In the past 11 months, federal prosecutors in Virginia and Maryland have helped convict or send to prison on child pornography charges the former head of the Virginia American Civil Liberties Union, an Ivy League professor, a sheriff’s deputy, a Transportation Security Administration employee, an Army sergeant, a former Navy cryptologist, a contractor working at Abu Ghraib prison in Iraq, a National Institutes of Health researcher and a U.S. Capitol Police officer.

Jerry Markon, *Crackdown on Child Pornography*, WASH. POST, Dec. 15, 1997, at A1.

³ This focus is suggested by the Justice Department’s own press release announcing the launch of Project Safe Childhood. As its name suggests, Project Safe Childhood is aimed at “[s]exual predators who target the most innocent and vulnerable of our society—our children.” *Safe Childhood Fact Sheet*, *supra* note 2.

⁴ See, e.g., Leary, *supra* note 1, at 50. The phrase “self-produced child pornography” does not appear to be a term of art, but rather a phrase coined by Professor Leary. Like her, I use the phrase as a reference to “images [produced by minors] of themselves in sexually explicit poses or engaged in sexual conduct.” *Id.* at 4 n.8. Self-produced child pornography is to be distinguished from child pornography created through the rape or molestation of children by adults. For expository ease, I refer to this latter type of child pornography as “conventional child pornography.”

liberation” of teenagers, we see a major social problem that exposes minors not only to the potential for a lifetime of shame and emotional distress, but also to the danger of sexual abuse at the hands of pedophiles and sexual predators.

Even though Professor Leary and I are united in the goal of protecting children against sexual exploitation, we part company on the proper societal response to the problem of self-produced child pornography. In my view, children who produce and distribute pornographic images of themselves ordinarily should not be regarded as proper objects of punishment. In this context, child protective services, backed up if necessary by the threat of criminal prosecution, is a much more appropriate way of reforming minors and protecting them against the serious dangers to which they expose themselves by creating and distributing pornographic images of themselves. A prosecution-based response, though essential for sexual predators and others involved in the sexual exploitation of minors, would create far more problems than it would solve for minors who make the mistake of creating and distributing pornographic images of themselves.

I. THE PROBLEM OF “SELF-PRODUCED CHILD PORNOGRAPHY” AND POTENTIAL CRIMINAL LAW RESPONSES

In order to decide whether criminal prosecutions have a role to play in dealing with the problem of self-produced child pornography, several threshold issues need to be considered.

First, what are the characteristics of the relevant offender population? In analogous situations, such as conventional child pornography, child prostitution, and statutory rape, children are treated as *victims*, not wrongdoers deserving of punishment.⁵ If we are to take the diametrically opposite approach in the case of children who create and distribute sexually explicit images of themselves, as Professor Leary urges, we need to consider whether, in fact, such a response is appropriate given the characteristics of minors who are likely to produce and distribute such images.

Second, assuming that juveniles who produce pornographic images of themselves do deserve punishment, are the tools currently available to law enforcement adequate to the task? At its most obvious, this inquiry involves consideration of whether existing child pornography laws apply to self-produced child pornography. Less obvious (but no less important) is the issue of proportionality of punishment. In a society that rightly insists that punishment imposed on criminals must “fit” the crime they

⁵ Professor Leary readily concedes this at various points. *See, e.g.*, Leary, *supra* note 1, at 9–10, 28 & 32.

committed,⁶ we need to decide whether the penalties to which children would be exposed under Professor Leary's approach are likely to be excessive in light of the moral culpability of the relevant offender population.

The remainder of this Comment analyzes each of these issues in detail. In this Part, I come up with a sketch of the type of minors whom Professor Leary would expose to the criminal law. On close inspection, these minors are hardly the grave social danger that she believes them to be. Later in this Part, I analyze whether minors who create sexually explicit images of themselves can be convicted under current child pornography laws. In agreement with Professor Leary, I conclude that minors can be prosecuted and convicted under current law for creating and distributing pornographic images of themselves. Part I concludes by showing the severe penalties to which minors would be exposed on Professor Leary's approach.

This sets the stage for the proportionality analysis contained in Parts II and III. Drawing upon the analysis of Part I, Parts II and III demonstrate that minors whose only crime is having made or distributed explicit images of themselves do not deserve prosecution. The severe penalties afforded by child pornography offenses, though appropriate for those involved in conventional child pornography, are likely to be excessive as applied to minors who create sexually explicit images of themselves. Part IV offers a different, more limited vision of how the criminal law should be used to deal with such minors – a vision that seeks to help minors, not punish them.

A. WHO DOES IT (AND WHY DO THEY DO IT)?

The problem of minors creating pornographic images of themselves has received scant attention until recently. The scope of the problem is not known, and it is difficult to know given how inexpensive and widely available the technology is that can be used to create and share sexually

⁶ As I have explained elsewhere:

Criminal law has traditionally rested on the notion that moral blameworthiness dictates the outcome of criminal cases. That is to say, blameworthiness determines two questions: *who* may be criminally punished and *how much* punishment may be inflicted on convicted offenders. . . . To be justified, criminal punishment should be proportional to the blameworthiness of the defendant's offense; those who are convicted should be punished in accordance with their degree of fault.

Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 882–83 (2005). The notion that moral blameworthiness should serve as an upper limit on criminal punishment is not unique to retributivists; utilitarians recognize the utility of limiting punishment in accordance with moral desert. *See generally id.* at 887–88.

explicit material, both on and off the Internet.⁷ Though we do know a fair bit about the children who are used to produce child pornography of the conventional (exploitative) sort,⁸ we do not, as of yet, have studies identifying the characteristics of minors who voluntarily choose, on their own initiative, to produce and distribute pornographic images of themselves.

Anecdotal evidence suggests that minors are likely to create and distribute sexually explicit images of themselves in several situations. First, minors who are sexually active—typically fifteen to seventeen year olds⁹—may record their own consensual sexual encounters or make sexually explicit images of themselves for their boyfriends or girlfriends

⁷ Web cameras, digital cameras, camcorders, and cell phone cameras, not to mention Internet access over home computers, are available to most children. For example, according to a 2006 survey conducted by the Pew Internet & American Life Project, in 72% of American households, teenagers have their own desktop computers. ALEXANDRA RANKIN MACGILL, PARENT AND TEENAGER INTERNET USE 4 (Pew/Internet & American Life Project 2007), *available at* http://www.pewinternet.org/pdfs/PIP_Teen_Parents_data_memo_Oct2007.pdf. The survey makes it clear that computer and cell phone usage among teenagers is ubiquitous: “Among teens, desktop computers are the most widely-owned devices, followed by cell phones. Two-thirds of desktop-owning parents (64%) have children who also own desktop computers and 60% of parents who own cell phones have children who own them as well.” *Id.* at 3. Although these items have many legitimate uses, they can also be used for the illegitimate purpose of creating and disseminating pornography.

⁸ The 1986 report of Attorney General Edwin Meese III’s Commission on Child Pornography made these findings about the children who are used in the production of conventional child pornography:

Children used in pornography seem to come from every class, religion, and family background; a majority are exploited by someone who knows them by virtue of his or her occupation, or through a neighborhood, community, or family relationship. Many are too young to know what has happened; others are powerless to refuse the demand of an authority figure; some seem to engage in the conduct ‘voluntarily,’ usually in order to obtain desperately needed adult affection. Adolescents used in pornography are often runaways, homeless youth or juvenile prostitutes who may feel with some justice that they have little choice but to participate.

FINAL REPORT OF THE ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY 135 (1986) [hereinafter “COMMISSION REPORT”].

⁹ According to 2003 data compiled by the Henry J. Kaiser Family Foundation (“KFF”), roughly half of teenagers in the United States have had sexual intercourse by the time they graduate from high school. For boys, the figure is 48%; for girls, 45%. *See* HENRY J. KAISER FAMILY FOUNDATION, U.S. TEEN SEXUAL ACTIVITY 1 (2005), *available at* <http://www.kff.org/youthhivstds/upload/U-S-Teen-Sexual-Activity-Fact-Sheet.pdf> [hereinafter TEEN SEX]. The median age at which sexually active high school students first had intercourse was 16.9 for boys and 17.4 for girls. *Id.*

or as pranks.¹⁰ Second, some minors, callously referred to in Internet subculture as “camwhores,”¹¹ sell sexually explicit images of themselves through webcams or other means as a way of earning money. Third, some may create and post on the Internet sexually explicit images of themselves as a means of making friends or meeting potential sex partners.

The first scenario materialized in the recent “cell phone porn” case in Allentown, Pennsylvania.¹² The case involved a pornographic video and picture featuring two underage female students at Parkland High School. One of the girls used her cell phone to take a picture of her bare breasts; the other girl was filmed having sex with another teenager.¹³ The images were forwarded by students to the cell phones of dozens of fellow Parkland students.¹⁴

From there, the situation mushroomed. One of the Parkland students who received the images logged on to a popular social networking website and created a group called “Parkland . . . Where Pornstars Are Born.”¹⁵ Soon, the images were far beyond the confines of Parkland High School. Eventually, the images were discovered in the possession of students at Harvard University and as far away as Oregon.¹⁶ Alerted to the situation by school officials, the police granted immunity to Parkland students who brought in their cell phones so that the images could be deleted but threatened to prosecute students who refused to comply.¹⁷ It is unclear at this time whether the students who created and appeared in the images will be charged.¹⁸

¹⁰ Once made, of course, the resulting images can be distributed to anyone (including pedophiles and sexual predators) or taken by purveyors of online child pornography and traded or sold.

¹¹ See Kurt Eichenwald, *Through His Webcam, a Boy Joins a Sordid Online World*, N.Y. TIMES, Dec. 19, 2005, at A1.

¹² See Michael Rubinkam, *Cell Phone Porn Scandal Hits U.S. School*, ASSOCIATED PRESS, Jan. 25, 2008, available at <http://www.msnbc.msn.com/id/22840727/>.

¹³ *Id.* It was unclear whether the girl made the video herself or, if not, knew she was being filmed. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See *Cell Porn Scandal Hits Pa. School*, NEWSMAX.COM, Jan. 24, 2006, http://www.newsmax.com/us/student_porn_cell_phones/2008/01/24/67247.html

¹⁷ *Id.*

¹⁸ A similar case arose in Tallahassee, Florida. A boyfriend and girlfriend, aged seventeen and sixteen, respectively, used a digital camera to photograph themselves while having sex. The couple kept the photos to themselves; the only distribution of the photos occurred when the couple sent the pictures from the girlfriend’s computer to her boyfriend’s e-mail account. The police were alerted, presumably by the girl’s parents, and the teenagers were charged in

The second and third scenarios are illustrated by the tragic case of Justin Berry, whose descent into the dark world of online child pornography as a young teenager was memorialized in a gripping investigative report by the *New York Times*.¹⁹ At age thirteen, Justin was so lonely that he hooked up a webcam to his bedroom computer in hopes of meeting girls and making friends his own age.²⁰ Within minutes of establishing his online presence, however, Justin was contacted by the first of a stream of men who began grooming him to make explicit images of himself and, eventually, to submit to sex.²¹ At their suggestion, Justin set up a “wish list” with an online retailer so that his new “friends” could buy him things that he wanted.²² The gifts began pouring in; predictably yet tragically, so, too, did the sexual demands.²³

Within a year, Justin had been molested on multiple occasions, often on film, by his new “friends.” The first round of sexual assaults was committed by a man who had enticed Justin to come halfway across the country with false promises to arrange for him to have sex with teenage girls.²⁴ From that point on, Justin—angry, hurt, and ashamed—plunged headlong into the world of drug abuse and commercial child pornography. He earned sizeable sums to perform sexual acts, both

juvenile court with producing and distributing child pornography. See Declan McCullagh, *Police Blotter: Teens Prosecuted for Racy Photos*, CNET NEWS, Feb. 09, 2007, http://www.news.com/Police-blotter-Teens-prosecuted-for-racy-photos/2100-1030_3-6157857.html.

¹⁹ See Eichenwald, *supra* note 11, at A1. Justin later testified before Congress on child pornography and the Internet. 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 of the H. Comm. on Energy and Commerce*, 109th Cong. 75 (2006) (Statement of Justin Berry).

²⁰ See Eichenwald, *supra* note 11, at A1.

²¹ *Id.*

²² *Id.* Justin initially relished the compliments and apparent friendship of the men who contacted him, which filled a void left in his life by his parents' divorce and his estrangement from his father. *Id.* Once it became clear what his new “friends” really wanted, he began to fear them. Years later, after receiving an e-mail from a man describing, in very graphic terms, what he would do to Justin if they met, Justin told a reporter from the *New York Times*: “This guy is really a pervert. He kind of scares me.” *Id.*

²³ Initially, Justin agreed to pose bare-chested on his webcam, which, unbeknownst to him, “sent an important message: here was a boy who would do things for money.” *Id.* Gradually, the requests and the inducements became more extreme: “More than \$100 for Justin to pose in his underwear. Even more if the boxers came down. The latest request was always just slightly beyond the last, so that each new step never struck him as considerably different.” *Id.*

²⁴ *Id.* Justin's mother apparently believed that he was going to Michigan to attend a computer camp. *Id.*

online and in person, for the hundreds of pedophiles who bombarded him with requests and eagerly paid whatever price he demanded.²⁵

Justin's downward spiral continued well after his eighteenth birthday, until he was finally contacted by a *New York Times* reporter. The reporter convinced Justin to contact the FBI and turn in the men who had exploited him. Justin agreed, and a reluctant Justice Department eventually granted him complete immunity against prosecution in exchange for his cooperation as a witness. Within weeks, waves of arrests followed. One of the men was arrested in his driveway as he was preparing to flee with a young teenage boy.²⁶ With help, Justin has finally turned his life around, getting off drugs and out of the pornography business, and he enrolled in college several years ago.²⁷

B. THE LEGAL STATUS OF SELF-PRODUCED CHILD PORNOGRAPHY

In the examples just discussed, minors made and distributed pornographic images of themselves. They did so for different reasons: Justin Berry (eventually) acted for financial gain, whereas for others, such as the two girls in the "cell phone porn" case, the images were made either as a prank or as an offshoot of consensual sex between teenagers. In the "cell phone porn" case and, eventually, Justin Berry's, the minors acted on their own initiative, willingly and voluntarily producing and distributing pornographic images of themselves.²⁸ In doing so, did the minors involved violate federal or state child pornography statutes?

²⁵ *Id.* One of the men went so far as to rent an apartment for Justin, at \$410 a month, near Justin's house. This allowed Justin even greater privacy for his performances without arousing any suspicions on the part of his mother, who was told that Justin was going over to a friend's house to play. *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Justin's case is more complex than the "cell phone porn" case. Originally, he was enticed by older men to produce sexually explicit images of himself. This constitutes conventional—not "self-produced"—child pornography because it involved adults using a child to produce pornographic material. *See supra* note 4. Eventually, however, Justin essentially went into the child pornography business in his own right, operating in a highly business-like manner no different (except, of course, in the illegitimate nature of the products and services he offered) from those of legitimate online businesses. For example, he determined the range of services he would offer, set the rates for his services, charged monthly subscriber fees, processed credit card payments from his patrons, and kept detailed business records—records that would later be of tremendous value to law enforcement. *See Eichenwald, supra* note 11. The pornography that resulted from Justin's independent efforts before his eighteenth birthday constitutes "self-produced" child pornography, as Professor Leary has defined that term, because it involved a minor producing sexually explicit images of himself on his own initiative. *See supra* note 4.

As Professor Leary correctly recognizes,²⁹ it appears that they did. Although the definition of child pornography offenses varies across jurisdictions, criminal statutes typically prohibit the production and dissemination of pornography featuring minors in terms that are broad enough to apply to self-produced child pornography. Federal law, for example, makes it a crime for “[a]ny person” to transport, ship, distribute, or receive “any visual depiction” that “involves the use of a minor engaging in sexually explicit conduct.”³⁰ Virginia law similarly subjects to punishment anyone who “[p]roduces or makes . . . sexually explicit visual material by any means . . . which utilizes or has as a subject a person less than eighteen years of age.”³¹

Laws such as these clearly do not exempt cases where minors produce or disseminate pornographic images of themselves. They plainly apply to *any* pornographic depictions of a minor. It makes no difference, from a definitional standpoint, whether or not the child pornography was produced by the minor featured in the images.

As a consequence, minors who create or distribute pornographic images of themselves can be convicted of child pornography offenses, no less than adults who traffic in such images of minors. Indeed, although reported cases are understandably few, there is at least some appellate authority specifically upholding the power of the state to punish minors for producing sexually explicit images of themselves.³²

²⁹ See Leary, *supra* note 1, at 19 (noting that minors who create and distribute sexually explicit images of themselves “are producing, distributing, and possessing child pornography which is a violation of state and local laws with significant penalties.”).

³⁰ Child Pornography Prevention Act of 1996, 18 U.S.C. § 2252(a)(1)-(2) (2006). Congress defined a “minor” as someone under the age of eighteen. See *id.* § 2256(1) (2003). Although many states have followed Congress’s lead in this regard, many others define “minor” more narrowly, for child pornography purposes, as encompassing children under the age of seventeen or even sixteen. See COMMISSION REPORT, *supra* note 8, at 134 (citing National Legal Resources Center for Child Advocacy and Protection, A.B.A., *Child Sexual Exploitation: Background and Legal Analysis* 35 (1984)). Interestingly, the Commission had recommended that the age of majority for child pornography laws be raised from eighteen to twenty-one. See *id.* at 140–42.

³¹ See VA. CODE ANN. § 18.2-374.1(a), (b)(2).

³² In *A.H. v. State*, 949 So.2d 234 (Fla. App. Dist. 1 2007), the District Court of Appeal upheld the adjudication of delinquency of the previously mentioned sixteen-year-old Tallahassee girl who took pictures of herself having sex with her seventeen-year-old boyfriend. See McCullagh, *supra* note 18. Reasoning that “[t]he statute is not limited to protecting children from sexual exploitation by adults,” the majority concluded that the “State’s interest in protecting children from exploitation . . . is the same regardless of whether the person inducing the child to appear in a sexual performance and then promoting that performance is an adult or a minor.” *A.H.*, 949 So.2d at 238. The dissenting

Therefore, the questions Professor Leary raises are largely directed to the discretion of prosecutors: whether, despite the applicability of child pornography offenses, minors who produce pornographic images of themselves should be prosecuted.

In answering that question, Professor Leary fails to take account of a highly salient factor: the punishment to which children would be exposed under her approach. In a system, such as ours, that is committed to proportionality of punishment,³³ it is not enough for prosecutors simply to decide whether or not a suspect deserves to be prosecuted and convicted. In deciding whether a prosecution is in the interests of justice, prosecutors should also consider whether the grade of offense and the level of punishment authorized by applicable law “fits” the suspect’s crime.

The careful consideration of proportionality concerns at the charging stage is especially important in the current climate of drastically reduced judicial sentencing discretion. Unlike prior generations of trial judges, who had wide discretion to do justice by granting leniency to convicted offenders, today’s trial judges increasingly find their hands tied at sentencing. The sources of limits on judicial sentencing discretion are varied—they typically emanate from statutes imposing mandatory minimum sentences or from sentencing guidelines³⁴—but, whatever their source, they, in effect, transfer much of the power to grant leniency from trial judges to prosecutors.

Not surprisingly, given that child pornography is typically produced through the sexual abuse of children,³⁵ the production of child pornography is classified as a very serious crime. That offense is not only classified as a felony under federal and state law,³⁶ but also punishable with long terms of imprisonment. Under federal law, a producer of child pornography faces a maximum punishment of twenty

judge found it ironic that the girl could be punished for recording a sexual encounter that was entirely legal under Florida law. *See id.* at 239 (Padovano, J., dissenting). Even the dissenting judge, though, did not question the applicability of the statute; instead, he voted to strike the statute down on right-to-privacy grounds, as applied to minors who produce sexually explicit images of themselves during legal sexual encounters. *See id.* at 241.

³³ *See supra* note 6, at 882, 888–90.

³⁴ For a brief sketch of current restrictions on the sentencing discretion in the federal system, *see* Smith, *supra* note 6, at 894–96. Those restrictions are still quite severe even though, after *United States v. Booker*, 543 U.S. 220 (2005), the harsh federal sentencing guidelines are said to be “advisory” only. *See, e.g., id.*, at 895–96.

³⁵ *See infra* Part II.

³⁶ *See, e.g.*, 18 U.S.C. § 2252(b)(1) (2006); VA. CODE ANN. § 18.2-374.1(C1)-(C2).

years for a first offense.³⁷ The maximum is doubled to forty years for defendants previously convicted of enumerated sexual offenses against children (including possession of child pornography)³⁸ and for defendants who produced child pornography that is hard-core in nature.³⁹ The Code of Virginia prescribes a twenty-year maximum, which is ratcheted up to thirty years if the minor depicted in the pornographic images is under age fifteen or if the producer is seven or more years older than the minor featured in the images.⁴⁰

Moreover, producers of child pornography often face mandatory minimum sentences—sentences that judges are *powerless* to mitigate no matter how much the circumstances of the case call for leniency. Under federal law, a person convicted of producing child pornography must be sentenced to at least five years in prison, in the case of a first offense, or a minimum of fifteen years with either a qualifying prior conviction⁴¹ or hard-core child pornography.⁴² Virginia law is similar: the basic mandatory minimum of one year in prison for pornography produced through the use of minors between the ages of fifteen and eighteen is increased, depending on the circumstances, to either three, five, ten, or fifteen years.⁴³

II. MORAL DESERT AND PROPORTIONALITY OF PUNISHMENT

There can be no question that the production and distribution of child pornography are very serious crimes. Are the penalties authorized by child pornography statutes too severe for minors whose only crime is

³⁷ 18 U.S.C. § 2252(b)(1) (2006).

³⁸ 18 U.S.C. § 2252(b)(2) (2006).

³⁹ 18 U.S.C. § 1466A(a)(2000 & Supp. 2007) (cross-referencing penalty provisions in 18 U.S.C. § 2252A(b)(1)). Congress described, in graphic detail that need not be repeated here, the kinds of sexual acts referred to here as “hard-core.” See *id.* § 1466A(a)(2)(A).

⁴⁰ VA. CODE ANN. § 18.2-374.1(C1)-(C2).

⁴¹ See 18 U.S.C. § 2252(b)(1)-(2)(2000).

⁴² See 18 U.S.C. § 1466A(a) (cross-referencing penalty provisions in 18 U.S.C. § 2252A(b)(1)).

⁴³ VA. CODE ANN. § 18.2-374.1(C2). If the minor featured in the pornographic image is between the ages of fifteen and eighteen but the producer was at least seven years older than the minor, the applicable mandatory minimum is three years. *Id.* If, on the other hand, the minor depicted in the pornography was less than fifteen years of age, the minimum punishment is five years. *Id.* at § 18.2-374.1(C1). A subsequent violation of section 18.2-374.1 carries a mandatory minimum of ten years if the minor was over fifteen but younger than eighteen and a fifteen-year minimum if the defendant was seven or more years older than the minor involved and the minor was less than fifteen years old. *Id.* at § 18.2-374.1(C1), (C2).

having made or distributed sexually explicit images of themselves? I believe they are.

With few exceptions of the kind canvassed in Part IV, my conclusion is that the heavy hand of the criminal law should not be brought to bear against minors who make or distribute pornographic images of themselves. Minors in this category should be regarded either as victims in need of help to turn their lives around or, at the very least, not wrongdoers deserving of the severe vengeance and blame society justifiably imposes on adults and others who sexually abuse children. Even if minors who create pornography featuring themselves do deserve some form of punishment, the consequences, both direct and collateral, for minors of prosecution—in either criminal court or juvenile court—are likely to be too severe to be deemed a proportional response to their crime. The problem of self-produced child pornography, in most instances, is one that is best resolved through means other than prosecutions of minors.

*A. A DISTINCTION WITH A DIFFERENCE: "SELF-PRODUCED" VERSUS
CONVENTIONAL CHILD PORNOGRAPHY*

The severe penalties that statutes prohibiting child pornography authorize were passed with a very different—and far more culpable—crime in mind than minors creating sexually explicit material featuring themselves. That crime, quite simply, is the rape and molestation of children, captured on film or in other visual formats.⁴⁴

With this conventional sort of child pornography, children are subject to unspeakable harm—sexual, emotional, and often physical⁴⁵—in the very creation of the images, often at the hands of relatives or other adults once trusted by child victims. The severity of the violation and harms that children suffer when they are raped or molested is compounded by two factors. First, the minors used to create conventional child pornography tend to be very young.⁴⁶ Second, the

⁴⁴ *E.g., Fugitive is Arrested in Videotaped Rape of Girl*, N.Y. TIMES, Oct. 17, 2007 (describing arrest of man for the rape of a three-year-old girl).

⁴⁵ The following passage from an ABA report is illustrative:

Child-sex-abuse victims experience symptoms of distress during the period of sexual exploitation, at the time of disclosure, and in the post-traumatic phase. In addition to any physical injuries they suffer in the course of their molestation, such as genital bruising, lacerations, or exposure to sexually transmitted diseases, child victims experience depression, withdrawal, anger, and other psychological disorders. Such effects may continue into adulthood.

Eva J. Klain, et al., *Child Pornography: The Criminal-Justice-System Response*, (A Report of the American Bar Association Center on Children and the Law for the National Center for Missing and Exploited Children), Mar. 2001, at 10 (footnote omitted) [hereinafter, "*ABA/NCMEC Report*"].

⁴⁶ As an American Bar Association ("ABA") committee recently reported:

sexual abuse the minor suffered is memorialized in images that might surface at any time, which makes the existence of those images a constant source of anxiety and emotional distress for the person who endured the abuse recorded in the images.⁴⁷ This is the horrifying nature of the offense that legislatures had in mind when they passed severe penalties for the production and distribution of child pornography, and there can be no question that such a serious crime against a vulnerable victim—a child—deserves severe punishment.

Unfortunately, Professor Leary fails to recognize that the legislatures which authorized severe penalties for production and distribution of child pornography did *not* have in mind cases in which minors produce pornographic images of themselves. Consider, for example, the influential report of the Attorney General's Commission on Pornography, which has had a major impact on efforts to eradicate child pornography. The report exhaustively reviewed the nature of the child pornography problem in America but did not even *mention* the possibility that minors might produce sexually explicit images of themselves.

To the contrary, the Commission made it clear that it had more conventional child pornography in mind. It said: "While concern over 'pornography' generally has centered on the impact of sexually explicit materials on the *audience*, 'child pornography' has been defined, and attacked, in terms of its effects on the children who appear in it."⁴⁸ Laws prohibiting child pornography, the Commission continued—and, one might add, the severe penalties those laws authorize—reflect the "anger" society rightly feels "over the sexual abuse of children used in its

Research indicates that children used in pornography are generally younger than those exploited in other ways (e.g., through prostitution). One study of law-enforcement-responses to child-sexual-exploitation cases revealed no prostitution cases involving victims younger than 11 in the sample, while approximately 20 percent of the pornography cases involved children between 6 and 10 years of age. In the same study the median age of child pornography victims was 13 years old with a range from 6 ½ to 17 years of age.

ABA/NCMEC Report, supra note 44, at 8 (footnote omitted).

⁴⁷ See COMMISSION REPORT, *supra* note 8, at 136 (noting how child pornography serves as a permanent record of the sexual abuse endured by children). The Commission referred to the ever-present risk that depictions of child sexual abuse may resurface as child sex abuse victims' "most unhealable wound." *Id.*

⁴⁸ COMMISSION REPORT, *supra* note 8, at 131; see also, e.g., *id.* at 154 ("The sexual exploitation of children is the basis for the production and distribution of child pornography.").

production” and represent a “governmental battle against [the] sexual exploitation of children.”⁴⁹

The Supreme Court’s child pornography decisions likewise stress the harms that minors suffer when used in the creation of pornographic material. In *New York v. Ferber*, the Court categorically exempted child pornography from the First Amendment protection that adult pornography receives.⁵⁰ The Court did so because “the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.”⁵¹

This child-protection rationale applied not just to the production of child pornography, but also to the distribution of child pornography. After all, the distribution of pornographic depictions of children is “intrinsically related to the sexual abuse of children” that occurs in the creation of such depictions.⁵² At every step, then, the protection of

⁴⁹ *Id.* at 132. The same exclusive focus on sexual abuse of the children depicted in pornographic material is evident in the 2001 ABA report prepared for the National Center for Missing and Exploited Children (“NCMEC”). That report flatly stated that “*all children* depicted in child pornography are victims of sexual abuse or other exploitation.” ABA/NCMEC Report, *supra* note 45, at 9 (emphasis added). The phrase “other exploitation” appears to be a reference to the fact that some child pornography is created using adolescent “porn stars” or prostitutes. *Id.* at 8. These children are “exploited” because they are largely runaways who get involved in prostitution or pornography out of desperation, as a means of surviving on their own. *Id.* at 9. The other two categories of child pornography identified in the ABA report—which account for “nearly three-quarters of [child] pornography victims”—“live at home at the time of their exploitation,” and “many” of these children “are the victims of abuse within their own families.” *Id.*

⁵⁰ 458 U.S. 747 (1982). Adult pornography can be banned only if it meets the definition of “obscenity” under *Miller v. California*, 413 U.S. 15, 24–25 (1973). By virtue of *Ferber*, however, child pornography is completely unprotected and thus can be prohibited even if not “obscene.” The difference can be seen in reference to the “cell phone porn” case: a picture of naked breasts is not in itself obscene, *see Ferber*, 458 U.S. at 765 n.18, but nevertheless can be proscribed if, as in the “cell phone porn” case, it involves a minor, *see id.* at 760–61. As the *Ferber* Court explained, “[t]he *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.” *Id.* at 761.

⁵¹ *Ferber*, 458 U.S. at 758. Professor Leary claims that the creation of images depicting a minor in sexually explicit poses or activities is an independent harm under *Ferber*. *See Leary, supra* note 1, at 12. That claim, however, is mistaken. *Ferber* could not be clearer that the harms flowing from the existence of images involving child pornography were “intrinsically related” to the “sexual abuse” inflicted on children in the act of creating child pornography. 458 U.S. at 759.

⁵² *Id.* In *Ferber*, Justice White gave two reasons why the distribution of pornographic images of minors is intrinsically related to the sexual abuse of

children against the sexual exploitation that inheres in the very creation of child pornography was the basis for the *Ferber* decision.

The importance of the harm to the children used to create pornography is powerfully underscored in the more recent decision of *Ashcroft v. Free Speech Coalition*.⁵³ In that case, the Supreme Court struck down prohibitions on “virtual” (or computer-generated) child pornography and pornography involving actors who appear to be (or are held out as) minors but, in fact, are adults. Unlike the material denied constitutional protection in *Ferber*, which “itself [wa]s the record of sexual abuse,” the prohibition of virtual child pornography was aimed at pornographic material that “records no crime and creates no victims by its production.”⁵⁴ This was even clearer with respect to pornography involving “barely legal” adults who appear to be minors.⁵⁵ Given that the pornography targeted by these two challenged provisions was not created through the sexual abuse of minors—which the Court described as “a most serious crime and an act repugnant to the moral instincts of a decent people”⁵⁶—the *Ferber* exception did not apply.

In a line of argument repeated by Professor Leary,⁵⁷ the government protested that virtual and “barely legal” child pornography should fall within the *Ferber* exception based on the possibility that it might cause pedophiles to molest children or be used by pedophiles to groom children for molestation. The Court, however, summarily rejected that line of argument as fundamentally inconsistent with *Ferber*. The possibility of future acts of molestation was “contingent and indirect” because the harm in question “does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent

children. First, such images serve as a “permanent record” of the victimization the children depicted suffered in the episodes recorded in child pornography. Second, banning the distribution of child pornography is the “most expeditious” means of “halt[ing] the exploitation of children by . . . those who produce the photographs and movies.” *Id.* at 759–60. This rationale also applies to the possession of child pornography, as the Supreme Court later held in *Osborne v. Ohio*, 495 U.S. 103, 110 (1990).

⁵³ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241–42 (2002).

⁵⁴ *Id.* at 250. The government had argued that virtual child pornography had to be banned to prevent those guilty of dealing in pornography involving real children from escaping conviction by claiming that their pornography was “virtual” only. The concern was that, as a result of highly sophisticated modern computer imaging technology, it may be possible to produce computer-generated images so realistic as to be indistinguishable from footage involving real children.

⁵⁵ *Id.* at 257–58.

⁵⁶ *Id.* at 244.

⁵⁷ Leary, *supra* note 1, at 12–16.

criminal acts.”⁵⁸ The government’s reasoning was also overbroad because it would apply, not just to virtual child pornography, but also to “innocent” items, such as “cartoons, video games, and candy, that might be used” to groom children for molestation.⁵⁹

The juxtaposition of *Ferber* and *Free Speech Coalition* underscores the importance of the distinction Professor Leary repeatedly glides over between conventional child pornography and other forms of pornography. Conventional child pornography necessarily involves the sexual abuse of children—itsself a serious, deplorable crime—captured on film or in other media. It is hardly surprising, given how it is produced and the harms it imposes on the children used to produce it, that such material enjoys no constitutional protection whatsoever and is severely punished. To be sure, other forms of pornography, including pornography involving adults only (or, by extension, sexually explicit images taken by minors of themselves), are morally objectionable.⁶⁰ Even so, however, they do not present the compelling child-protection justification that has driven the Court’s decisions in this area.

To be clear, I am not making any sort of argument that child pornography—“self-produced” or otherwise—either is, or should be, constitutionally protected. Quite the opposite: *Ferber* squarely (and, in my view, quite rightly) holds that any form of child pornography involving real children lies completely beyond the protection of the First Amendment. My only purpose in discussing *Ferber* and *Free Speech Coalition* is to establish that there is an enormous difference between pornographic images minors freely choose to make of themselves and

⁵⁸ *Free Speech Coal.*, 535 U.S. at 250; see also *id.* at 253 (admonishing the government that “[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it”).

⁵⁹ *Id.* at 251.

⁶⁰ Robert George, a leading scholar of natural law, has succinctly stated the traditional moral case against pornography. Disclaiming any suggestion that “sex is bad, or, in itself, sinful, or only for procreation,” he contends that pornography nonetheless is morally corrosive:

Pornography, precisely by arousing sexual desires unintegrated with the human goods to which sexuality is morally ordered, induces in its consumers states of emotion, imagination, and sentiment which dispose them to understand and regard themselves and their bodies, and others and their bodies, as, in essence, instruments of sexual gratification—sex objects. Pornography corrupts by appealing to and heightening the tendency towards selfishness which, even in the most virtuous among us, represents a danger to our integrity and to the precious relationships (husband-wife, parent-child, friendships) which depend, in part, on the proper integration of our sexuality into our lives.

Robert P. George, *Making Children Moral: Pornography, Parents, and the Public Interest*, 29 ARIZ. ST. L.J. 569, 575 (1997). For an elaboration on the moral case against pornography, see, e.g., DANIEL LINZ & NEIL MALAMUTH, PORNOGRAPHY 6-8 (Sage Publications 1993).

pornography created through the rape or molestation of minors. It is a mistake to assume, as Professor Leary does, that the severe penalties that are justifiably imposed on persons who traffic in pornographic material produced through the sexual abuse of children are appropriate for minors whose only crime is that they, voluntarily and on their own initiative, produced sexually explicit images of themselves.

B. THE PROPORTIONALITY QUESTION, PROPERLY FRAMED

The proportionality of the heavy penalties afforded by existing child pornography laws must be determined by the nature of the offense and offender involved when minors make and distribute sexually explicit images of themselves. In other words, how harmful is *that* offense, and how blameworthy are *those* minors, as compared to the very serious crime of producing and distributing pornography involving the sexual abuse of children?

I agree with Professor Leary that it is wrong for anyone—minors included—to make and distribute sexually explicit images of minors. Children should not be treated or depicted as sexual objects to be used to satisfy the illegal and immoral carnal desires of others. This wrong is not dissipated when the child pornography is created by the very minor who is depicted in it, but the gravity of the wrong is considerably reduced.

With “self-produced” child pornography, the minor’s only “victim” is himself or herself. Far from being forced or enticed into submitting to sexual acts to be recorded in some fashion—the usual, incredibly harmful means through which child pornography is created—with self-produced child pornography, it is the minor who decides to create or distribute sexually explicit images of himself or herself. It is true, of course, that some minors might later regret having made pornographic images of themselves. The possibility of such regret justifies proactive efforts, by parents and other responsible adults, to dissuade minors from creating and distributing such images in the first place; it also justifies efforts by law enforcement and school personnel to get such images, once made, promptly out of circulation.⁶¹ It does not, however, justify arresting and charging minors who have chosen, unwisely, to create or distribute sexually explicit images of themselves—at least not for crimes as stigmatizing and severely punished as child pornography offenses.

This conclusion is bolstered by the characteristics of the likely offender population. As the reported cases discussed in Part I suggest,

⁶¹ This is exactly what happened in the “cell phone porn” case: school officials notified the police that pornographic images of two high school students were being circulated among students, and the police arranged for students to avoid prosecution by bringing in their cellular phones to have those images erased. See Rubinkam, *supra* note 12.

the problem of “self-produced” child pornography involves three kinds of cases. Minors, on their own initiative, have created and distributed pornographic images of themselves (1) as a means of earning money on the sale of those images, (2) as a means of forming or keeping friendships formed over the Internet, and, most commonly, (3) as part of their own private, voluntary sexual exploits. Except in extreme circumstances of the kind discussed in Part IV, child pornography charges would be too severe a response to these cases.

1. To Make Money or Develop Friendships

The first two categories, which probably comprise the smallest slice of the problem of “self-produced” child pornography, can be addressed together, in fairly short order. Although most minors have access to the technology necessary to create pornographic images of themselves (such as video recorders, cameras, and personal computers),⁶² relatively few go into the business of selling pornographic images themselves.⁶³ The economic pressure to do so is likely to be greatest in the most impecunious of households. Those, however, are the very households in which minors are most likely to lack access at home to the Internet (and, with it, the lucrative, and insatiable, market for pornography that unfortunately is the World Wide Web).⁶⁴

This is not to deny that some minors do produce pornographic images of themselves for sale. It is, however, to suggest that minors who do so are very unlikely to be acting alone. They are more likely to go into the business of making pornographic images of themselves for sale at the behest of, or in conjunction with, adults.⁶⁵ To the extent the minor

⁶² See Macgill, *supra* note 7, at 2–3.

⁶³ Justin Berry did, of course, eventually develop a substantial Internet business that generated thousands of dollars a month from the sale of pornographic images and performances featuring himself. Eichenwald, *supra* note 11, at A1. He did so only at the suggestion of the pedophiles, who carefully groomed him for later molestation, *id.*, not because he needed or desired money. After all, he lived in a comfortable suburban home in Bakersfield, California under the care of his mother and stepfather, and his family was well off enough to get him his own computer. *Id.* His initial forays onto the Internet were driven by the desire to make friends, and he became a purveyor of pornography for profit only after his new “friends” showed him how to do it and molested him. *Id.*

⁶⁴ Data compiled during the most recent census show that only 28% of households with family incomes below \$25,000 have a computer at home; the rate of home-based Internet access for households in this income bracket is even lower: 19%. See U.S. CENSUS BUREAU, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES: AUGUST 2000, at 2 (Sept. 2001), available at <http://www.census.gov/prod/2001pubs/p23-207.pdf>.

⁶⁵ Recall that Justin Berry’s earliest suggestive images, in which he appeared scantily clad on his webcam, were created at the request of pedophiles. See Eichenwald, *supra* note 11, at A1. But for their involvement, there is no reason

is being used by others to produce child pornography for profit, as Justin Berry was originally, he or she should be viewed as a victim, not a wrongdoer deserving of punishment.

The second class of cases in which minors create sexually explicit images of themselves involves efforts on their part to develop or maintain friendships. These are the motives that initially led Justin, at age thirteen, to hook up his webcam and establish a presence online, and they are the same motives that led him to acquiesce in the increasingly aggressive sexual demands of the men who contacted him online.⁶⁶ To say the least, posting sexually explicit images of oneself is an odd way to go about making friends. It is considerably more plausible as an attempt by a minor to keep “friends” who are pressuring the minor to expose himself or herself online, which is exactly how Justin became involved in child pornography.

Needless to say, these are the kinds of “friends” against whom minors desperately need protection. As Justin’s case vividly shows, pedophiles are highly skilled at manipulating trusting, oftentimes emotionally needy minors into allowing themselves to be sexually exploited.⁶⁷ To quote a former high-ranking FBI official: “In these cases, there are problems in [minors’] own lives that make them predisposed to’ manipulation by adults. . . . ‘The predators know that and are able to tap into these problems and offer what appear to be solutions.’”⁶⁸

To the extent that minors succumb to the temptation of their purported “friends” and create or disseminate pornographic depictions of themselves, the minors do not deserve punishment. They are, instead,

to believe that Justin would have ventured into the world of pornography. In addition, hard to believe though it is, it was Justin’s *own father* who helped him produce live sex shows featuring himself having sex with prostitutes. *Id.* The father, with whom Justin was briefly reunited in Mexico, obtained the prostitutes for Justin and shared in the proceeds from the show. *Id.*

⁶⁶ As the *New York Times* reported: “I didn’t really have a lot of friends,’ [Justin] recalled, ‘and I thought having a Webcam might help me make some new ones online, maybe even meet some girls my age.’” *Id.* Once he got online, he was inundated with contacts, the first of which came within a few minutes of his posting his profile. *Id.* None of the contacts came from kids his own age, and none came from females: only men (and, in some cases, men posing as teenage girls) contacted him—and, of course, they were seeking something very different than Justin was. *Id.*

⁶⁷ *Id.* (describing how the pedophiles grooming Justin for eventual molestation carefully planned how they would approach Justin and how far they would push him with each escalating sexual demand).

⁶⁸ *Id.* (quoting former FBI Supervisor Lawrence Likar).

victims of sexual exploitation.⁶⁹ The proper targets of the criminal law, in this instance, are those who cajoled or enticed minors into making or distributing pornographic images of themselves in the first place.

2. Teenage Sexual Exploits

The third and final category—that of minors seeking or involved in consensual sexual encounters or romantic relationships—almost certainly encompasses the bulk of child pornography in the “self-produced” category. This class of child pornography is created by minors in connection with their own consensual sexual activities. That is to say, the minors create the images in order to attract sex partners (an example here would be an explicit personals ad on adult dating websites) or to memorialize their own voluntary sexual exploits.

Importantly, by virtue of their being sexually active, these minors are very likely to be older teenagers. The median age at which American teenagers become sexually active today is 16.9 for boys and 17.4 for girls.⁷⁰ Very few teenagers have sex before age fourteen, and, thankfully, that number has been on the decline recently. According to data compiled by the Kaiser Family Foundation, “[t]he percentage of teens 15-19 who had initiated sexual intercourse before age 14 has decreased in recent years, from a high of 8 percent of girls and 11 percent of boys in 1995 to a low of 6 percent of girls and 8 percent of boys.”⁷¹

The fact that child pornography relating to teenage sexual exploits involves older teenagers is highly significant. Although the definition of “minor” under federal child pornography laws is eighteen (as it is in many states), those age requirements are “higher than the legal age for marriage in many States, as well as the age at which persons may

⁶⁹ Professor Leary agrees with me on this point. See Leary, *supra* note 1, at 4 n.8 (conceding that in “situations in which a minor produces child pornography at the request of an adult abuser . . . the minor is completely the victim and has been exploited by the adult.”).

⁷⁰ See TEEN SEX, *supra* note 9, at 1. By contrast, the median age for conventional (exploitative) child pornography is considerably lower, at thirteen, and roughly one-fifth of such pornography involves children between six and ten years old. See ABA/NCMEC Report, *supra* note 45, at 8 (quoted in *supra* note 48).

⁷¹ See TEEN SEX, *supra* note 9, at 1. That picture changes quite dramatically in the upper grades of high school: by their senior year, almost two-thirds (62%) of teenagers are sexually active. *Id.* Given that, historically, concerns about teenage sex focused on the potential for exploitation of underage females by older men, it is worth noting that almost three-quarters (74%) of high school age girls who are sexually active “have partners who are the same age or 1-3 years older.” *Id.*

consent to sexual relations.”⁷² To my mind, it makes little sense, either as a matter of logic or crime policy, to prosecute minors who are old enough to be married or to consent to sex for child pornography offenses based on their recording of their own consensual sexual encounters.⁷³ If the law considers a minor to be old enough to choose to engage in the adult act of having sex, they should also be treated as old enough to decide to record their own sexual exploits.⁷⁴

Of course, in many instances of minors recording themselves engaged in otherwise consensual sexual encounters, those encounters may themselves be a crime. The most obvious potential crime, depending on the age of the persons involved, is statutory rape.⁷⁵ In these

⁷² *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 247 (2002) (citing authorities); see generally RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA’S SEX LAWS* 44 (Univ. of Chicago 1996) (noting that the ages of consent “range fourteen to eighteen,” with the “vast majority of states” prescribing “either fifteen or sixteen”). Ironically, over half a century ago, Congress itself adopted sixteen as the age cut-off for the crime of statutory rape on federal enclaves. See 18 U.S.C. § 2243(a). The Supreme Court has long prevented federal prosecutors from overriding the federal age of consent under section 2243(a) by borrowing state statutory rape crimes with higher age requirements as the basis for federal prosecutions under the Assimilative Crimes Act, 18 U.S.C. § 13(a). See *Williams v. United States*, 327 U.S. 711 (1946).

⁷³ This assumes, naturally, that the minor who filmed the encounter did so with the consent of his or her partner and that the consent was freely given, without force, threats, or coercion. If such consent was absent, then the filming and any subsequent dissemination of the resulting images violated the autonomy and privacy interests of the other person.

⁷⁴ Although being old enough to marry or consent to sex should entitle teenagers to decide whether or not to create sexually explicit images of themselves in connection with their own intimate relationships, it does not and should not entitle them to become what the Attorney General’s Commission called “adolescent ‘porn star[s].’” COMMISSION REPORT, *supra* note 8, at 141. As the Commission explained: “Because of the economic and social realities of late adolescence . . . it is highly unlikely that a decision to accept the[] consequences [of being an adolescent ‘porn star’] has been made in an atmosphere free of pressure or coercion.” *Id.* Older teenagers may feel economic pressure to go into the pornography business to make the proverbial “quick buck,” giving inadequate attention to the potential long-term adverse employment or emotional consequences of making their “bod[ies] ‘available’ for anyone willing to pay the price anywhere in the world.” *Id.*

⁷⁵ Statutory rape may not be the only possible charge for consensual sexual activity among teenagers. In roughly a dozen states, fornication statutes prohibit sex among unmarried persons, and sodomy statutes in force in almost thirty states prohibit oral and anal sex. See POSNER & SILBAUGH, *supra* note 71, at 99–102 (fornication); *id.* at 66–71 (sodomy). After *Lawrence v. Texas*, 539 U.S. 558 (2003), consensual sex cannot, as a general matter, be criminalized; sex involving minors, however, is another matter entirely. See, e.g., *id.* at 578 (distinguishing sex involving minors from constitutionally protected sex in

situations, the sex is illicit, and prosecutors can, if they wish, pursue statutory rape charges against the person who had sex with the underage victim. They can potentially do so even if the suspect was also a minor.⁷⁶

Many would no doubt argue that, regardless of the legal definition of statutory rape, voluntary sex between teenagers who are roughly the same age should not be charged as statutory rape. On this theory, prosecutors should charge statutory rape in limited cases, such as where the victim is extremely young (e.g., under age fourteen) or where the suspect is considerably older than the minor—the kinds of cases, in other words, in which the minor, by virtue of his or her youth or immaturity, may have been manipulated into submitting to sex. Some prosecutors agree and use their discretion in this area very carefully, sensitive to the unfairness of singling out teenagers for conduct that many teenagers across the country engage in every day without consequence.⁷⁷

private among consenting adults). For an argument that *Lawrence* may imply constitutional limits on the crime of statutory rape as well, see Arthur H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77 (2005).

⁷⁶ Some statutory rape laws apply only to offenders who are eighteen or older. See, e.g., N.Y. PENAL LAW § 130.30(1) (McKinney 2004) (providing that, to be guilty, the defendant must have “be[en] eighteen years old or more”). Others define statutory rape, not in absolute terms, but rather in terms of specified differences in age between the perpetrator and victim. See, e.g., MICH. COMP. LAWS ANN. § 750.520e(a) (subjecting to liability anyone “5 or more years older” than a sex partner between the ages of thirteen and sixteen). The laws of other states, however, impose no such limitations on the definition of statutory rape and therefore allow minors to be prosecuted and convicted for sex with other minors. See, e.g., ARIZ. REV. STAT. ANN. § 13-1405(A) (1997) (making it a crime for anyone to commit a sex act with a person under age eighteen). See generally Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Among Teenagers*, 12 CORNELL J.L. & PUB. POL’Y 373, 391 & nn.118–120 (2003) (discussing similar statutes). For a useful compendium of the various legislative treatments of statutory rape, see generally POSNER & SILBAUGH, *supra* note 72, at 45–65.

⁷⁷ For example, it has long been the policy of the Los Angeles District Attorney’s Office “not to file criminal charges where there is consensual sex between teenagers.” Joan Didion, *Trouble in Lakewood*, THE NEW YORKER, July 26, 1993, at 46, 54 (citing press release from District Attorney’s Office). According to a series of recent interviews conducted by Kay Levine with prosecutors across California, prosecutors outside of Los Angeles are not nearly as lenient in their treatment of teenage sex. See Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691 (2006). Levine’s major finding is that “[o]nly those defendants who sexually engage teens within committed, stable relationships are entitled to receive lenient treatment,” which she terms the “intimacy discount.” *Id.* at 746.

Others, however, can be quite aggressive in prosecuting teenagers for sexual activity with peers. An example is the widely criticized Georgia prosecutor who sent seventeen-year-old Genarlow Wilson to prison for ten years for receiving oral sex from a willing female schoolmate.⁷⁸ The prosecutor successfully prosecuted him for aggravated child molestation. This was possible because only sexual intercourse (as opposed to oral sex) among teenagers was covered by the molestation law's so-called "Romeo and Juliet" exception.⁷⁹ The molestation charge carried a mandatory minimum sentence of ten years in prison, without possibility of parole, and that is the sentence Wilson received.⁸⁰

Although I believe the prosecutor was undeniably overzealous in his handling of the Wilson case,⁸¹ the debate over whether consensual sex

⁷⁸ See Editorial, *Georgia's Shame*, N.Y. TIMES, Apr. 30, 2007, at A20. Interestingly enough, Wilson's sexual escapades at the party and those of other students were videotaped by one of the students. *Id.* Press accounts give no indication that anyone was charged for making or possessing the pornographic videotape.

⁷⁹ By virtue of the irrational loophole exploited by the prosecutor, Wilson would have been better off if he had actually had *intercourse* with the girl. Had he done so, his crime would only have been a misdemeanor, and he might have received probation and could not have received more than twelve months in jail. See GA. CODE ANN. § 16-6-3(c) (Supp. 2006) (amending GA. CODE ANN. § 16-6-3(b) (2003)) (downgrading to a misdemeanor teenage sexual intercourse where the "victim is at least 14 but less than 16 years of age" and the defendant is "18 years of age or younger and is no more than four years older than the victim"). Special, lenient exemptions for sex among teenage peers are commonly referred to as "Romeo and Juliet" laws, in recognition of the fact that to stand in the way of a relationship that might blossom into true love would indeed be a tragedy of Shakespearean proportions. See *e.g.*, State v. Limon, 122 P.3d 22, 24 (Kan. 2005) (using the term to describe a Kansas statute).

⁸⁰ After Wilson served several years on his sentence, the state supreme court, which had previously refused to review his case, finally took the case and freed him last year. See *Humphrey v. Wilson*, 652 S.E.2d 501 (Ga. 2007). The sentence he received, the court ruled, was grossly disproportionate to the crime of "oral sex between two willing teenage participants." *Id.* at 507. For a distressingly similar recent prosecution, also from Georgia, involving the added complication of taboos concerning sex between black males and white females, see Andrew Jacobs, *Student Sex Case in Georgia Stirs Claims of Old South Justice*, N.Y. TIMES, Jan. 22, 2004, at A14.

⁸¹ A mandatory minimum of ten years in prison, without possibility of parole, for consensual oral sex among teenagers so close in age can only be viewed as a gross miscarriage of justice. The 120 months he received was close to the average sentence imposed in state courts for rape (136 months) and far in excess of the average sentences for sexual assault other than rape (92 months), robbery (94 months), aggravated assault (59 months), burglary and drug trafficking (52 months each), and weapon offenses (38 months). See MATTHEW R. DUROSE & PATRICK A. LANGMAN, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2000 4 (2003), available at <http://www.ojp.usdoj.gov/>

among teenagers should be prosecuted as statutory rape is largely irrelevant here. Whether or not statutory rape charges are filed in cases of teenagers who record themselves engaged in consensual sex, the relevant issue here is whether prosecutors should seize upon the fact that the encounter was recorded as a basis for filing child pornography charges. I believe they should not.⁸²

If charges are warranted for particular instances of consensual teenage sexual encounters caught on film, statutory rape statutes are much more likely to provide proportional punishment than child pornography offenses. Many statutory rape laws have been revised in recognition of the fact that most teenagers become sexually active well before their eighteenth birthday. These statutes either decriminalize⁸³ or dramatically lower the penalty for consensual sex between teenagers who are close in age.⁸⁴ As significant as these legislative changes are, they may understate the degree to which consensual sex among teenage peers has been decriminalized insofar as prosecutors who could charge teenagers with statutory rape for consensual sex often decline such charges, absent extraordinary circumstances.⁸⁵

bjs/pub/pdf/fssc00.pdf. To be fair, the prosecutor did believe that Wilson had raped another student at the party, who claimed to have been too intoxicated to give valid consent. The prosecutor properly put the rape charge to the jury, but the jury acquitted. See Editorial, *Georgia's Shame*, *supra* note 77.

⁸² The argument that follows should not be construed as condoning either the filming of sexual encounters of any sort or sexual activity among teenagers.

⁸³ See, e.g., KY. REV. STAT. ANN. § 510.060 (LexisNexis 1990); NEB. REV. STAT. § 28-319(1)(c) (LexisNexis 1996).

⁸⁴ As one commentator explains: "These laws, for example, prohibit sexual intercourse (and most sexual contact) with prepubescent girls (usually age twelve and under); prohibit older, adult men from having sexual intercourse with younger adolescents (under fifteen, for example); and allow adolescent females the freedom to experiment sexually with their peers." Britton Guerrina, Comment, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1252 n.5 (1998) (citing authorities). The dramatic impact of Romeo and Juliet provisions is vividly illustrated by Genarlow Wilson's prosecution in Georgia, which resulted in a felony conviction for aggravated sexual molestation and a mandatory minimum of ten years in state prison: if prosecuted today for the same conduct (receiving oral sex from a fifteen year old as a seventeen year old), he would be guilty, at most, of a misdemeanor and might not receive any jail time whatsoever. See GA. CODE ANN. § 16-6-3 (2006).

⁸⁵ As previously noted, this is the case, for example, in Los Angeles. Didion, *supra* note 76 (describing statement of policy by the Los Angeles District Attorney's Office). Even prosecutors who are willing to prosecute teenagers for statutory rape typically focus their enforcement efforts elsewhere. See Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. CRIM. L. REV. 703, 747-48 (2000) (reporting that the overwhelming majority of reported statutory rape prosecutions involved sexual predation by perpetrators who are at least ten years older than their victims or

In sharp contrast, laws prohibiting child pornography are both severe and inflexible. They authorize punishments as high as forty years or more—and justifiably so, given that child pornography laws are aimed at protecting young children against rape and molestation by adult sexual predators.⁸⁶ Statutes prohibiting child pornography also often contain mandatory minimum sentences restricting judicial exercises of leniency at sentencing. These laws are simply too blunt an instrument to deal with consensual teenage sex that the minors involved chose to film in a culture where, for good or ill, sex among teenagers is commonplace.

Unlike minors who produce pornographic images of themselves to make money or make friends, minors who do so as part of voluntary sexual exploits are not “victims” in any sense of the word. Rather, they have freely decided to seek or engage in sex, typically late in their high school years with other teenagers their own age or close to it. To the extent these minors are old enough to get married or consent to sex, their sexual activities are not illegal, and their private recording of those activities should not result in prosecution. Minors who have sex even though they are not of proper legal age may or may not warrant prosecution for statutory rape, but they are insufficiently blameworthy to deserve the severe penalties authorized by child pornography laws that were passed with adult sexual predators in mind.

III. FORMALISM AND JUVENILE JUSTICE TO THE RESCUE?

Professor Leary does not consider, much less contest, any of the foregoing points. Rather, she seeks to avoid the considerations raised above—which I regard as absolutely critical—concerning whether or not the severe penalties that child pornography laws afford are proportionate to the wrong committed by minors who create and distribute sexually explicit images of themselves. She does so on two grounds. The first is what might be called “child pornography formalism;” the second, an unexamined assumption that the prosecutions she advocates would take place in juvenile rather than criminal court and result in purely rehabilitative sanctions. Neither, in my judgment, constitutes a

occupy familial or other positions of authority over their victims). Oberman strongly condemns the reluctance of prosecutors to bring statutory rape charges based on sex among peers: by essentially “assum[ing] that, so long as it was not forced, sex among peers causes no real injury to [the] victim,” prosecutors “cheat[] girls out of the protection ostensibly provided them by [statutory rape] statutes.” *Id.* at 752.

⁸⁶ See *supra* Part II.A. This is also true of the aggravated child molestation law under which Genarlow Wilson was prosecuted. See Editorial, *Georgia’s Shame*, *supra* note 77 (explaining how the Georgia legislature rushed to exempt minors from prosecution under the molestation law because that law was never intended to apply to sexual activity among minors).

satisfactory response to the dangers of disproportionate punishment that inhere in Professor Leary's prosecution-based approach.

This Part identifies and develops several flaws in Professor Leary's effort to avoid the proportionality of the penalties to which her approach would expose minors. *First*, the fact that adults who produce child pornography merit the severe penalties child pornography laws afford does not prove (let alone suggest) that those penalties are appropriate for minors who make sexually explicit images of themselves. The proportionality of child pornography offenses for minors must be determined in light of their own moral culpability, without the artifice of equating them with pedophiles or sexual predators who rape or molest children on film. *Second*, juvenile court is far from the panacea that Professor Leary believes it to be. Minors are often transferred to criminal court for prosecution as adults, and can receive adult sentences in juvenile court. *Third*, even if juveniles are prosecuted and sentenced as minors in juvenile court, as she assumes, they will be gravely damaged, and their prospects for rehabilitation adversely impacted, by having to register as convicted sex offenders. Thus, the proportionality objections raised in Part II are serious ones, and remain so even if minors are charged in juvenile court for crimes as serious and as stigmatizing as child pornography offenses.

A. THE LIMITS OF "CHILD PORNOGRAPHY FORMALISM"

The child pornography formalism runs as follows: minors who create and disseminate "self-produced" pornography are no less deserving of prosecution than adults who produce child pornography because both sets of producers are creating child pornography.⁸⁷ Because they are equally guilty of creating noxious materials that child pornography laws are designed to prevent, both sets of "producers" merit prosecution. Perhaps minors who create pornographic images of themselves deserve more lenient sentences than adults who create such images using children, but minors should not be allowed to escape responsibility for adding to the amount of child pornography that is in circulation.

As a logical matter, this argument makes sense—but only if the policies behind homicide laws are taken as supporting prosecution of individuals who attempt suicide. The reasoning is the same as that underlying Professor Leary's argument: the harm that murder laws seek

⁸⁷ See, e.g., Leary, *supra* note 1, at 50 ("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. . . . Given these social harms, appropriate government intervention under both the *parens patriae* doctrine and the state police powers includes juvenile prosecution.").

to prevent is the loss of human life, and those who attempt suicide are trying to produce that harm and, to that extent, should be prosecuted for attempted murder even though their only intended victims were themselves. Not surprisingly, this logic is regarded as unpersuasive in the murder/suicide context. As a leading treatise notes, “[n]one of the modern codifications treats attempted suicide as a crime.”⁸⁸ The reason is obvious: people who attempt suicide need help to avoid their self-destructive behavior, not punishment. A similar therapeutic approach is warranted, in my judgment, in dealing with minors who create sexually explicit images of themselves.

The larger point is that, even if Professor Leary’s child pornography formalism is taken at face value, it still does not solve the problem of disproportionately severe punishment. Although Professor Leary advocates prosecution of minors who create “self-produced” child pornography, I assume she would not equate such minors, for sentencing purposes, with adults who use children to produce pornography. If that assumption is correct, then her prosecution-based approach is premised on the view that minors convicted of producing sexually explicit images of themselves will be shown appropriate leniency at sentencing. This, however, is where the mandatory minimums imposed by many child pornography statutes come into play.

To illustrate, suppose a judge is sentencing two different offenders for producing the same masochistic video. One is the fourteen-year-old girl who recorded and performed sexual acts in the video and was prosecuted as an adult. The other is the middle-aged man who enticed her into making the video and financed the project. If the sentencing took place in federal court (as, of course, prosecutions of juveniles

⁸⁸ WAYNE R. LAFAVE, CRIMINAL LAW 810 (4th ed. 2003) (emphasis added). Moreover, even long ago when attempted suicide was a crime in this country, prosecutors only “rarely” filed charges for a suicide attempt “which harms no one but the attempter himself.” *Id.*

generally do not),⁸⁹ the judge could give neither participant anything less than fifteen years.⁹⁰

That is not a problem for the adult, whom the judge might wish to give an even higher sentence. It is, however, a real problem for the minor, whom few (if anyone) would think deserving of such a heavy sentence. Where, as in the hypothetical, mandatory minimums apply, Professor Leary faces a Catch-22. She can avoid unjustly harsh sentences for minors only by not going forward with the prosecution in criminal court. If, however, minors are not punished for making pornographic images of themselves—and bear in mind that juvenile courts typically do not *punish* but rather *rehabilitate*⁹¹—then the “clear deterrent message” she wishes to send minors about the “severe social harm” of child pornography will be greatly undermined.⁹²

Indeed, it is not at all apparent that Professor Leary’s approach would add to the deterrent effect of current prosecutorial policies on the creation of self-produced child pornography. It might if she were calling for mandatory prosecutions of minors or for more restrictive standards for declining prosecutions in this area. Although some of her rhetoric suggests that she might favor tougher measures such as these,⁹³ she ultimately backs off these stronger claims. Toward the end of her Article, Professor Leary disclaims any “suggest[ion] that juvenile

⁸⁹ Under the Federal Juvenile Delinquency Act (FJDA), 18 U.S.C. § 5032, minors subject to state criminal jurisdiction are presumptively to be prosecuted in state courts, not the federal system. The Act provides that, with the exception of petty misdemeanors committed on federal enclaves (areas in which federal jurisdiction is exclusive of state jurisdiction), juveniles “alleged to have committed an act of juvenile delinquency . . . shall not be proceeded against in any court of the United States” absent a certification by the Attorney General that “there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction” and that the case meets one of three enumerated standards for federal prosecution. *Id.* These restrictive standards have resulted in relatively few federal prosecutions of minors.

⁹⁰ Federal law prescribes a fifteen-year mandatory minimum for persons convicted of producing hard-core child pornography. *See* 18 U.S.C. § 1466A(a), 2252A (b)(1).

⁹¹ *See, e.g.,* Leary, *supra* note 1, at 43. This historical feature of the juvenile justice system has been eroded in fairly dramatic ways over the last two decades as legislatures have cracked down on serious juvenile crime. *See infra* notes 102–105 and accompanying text.

⁹² *See* Leary, *supra* note 1, at 49.

⁹³ *E.g., id.* at 39 (“When a juvenile engages in the production or dissemination of child pornography through either self-exploitation or the distribution of self-exploitative 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.”).

prosecutions be a mandatory consequence,” emphasizing that she merely wants prosecutors to develop a “protocol which includes . . . juvenile prosecution as an option.”⁹⁴

An approach that would limit the charging options of prosecutors to juvenile court, and make a prosecution in juvenile court merely “an option” that prosecutors should consider, is likely to be one that invites minors to continue taking their chances at getting caught for making pornographic images of themselves. After all, prosecutors *already* treat juvenile prosecutions as “an option.”⁹⁵ Moreover, minors have, in fact, been successfully prosecuted for creating pornographic images of themselves.⁹⁶ Although the media has widely broadcast stories of minors being charged for creating and disseminating such images,⁹⁷ minors continue to create such images, undeterred by the prospect of prosecution. Regrettably, that trend seems almost certain to continue no matter what is done.

B. THE LIMITS OF JUVENILE COURT

Understandably, Professor Leary anticipates objections that her approach would be too harsh by stressing that she favors prosecution in juvenile, not criminal, court.⁹⁸ Despite the traditional rehabilitative focus of juvenile proceedings, the juvenile forum does not and cannot guarantee that the prosecutions she advocates will not impose serious hardships on minors. Even juvenile prosecutions against minors for making and distributing pornographic depictions of themselves will have severe, stigmatizing consequences that are best avoided for this class of delinquents.

As an initial matter, there is no assurance that charges against minors who produce sexually explicit images of themselves will be filed in juvenile court—or, if they are, that the charged minors will not find themselves transferred to criminal court to be tried and sentenced as

⁹⁴ *Id.* at 48.

⁹⁵ In the Pennsylvania “cell phone porn” case, for example, although law enforcement will not charge students who brought in their phones to have pornographic images of two high school girls erased, they evidently are still contemplating charges against the girl who photographed her naked breasts and electronically forwarded the picture to other students. See Michael Rubinkam, *supra* note 12. Of her, the district attorney offered this mixed assessment: “She’s a victim and she’s not a victim.” *Id.*

⁹⁶ For example, in the proceedings that culminated in *A.H. v. Florida*, 949 So.2d 234 (Fla. Dist. Ct. App. 2007), a teenage boyfriend and girlfriend were charged, and adjudged delinquent in juvenile court for making a sex tape with each other. *Id.* at 235.

⁹⁷ See generally Leary, *supra* note 1, at 25 n.119 (citing press accounts).

⁹⁸ See, e.g., *id.* at 6 (arguing that “juvenile prosecution should be considered, although not mandated, as a viable response to juvenile self-exploitation”).

adults. At both the federal and state levels, prosecutors can request a court order transferring minors from juvenile court to criminal court; in fifteen states, prosecutors can avoid juvenile court altogether for certain crimes and file charges against minors directly in criminal court.⁹⁹ In thirteen states, charges can *only* be filed against minors sixteen and older in criminal court as a result of laws setting age cut-offs for juvenile court jurisdiction.¹⁰⁰ According to an estimate by the Department of Justice, these laws alone could expose 218,000 minors each year from the thirteen states with maximum ages of sixteen or seventeen to the prospect of being tried and sentenced as adults.¹⁰¹

Moreover, even if child pornography prosecutions are adjudicated in the juvenile court system, that does not rule out the possibility that the minors will be treated as adults for sentencing purposes. As of 2004, the

⁹⁹ See, e.g., 18 U.S.C. § 5032 (1996) (granting federal district judges broad discretion, in the interests of justice, to allow juveniles to be prosecuted as adults in federal court). Thirty-eight states allow for the possibility that minors will be prosecuted as adults on any felony charge; twenty of those states go even farther, permitting minors to be prosecuted in criminal court for misdemeanors as well. See National Center for Juvenile Justice, National Overviews, <http://www.ncjj.org/stateprofiles/overviews/transfer8t.asp> (last visited Mar. 13, 2008). Laws authorizing or requiring prosecutors to proceed against certain minors directly in adult criminal court, commonly called “prosecutorial waiver” laws, “account for approximately forty-five percent (90,000) of all juveniles transferred to adult criminal courts annually.” Christopher Mallett, *Death is Not Different: The Transfer of Juvenile Offenders to Adult Criminal Courts*, 43 CRIM. L. BULL. 3 (2007). Furthermore, in “more than half of the states,” there are laws *requiring* prosecutors to charge as adults minors who commit any of a series of enumerated serious crimes. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, 106 (2006), available at <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

¹⁰⁰ See generally SNYDER, *supra* note 98, at 103, for a table listing these thirteen states. Three of the thirteen states with low age caps on juvenile court jurisdiction (Connecticut, New York, and North Carolina) also exclude sixteen-year olds from the jurisdiction of juvenile courts. *Id.* Due to age caps in these thirteen states, “large numbers of youth younger than age 18 are tried in criminal court.” *Id.* at 114. These laws essentially treat sixteen- and seventeen-year-olds as adults for purposes of the jurisdiction of juvenile courts. This creates the irony that sixteen- or seventeen-year-olds who produce sexually explicit images of themselves can be convicted of child pornography offenses, on the grounds that they are children, but are excluded from the jurisdiction of juvenile courts on the grounds that the “children” are considered all grown up for jurisdictional purposes.

¹⁰¹ HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT, 106 (1999) available at <http://www.ncjrs.gov/html/ojdp/nationalreport99/toc.html>.

juvenile courts of fifteen states are empowered to impose on minors “the same penalties faced by adult offenders.”¹⁰² This enormous shift toward punishment in the juvenile justice system has been accomplished through “blended juvenile sentencing.” Minors who receive blended sentences in juvenile court serve the “juvenile” part of their sentences first and then, assuming successful completion, the judge typically suspends the “adult” portion of their sentences.¹⁰³

There is a catch. As with other types of suspended sentences, minors who violate any of the conditions of their supervised release are jailed—in an *adult* detention facility—for the duration of their sentence.¹⁰⁴ In this sense, blended sentences are the proverbial double-edged sword: they “give a young offender some rope, enough to yank himself out of a life of crime—or to hang himself and wind up in prison.”¹⁰⁵

C. TURNING CHILDREN INTO REGISTERED SEX OFFENDERS

The existence of sex-offender registration and community-notification laws is another major problem with Professor Leary’s prosecution-based approach. To her credit, she recognizes that minors who are convicted, even in juvenile court, for creating and distributing self-produced child pornography might be classified as “sex offenders” legally required to comply with intrusive registration and community-

¹⁰² SNYDER, *supra* note 98, at 115 (emphasis added).

¹⁰³ This is how the “most common type of juvenile court blended sentencing provision” operates. *Id.* Three states (Colorado, Rhode Island, and Texas) follow a variant of the “blended” approach. In those states, juvenile courts do not impose two different sentences to be served in succession; instead, a single, “contiguous” sentence is imposed. *See id.* If that sentence is short enough to be served before the offender reaches the state’s age of extended jurisdiction, the sentence is served in full in a juvenile facility; if, however, the sentence extends beyond that point in time (which these states allow), the offender is transferred to an adult detention facility to serve the remainder of the sentence. *See id.* The process is more straightforward in New Mexico: the juvenile court has the power simply to impose an exclusively criminal sentence on the minor. *See id.*

¹⁰⁴ *See id.* at 110.

¹⁰⁵ Pam Belluck, *Fighting Youth Crime, Some States Blend Adult and Juvenile Justice*, N.Y. TIMES, Feb. 11, 1998. For differing perspectives on this fairly new approach to juvenile sentencing, compare, e.g., David S. Tanenhaus & Steven A. Drizin, “Owing to the Extreme Youth of the Accused”: *The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 696–97 (2002) (arguing that blended sentencing schemes “expos[e] many younger offenders and less serious offenders to adult sanctions who otherwise would not have been exposed to them” and “set juveniles up for failure . . .”), with Randi-Lynn Smallheer, Note, *Sentence Blending and the Promise of Rehabilitation: Bringing the Juvenile Justice System Full Circle*, 28 HOFSTRA L. REV. 259, 289 (1999) (arguing that “blended sentencing promises to give juvenile offenders a second chance at rehabilitation” while “protecting the safety of society and the needs of youthful offenders . . .”).

notification requirements.¹⁰⁶ Although such requirements are appropriate as to real sex offenders—child molesters, rapists, and the like—Professor Leary says, and I agree, that “self-exploitation [(that is, a minor’s creation of self-produced child pornography)] alone should not be an adequate basis for registration.”¹⁰⁷

Nevertheless, being branded a registered sex offender is not some remote possibility that might (or might not) come to pass when minors are convicted of making or circulating pornographic images of themselves. It is, absent legislative reform, an unavoidable fact. The Adam Walsh Child Protection and Safety Act of 2006 specifically provides that “[p]ossession, production, or distribution of child pornography” are registrable sex offenses.¹⁰⁸ Even before that statute imposed this mandate on the states, most states already required juveniles convicted of sex crimes to register as sex offenders.¹⁰⁹ Given that minors convicted for producing pornographic images of themselves will be subject to sex-offender registration and community-notification requirements, it is necessary to consider the consequences that being publicly branded a “sex offender” will have on efforts to rehabilitate these minors.

Professor Leary fails to appreciate the severe hardships that minors trying to readjust to normal life will experience as a result of being registered sex offenders. Their names, pictures, and offenses of conviction will be available to the public—and, more to the point, their schoolmates—through databases easily accessed over the Internet.¹¹⁰ Once one student finds out, word will likely spread throughout the school like wildfire. It is difficult to see how minors returning to school

¹⁰⁶ Leary, *supra* note 1, at 46–47.

¹⁰⁷ *Id.* at 48.

¹⁰⁸ Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911(7) (2006).

¹⁰⁹ See Elizabeth Garfinkle, Comment, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles*, 91 CAL. L. REV. 163, 163 (2003). The potential that registration requirements such as these can apply to minors who create or distribute self-produced child pornography is illustrated by *Doe v. Blunt*, 225 S.W.3d 421 (Mo. 2007) (per curiam). In that case, a man who was convicted as a teenager for distributing a videotape of himself having sex with his girlfriend, also a teenager, sought a declaratory judgment that he was not required to register as a sex offender. Matthew Franck, *High Court Hears Sex Offender List Case*, ST. LOUIS POST-DISPATCH, Apr. 27, 2007, at C11. He claimed that a law, enacted after his offense, adding the display of sexually explicit material to the list of triggering offenses, could not be applied retroactively to him. *Id.* He avoided registration only because the state supreme court agreed with his nonretroactivity argument. *Blunt*, 225 S.W.3d at 422.

¹¹⁰ The basic contents of the registry are prescribed by statute. See 42 U.S.C. § 16912 (2008).

after a conviction in juvenile court can even begin to reintegrate into school when students are gossiping and teasing them about the sexually explicit videotapes or pictures they made. The disruption of the school environment is obvious—which is why, in the Pennsylvania “cell phone porn” case, police and school officials acted with such haste to sweep the school and destroy pornographic images circulating around the school of two female students.¹¹¹

Incredibly, Professor Leary asserts that requiring minors convicted of making self-produced pornography to register as sex offenders promotes “public safety” by allowing “school officials, classmates, and law enforcement” to “increase safety measures to prevent future victimization.”¹¹² There are many problems inherent in this assertion, but they all boil down to this essential point: yet again, Professor Leary conflates two very different kinds of child pornography. She obviously has in mind here (and indeed throughout her Article) pornography produced through the rape and molestation of children, which I have referred to as conventional child pornography. The issue at hand involves self-induced pornography, or sexually explicit images that the minors depicted in them created on their own initiative.

The two types of child pornography are not remotely comparable. The first type involves sexual predators, usually older men, brutally exploiting young minors for sex; the paradigm here, not to put too fine a point on it, is the man who videotaped himself raping a three-year-old girl¹¹³ and the men who enticed thirteen-year-old Justin Berry to leave home under false pretences so they could molest him.¹¹⁴ The second type, in sharp contrast, has no victim at all, with the possible exception of the very minor who chose to record himself or herself in the first place. The paradigm here is the fifteen-year-old girl at Parkland High School who posted photographs of her breasts on the internet¹¹⁵ and the sixteen-year-old Florida girl who posted recordings of herself having sex with her boyfriend.¹¹⁶

There would indeed be a need for “increase[d] safety measures” if a true sexual predator was coming to school. No such need exists, however as to minors who are just trying to get back to school, and on with their lives, after an unfortunate run-in with the law for a minor sexual

¹¹¹ See Rubinkam, *supra* note 12.

¹¹² Leary, *supra* note 86, at 47.

¹¹³ See *Fugitive is Arrested in Videotaped Rape of Girl*, N.Y. TIMES, Oct. 17, 2007, at A14.

¹¹⁴ See Kurt Eichenwald, *Through His Webcam, a Boy Joins a Sordid Online World*, N.Y. TIMES, Dec. 19, 2005, at A1.

¹¹⁵ See Rubinkam, *supra* note 110.

¹¹⁶ See *A.H. v. Florida*, 949 So.2d 234 (Fla. Dist. Ct. App. 2007) (upholding the girlfriend’s adjudication of delinquency).

indiscretion. Indeed, if such a need really did exist, Professor Leary would undoubtedly *support* instead of *oppose* requiring minors convicted for producing pornographic images of themselves to register as sex offenders.¹¹⁷

If anything, public safety concerns cut against requiring such minors to register as convicted sex offenders. Once word gets around the minors' school that they made sexually explicit images of themselves, there is a real possibility that they will be harassed or bullied by their schoolmates. This happened to Justin Berry. Some boys in his school happened across the pornographic images of himself that he had posted on his website and confronted him about it at school. Evidently believing him to be gay, they proceeded to beat him up.¹¹⁸ Girls might face an even more serious risk as boys learn of their appearance on a sexually explicit video: that of being sexually harassed or assaulted by other students.

As bad as the possibility of harassment or bullying at school is, there are even greater hardships for minors associated with sex offences. As sex offender registries have taken off, states and local governments have been engaged in an unseemly race to the bottom, trying, in effect, to outdo each other with increasingly draconian residency restrictions aimed at registered sex offenders. These restrictions bar sex offenders from being, even in their own homes, within some specified distance (usually 1,000 - 2,500 feet) of places where children might congregate, such as schools, parks, playgrounds, churches, residential neighborhoods, and even school bus stops.¹¹⁹ Many sex offenders have

¹¹⁷ See Leary, *supra* note 86, at 47 (opposing registration requirements in this context). Registration is also unnecessary to give notice to law enforcement and school officials. Sexual predators can be transient, moving from place to place. In some cases, their transience may reflect a desire to live among people (and potential victims) who are unaware of their dangerous propensities; in other cases, they are driven from their homes and forced to relocate by restrictive residency laws applicable to registered sex offenders. See *infra* notes 119–121 and accompanying text. The people whose prosecution Professor Leary advocates are simply minors returning to their own schools, in their own neighborhoods. It is almost certain that their recent involvement in the juvenile system will be already be known to law enforcement and school officials when they return to school. After all, “[s]tatutes in forty-seven states and the District of Columbia now allow information in juvenile court records to be released to at least one of several sources: prosecutors, law enforcement agencies, social services agencies, schools, victims or the general public.” Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391, 404 (2001).

¹¹⁸ See Eichenwald, *supra* note 113, at A1.

¹¹⁹ For an extensive review of this problem, with an emphasis on the apparent winner of the race to the bottom (Georgia), see Jacqueline Canlas-LaFlam,

been forced to abandon their homes, quit their jobs, and stop going to church—all because those places lie within the radius of someplace, like a school or playground, where they cannot legally be.

Residency requirements—which even supporters sometimes admit are efforts to drive registered sex offenders out of their communities¹²⁰—have spread (and continue to spread) all across the country. As one student commentator explains:

In the last ten years, twenty-seven states and many cities have passed residency restrictions, limiting where a convicted sex offender may live within the state. In some situations, the statutes have barred registered sex offenders from large parts of the cities, if not made it nearly impossible for them to find anywhere to live legally in the state.¹²¹

Again, these harsh residency requirements were designed with sexual predators in mind. They, however, are hardly the only people who can be forced to register as sexual offenders. Teenagers having consensual sex with their peers have been convicted of sex crimes like statutory rape and sodomy and branded as sex offenders. Georgia gives us two ready examples of people on the sex-offender registry who do not even remotely fit the sexual-predator paradigm.

Recall Genarlow Wilson, the seventeen-year-old student who was convicted based on a videotape in which he was recorded receiving oral sex from a fifteen-year-old schoolmate. When he was convicted of aggravated child molestation, he had to register as a sex offender—and,

Note, *Has Georgia Gone Too Far—Or Will Sex Offenders Have To?*, 35 HASTINGS CONST. L.Q. 309 (Winter 2008).

¹²⁰ As the chief sponsor of a recent bill passed in Georgia explained:

We want people running away from Georgia. Given the toughest laws here, we think a lot of people [(convicted sex offenders, that is)] could move to another state If it becomes too onerous and too inconvenient, they may just want to live somewhere else. And I don't care where, as long as it's not in Georgia.

Id. at 317.

¹²¹ *Id.* at 310. According to a study of the impact of Florida's residency requirements:

[O]ne quarter of offenders were forced to move from a home that they owned or rented, or were unable to return home following their release from prison. Nearly half (44 percent) reported that they were unable to live with supportive family members due to zoning laws. More than half (57 percent) found it difficult to secure affordable housing, and 60 percent reported emotional distress as a result of such housing restrictions.

Jill Levenson et al., *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, 71 FED. PROBATION 2, 1, 4 (2007).

accordingly, could not return home, even if released pending sentencing and appeal, because he could not legally live under the same roof as his eight-year-old sister.¹²² A married woman was convicted years before, at age seventeen, for performing oral sex on her fifteen-year-old then-boyfriend. Like Genarlow, she had to register as a sex offender. She and her husband had to vacate their house to avoid violating the residency requirement (which is a felony punishable by ten to thirty years in prison),¹²³ and are now paying rent for their replacement home in addition to their mortgage on their first home.¹²⁴

As these cases show, it is not just sexual predators who get hit with burdensome residency requirements. The sex offender registry, and the residency laws that take advantage of them, have the very real potential to cause grave injustice. Even if one is prepared to accept that result when it comes to real sexual predators, their interests are not the only ones at stake. Given the severe hardships that being a registered sex offender can and will impose on minors trying to get reacclimated to their schooling and healthy social networks after a run-in with the law, the potential for a lenient, rehabilitative sentence in juvenile court is not enough to justify claims that minors who make pornographic images of themselves should be prosecuted. The fact that those prosecutions will result in minors who are a danger to no one being branded with the highly stigmatic label of “sexual offender” is yet another reason to reject Professor Leary’s prosecution-based approach.

To summarize, Professor Leary’s confidence that her prosecution-based approach to the problem of self-produced child pornography will result in only rehabilitative intervention in juvenile court is misplaced. In light of the heavy penalties that child pornography offenses carry, minors charged for producing or distributing sexually explicit images of themselves may find themselves facing trial and sentencing as adults in criminal court. Additionally, in states that allow blended sentences, the lucky minors whose cases remain in juvenile court may well come out of the juvenile process not rehabilitated with the proverbial “fresh start” at age twenty-one, but rather as an inmate of state correctional facilities—branded not only a convicted felon but, even worse, a convicted *sex offender* and potentially driven from their homes, churches, and places of employment by restrictive residency requirements passed with sexual predators in mind. Putting minors whose only crime is having created explicit images of themselves through all these hardships is a rather odd way of helping them resume normal, healthy lives.

¹²² See Editorial, *Free Genarlow Wilson Now*, N.Y. TIMES, Dec. 21, 2006, at A38.

¹²³ See GA. CODE ANN. § 42-1-15(d) (2007).

¹²⁴ See Canlas-LaFlam, *supra* note 1198, at 314.

IV. THE PROPER (LIMITED) ROLE FOR CRIMINAL LAW IN ADDRESSING
“SELF-PRODUCED CHILD PORNOGRAPHY”

The discussion so far might be taken to suggest that there is no proper role for the criminal law to play in dealing with the problem of minors creating and distributing sexually explicit images of themselves. That suggestion, however, would be mistaken. There is a salutary, albeit limited, role for the criminal law to play here, but it is not the aggressive role that Professor Leary defends. Instead of using the criminal law to punish minors whose only crime is the creation and dissemination of sexually explicit images of themselves, I advocate a therapeutic approach—one that spares minors the severe consequences of being convicted of crimes as serious as child pornography offenses while protecting them against the dangers they face when featuring themselves in pornographic material.

Needless to say, to come up with a comprehensive vision of when criminal law should, and should not, be used against minors who create or distribute pornographic images of themselves would be an unmanageable task. I attempt no such Herculean feat here. Instead, I offer a few examples to illustrate the therapeutic use of the criminal law that is advocated here.

One proper use of the criminal law is as leverage to convince minors to cooperate with law enforcement in the apprehension and prosecution of pedophiles and sexual predators. Minors who post pornographic images of themselves on the Internet may find themselves pursued by pedophiles who scour the Internet looking for children to molest. In Justin Berry’s case, after five years of operating his own pornographic website, he had extensive business records (including credit card information) of literally hundreds of pedophiles who paid lavish sums to exploit him online and in person.¹²⁵ Clearly, it is in the public interest to convince minors in Justin’s position to assist law enforcement in bringing pedophiles and sexual predators to justice. Although Justin voluntarily came forward and offered to cooperate with the Justice Department, some minors might not wish to cooperate. A refusal to cooperate is very serious because it leaves other minors at risk of being molested by pedophiles who remain at large. In those cases, prosecutors can threaten to charge (or, if necessary, actually charge) minors who created pornographic images of themselves unless they become witnesses for the government.

Similarly, it is proper to use the threat of criminal prosecution to convince recalcitrant minors who have made or distributed pornographic images of themselves in the past to cease and desist and help remedy the

¹²⁵ See Eichenwald, *supra* note 11, at A1.

situation they created. Once child pornography has been created, it is in society's interest to have those materials destroyed as soon as possible, if only to avoid the potential that they might resurface later to the detriment of the minors depicted in those images. Threats of prosecution can be an effective means of persuading minors to surrender to law enforcement for destruction any pornographic images they have made of themselves, as well as to identify the persons to whom they distributed those images.¹²⁶

Notice that, in both of these situations, the use of the criminal law advocated here against minors who produce or distribute pornographic images of themselves has two common features. First, minors are prosecuted only as a last resort, in cases where they refuse to cooperate with law enforcement. They can avoid prosecution and conviction simply by complying with the legitimate demands of law enforcement, and there is every reason to expect minors facing charges for circulating explicit images of themselves to jump at the chance to avoid prosecution.¹²⁷ Second, the criminal justice system is used, not to punish minors, but rather as a therapeutic intervention. The goal is to help minors who have made or disseminated sexually explicit images of themselves to reform their ways and get child pornography out of circulation as quickly as possible—and, above all, to protect the minors depicted in the images against future acts of sexual predation and bullying or harassment by their peers.

There is still more for the criminal law to do in dealing with the problem of self-produced child pornography. It goes without saying that

¹²⁶ Where, as in the Pennsylvania “cell phone porn” case, “self-produced” pornography has been distributed to other minors, the minors who received the pornography should generally not be prosecuted for possession or receipt of child pornography, provided they fully cooperate with law enforcement in the destruction of the images. *See* Rubinkam, *supra* note 12.

¹²⁷ Of course, minors who refuse to cooperate will face prosecution. In that event, prosecutors will likely have a range of charging options and ordinarily should not charge uncooperative minors with offenses as severely punished as child pornography offenses. If, however, prosecutors do elect to file child pornography charges, the minors involved have no valid ground for complaint. After all, they could have avoided prosecution altogether by cooperating with law enforcement. The very premise of plea bargaining is that there is no unfairness in holding defendants to the adverse consequences of their choices to reject offers of leniency from prosecutors. *See, e.g.,* Ricketts v. Adamson, 483 U.S. 1, 10-12 (1987) (finding no unfairness to a defendant who received a death sentence after breaching his plea agreement offering him life imprisonment in exchange for his testimony against his co-conspirators). It is settled law that prosecutors can legitimately threaten higher charges—even the death penalty—if the defendant refuses to cooperate and follow through on such threats against uncooperative defendants. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Brady v. United States, 397 U.S. 742, 749-50 (1970).

adults who sexually abuse children should be prosecuted to the fullest extent of the law. Additionally, adults who are, in any way, knowingly involved in child pornography—as producers, financiers, distributors, enticers, or possessors—merit prosecution, whether or not the child pornography in question was “self-produced.” Furthermore, minors who go beyond producing pornographic images of themselves and actually coerce other minors into submitting to sex or allowing themselves to be filmed during sex should also be prosecuted.¹²⁸ Despite their minority status, they—like adult offenders—fall within the exploitative paradigm of child pornography and deserve prosecution.

Finally, it is possible that child protective services, or law enforcement, should take action in appropriate cases against the parents of children who produce or distribute pornographic material of themselves. To protect children against the many dangers that await them in the world of child pornography, parents need to be vigilant in making sure that their children are not engaging in unsafe behaviors, either online or elsewhere, that put them at risk of being victimized by sexual predators. If parents are negligent in this regard, it is appropriate for child protective services to intervene for the protection of the child; in extreme cases, criminal charges of child neglect or contributing to the delinquency of minors (to give but two examples of potential charges) might be appropriate as well. After all, parents have a legal duty to supervise their minor children and take all reasonable steps to protect them against foreseeable health and safety risks.¹²⁹ More vigilant parents will make for safer, happier children—and that is the goal, not just of child pornography laws, but also of any decent society.

CONCLUSION

Although Professor Leary’s commitment to protecting children against sexual abuse is one that I both admire and share, I believe her prosecution-based approach would cause more problems for minors than it would solve. Highly stigmatic criminal convictions, long prison sentences, years of being listed in national and state databases as a convicted sex offender—all this (and perhaps even more) is appropriate for predators who cause such immeasurable suffering by raping and molesting children and spreading throughout cyberspace graphic images memorializing their unspeakable crimes. Nevertheless, it is important to

¹²⁸ Based on interviews with minors featured in pornographic materials, one study found that ten percent of the victims were recorded by peers. See *ABA/NCMEC Report*, *supra* note 44, at 26. This, in itself, is not surprising. What is surprising is that “[f]orce was used or threatened in *one-half* of these peer pornography incidents.” *Id.* (emphasis added).

¹²⁹ See generally LAFAYE, *supra* note 78, § 6.2(a)(1), at 312 & n.11 (citing cases).

remember that we do not deal here with child pornography of that odious, exploitative type.

We deal here with minors (typically, older teenagers) who freely choose, on their own, to make or distribute sexually explicit images of themselves. I agree that such behavior is troubling. Minors who distribute pornographic images of themselves place may themselves at risk of being victimized by pedophiles or sexual predators and create potential problems for themselves among their peers. Given the risks involved, responsible parents and guardians will no doubt educate teenagers about the many risks that await them online and be vigilant against the possibility of sexual abuse.

There is a role for the criminal law to play in dealing with the problem of minors creating and distributing sexually explicit images of themselves, but it is not the aggressive, almost vengeful role that Professor Leary advocates. The desire for vengeance and retribution is amply justified for those who sexually abuse children for any purpose, including the making of pornography. It is not justified, however, for minors whose only crime is having made or distributed sexually explicit images of themselves.

To funnel into the criminal or juvenile justice systems cases of self-produced child pornography—material that, at its root, steps from the undeniable fact that today’s teenagers are sexually active well before they turn eighteen—is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers.

To come to this conclusion, we need not celebrate what some might describe as the “sexual liberation” of teenagers. If we really want to help children (and we should), we should not pursue prosecution-based strategies that are likely to do minors more harm than good. We should instead concentrate our efforts, as a society, on dealing with the many sexual predators and other dangerous criminals in our midst—and, so far as the criminal law is concerned, leave the Romeos and Juliets of the world alone, even if their love happens to be memorialized in forms less appealing than iambic pentameter.