

Chapter 5

VICTIMS OF CHILD PORNOGRAPHY

This chapter presents information on victims of child pornography. It is unknown how many victims of child pornography exist worldwide. The National Center for Missing and Exploited Children (“NCMEC”) has reviewed over 57 million images and videos of child pornography (many of them duplicates) and has assisted law enforcement in the identification over 4,103 individual victims.¹ The number of identified victims represents only a small portion of the victims whose images are in circulation. It is estimated that there are over five million unique child pornography images on the Internet² and some offenders possess over one million images of child pornography.³ This chapter considers the issues and harms surrounding victimization through the production of child pornography and the continued existence and distribution of child pornography. It also addresses the legal issues surrounding victims’ rights for child pornography victims.

A. VICTIMIZATION THROUGH PRODUCTION

Child pornography victims have usually been the victims of contact child sex abuse.⁴ Like other victims of child sex abuse, child pornography victims can suffer physical harms

¹ NCMEC was established in 1984 as a nonprofit organization working in partnership with federal law enforcement. NCMEC works to find missing children, prevent victimization, and identify exploited children. *See* http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=4327; Prepared Statement of Michelle Collins Vice President, Exploited Children Division and Assistant to the President of the National Center for Missing & Exploited Children, to the Commission, at 4 (Feb. 15, 2012) (“Collins Statement”).

² Government of Canada, Federal Ombudsman for Victims of Crime, *Every Image Every Child: Internet Facilitated Child Sexual Abuse in Canada*, 18 (Aug. 20, 2009), <http://www.victimfirst.gc.ca/pdf/childp-pjuvenile.pdf>.

³ *See, e.g.*, Sentencing Memorandum, United States v. Burr, No. 09-cr-308 (D. Or. July 23, 2010), ECF No. 26 at 3–4 (“A forensic review of the defendant’s computer and digital media storage devices have located over one million images of child pornography”); Sentencing Memorandum, United States v. Worman, 07-cr-40 (E.D. Pa. July 30, 2009), ECF No. 208 at 1 (“1.2 million images of child pornography were seized”); Peggy O’Hare, *Pilot Arrested on Child Porn Charges*, HOUS. CHRON., July 1, 2010, <http://www.chron.com/disp/story.mpl/metropolitan/7089813.html> (“police investigators seized what they called the largest cache of child pornography ever discovered in Harris County, amounting to ‘millions of images’”).

⁴ *See* Chapter 9 at 263. Two primary exceptions are victims whose images were taken with hidden cameras or recorded remotely (*e.g.*, via webcam) and victims whose images were used to create morphed child pornography images. *See id.* While victims of sexual exploitation, they may not have been victims of contact sex abuse. “Morphed” child pornography is produced by manipulating images of identifiable children in conjunction with computer generated graphics or drawings. In 2007, the PROTECT Our Children Act of 2008 made it unlawful to knowingly produce with intent to distribute or to knowingly distribute morphed child pornography (“child pornography that is an adapted or modified depiction of an identifiable minor”). *See* PROTECT Our Children Act of 2008, Pub. L. 110–401, § 304 (2008); USSG App. C., Amend. 733 (Nov. 1, 2009). Morphed child pornography offenses are rarely prosecuted in federal court. *See* Chapter 6 at 146.

during the abuse, including bone fractures and sexually-transmitted diseases.⁵ They may also suffer long-term physical and psychological harms.⁶

There is limited information available about the subset of child sex abuse victims who are also victims of child pornography production offenses.⁷ Though children of both genders are sexually abused, females appear more likely to be victims of child pornography production offenses.⁸ Children of all ages are victimized by child pornography producers, from as young as infants and toddlers to adolescents; about half of victims are younger than 12 years of age.⁹ NCMEC reports that 24 percent of identified victims were pubescent, and 76 percent were prepubescent. Ten percent of the prepubescent identified victims were infants or toddlers.¹⁰ That range of victim ages is consistent across different data pools. Child pornography producers may target young victims because they are pre-verbal and unable to report their abuse. They are also less likely to recognize inappropriate touching.¹¹

⁵ IAN O'DONNELL & CLAIRE MILNER, CHILD PORNOGRAPHY CRIME, COMPUTERS & SOCIETY 77 (2007).

⁶ See, e.g., Holly L. Wegman & Cinnamon Stetler, *A Meta-Analytic Review of the Effects of Childhood Abuse on Medical Outcomes in Adulthood*, 71 PSYCHOSOMATIC MED. 805 (2009); O'DONNELL & MILNER, *supra* note 5, at 77; Beth E. Molnar, Stephen L. Buka, & Ronald C. Kessler, *Child Sexual Abuse and Subsequent Psychopathology: Results from the National Comorbidity Survey*, 91 AM. J. OF PUB. HEALTH 753 (2001); Bernice Andrews, Chris R. Brewin, Suzanna Rose, & Marilyn Kirk, *Predicting PTSD Symptoms in Victims of Violent Crime: The Role of Shame, Anger, and Childhood Abuse*, 109 J. OF ABNORMAL PSYCHOL. 69 (2000); Angela Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOL. BULL. 66 (1986); Marvin L. Blumberg, *Depression in Abused and Neglected Children*, 35 AM. J. OF PSYCHOTHERAPY 342 (1981).

⁷ Additional information regarding the child pornography victims can be found in the discussion of child pornography images. See Chapter 4 at 85–92.

⁸ Janis Wolak, David Finkelhor, Kimberly J. Mitchell, & Lisa M. Jones, *Arrests for Child Pornography Production: Data at Two Time Points From a Nat'l Sample of U.S. Law Enforcement Agencies*, 16 CHILD MALTREATMENT 184, 188 (2011); David Finkelhor & Richard Ormrod, *Child Pornography: Patterns From NIBRS*, OFFICE OF JUVENILE JUST. & DELINQUENCY PREVENTION, JUV. JUST. BULL., NCJ 204911, at 6 (Dec. 2004) (available at <https://www.ncjrs.gov/pdffiles1/ojjdp/204911.pdf>).

⁹ While recent research finds that most victims of child pornography production are teens, see Janis Wolak, David Finkelhor, & Kimberly J. Mitchell, *Trends in Arrests for Child Pornography Production: The Third Nat'l Juv. Online Victimization Study (NJOV-3)*, 3 (2012), <http://www.unh.edu/ccrc/internet-crimes/papers.html> (last visited Nov. 30, 2012), the same researchers agree that offenders possessed images of victims of different ages including those of children under three (28%), aged three to five (46%), aged six to 12 (86%), and older than 12 years (67%). Janis Wolak, Kimberly J. Mitchell, & David Finkelhor, *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE: A J. OF RES. & TREATMENT 22, 31 (2011). Criteria for inclusion in the NJOV studies include an Internet-related sexual exploitation crime (possession, trafficking, distribution, or production) ending in arrest, in which a victim was under the age of 18. *Id.* at 22–23.

¹⁰ Collins Statement, *supra* note 1, at 4–5.

¹¹ Max Taylor, Gemma Holland & Ethel Quayle, *Typology of Paedophile Picture Collections*, 74 THE POLICE J. 97, 106 (2001) (“Very young children (of 5 and under) may be particularly vulnerable to involvement in child pornography, in that they may be more susceptible to what for an older child would be inappropriate requests to undress, for example. Very young children have little or no awareness of the sexual context to what they are being asked to do, and may be subject to sexual victimisation without the same risk of disclosure to adults.”).

Child pornography producers make victims participate through different methods. Like other contact sex offenders, they often groom their victims prior to engaging in sexual abuse.¹² While underage children are incapable of legal consent, many child pornography producers will manipulate victims to make them “agree” to participate.¹³ Some offenders produce child pornography by convincing or coercing a child to take images of himself or herself. Coercion of a child to take nude images of himself or herself is production of child pornography.¹⁴ Such images should be distinguished from self-produced nude images without an adult producer’s involvement (sometimes called “sexting” or “youth-only experimental” production).¹⁵ While sexting and youth-only experimentally produced images are serious and can lead to many negative repercussions,¹⁶ there is little evidence that children are regularly prosecuted for such behavior.¹⁷

Most identified victims of child pornography production offenses are abused by a family member or acquaintance.¹⁸ Depending on the age of the child and the relationship of the abuser

¹² Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190; see Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis*, for NCMEC, at 10 (2001), http://www.missingkids.com/en_US/publications/NC70.pdf.

¹³ See Deborah Muir, *Violence against Children in Cyberspace: A Contribution to the UN Study on Violence Against Children*, END CHILD PROSTITUTION, CHILD PORNOGRAPHY & TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES (“ECPAT INT’L”), 43(2005), www.ecpat.net/ei/Publications/ICT/Cyberspace_ENG.pdf; MAX TAYLOR & ETHEL QUAYLE, *CHILD PORNOGRAPHY: AN INTERNET CRIME* 22–23 (2003) (referring to child pornography videos where “bribes and threat made by the photographer to induce the child to do what is required”); Lanning, *supra* note 12, at 56–58. Regardless of whether a child appears to consent, a child cannot legally consent to participation in production of child pornography. 18 U.S.C. § 2251. See also Kenneth V. Lanning, *Compliant Child Victims: Confronting an Uncomfortable Reality* (hereinafter “*Compliant Child Victims*”), in *VIEWING CHILD PORNOGRAPHY ON THE INTERNET* 56–58 (Ethel Quayle & Max Taylor, eds. 2005).

¹⁴ A child pornography producer is an individual who “employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . sexually explicit conduct for the purpose of producing any visual depiction of such conduct.” 18 U.S.C. § 2251(a).

¹⁵ NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, *Policy Statement on Sexting*, (Sept. 21, 2009), http://us.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130 (Last visited Nov. 30, 2012); Wolak et al., *Trends in Arrests for Child Pornography Production*, *supra* note 9, at 2 (distinguishing “youth-only experimental” production and “youth-only aggravated” production from “adult-involved” production). For a discussion of appropriate law enforcement and societal response to sexting see Mary G. Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues - Structured Prosecutorial Discretion Within a Multidisciplinary Response*, 17 VIRGINIA J. OF SOC. POL. & THE L. 487, 491–92 (2010).

¹⁶ See, e.g., Slate V Staff, *Almost 9 in 10 Sexted or Emailed Youth Photos Turn Up as Porn*, http://www.slate.com/blogs/trending/2012/10/23/sexting_risk_study_says_naked_photos_end_up_online_on_porn_sites_nine_times.html (last visited Oct. 23, 2012).

¹⁷ See Wolak et al., *Trends in Arrests for Child Pornography Production*, *supra* note 9, at 2 (“research shows that few youth actually participate in sexting and most police do not arrest youth in cases that come to police attention”) (footnotes omitted); Leary, *supra* note 15, at 488. No juveniles were sentenced in 2010 for self-produced child pornography images. See generally, Chapter 9 (discussing Commission’s coding project of federal child pornography producers sentenced in fiscal year 2010).

¹⁸ Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190; TAYLOR & QUAYLE, *supra* note 13, at 23 (noting that the abuser is “invariably a parent, guardian of some kind”). Interestingly, trends suggest that non-family acquaintances are increasingly arrested for child pornography production offense. Wolak et al., *Trends in Arrests for Child Pornography Production*, *supra* note 9, at 3 (noting that in 2009, half of production offenders in the sample were acquaintances).

to the child,¹⁹ offenders may pressure the victims via parental authority, threats, and/or payment with drugs, alcohol, or money.²⁰ Other offenders manipulate by using one child to recruit other victims, including siblings.²¹ These child pornography producers sometimes rely on peer pressure to encourage multiple children to participate.²²

Images of child pornography often present a distorted picture of what actually occurred. Some child pornography images show forcible rape, forced penetration, and other violent sexual assaults,²³ but images reflecting a child crying or in distress appear to be the exception.²⁴ Rather, most images are manipulated to show “a compliant sexually involved child who willingly participates in the sexual behavior being portrayed.”²⁵ Some perpetrators use such images that depict victims enjoying themselves to groom other child victims.²⁶ Some offenders can be heard on videos suggesting poses or exhorting victims to smile for the camera while they are abused.²⁷

While the vast majority of child pornography images are created with the victim’s knowledge,²⁸ approximately one-quarter of child pornography images appear to have been produced, at least to some extent, without the victim’s knowledge.²⁹ Production of these images occurs by using hidden cameras, creating morphed images, or by photographing or filming

¹⁹ Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190–191; TAYLOR & QUAYLE, *supra* note 13, at 21–23; Ethel Quayle, *The Impact of Viewing on Offending Behavior*, in *CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER* 31 (Martin Calder ed. 2004).

²⁰ Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190; *see* Lanning, *supra* note 12, at 5–6.

²¹ Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190. Sometimes these are siblings sets and sometimes an initial victim may be encouraged by the offender to “recruit” another child. *See id.*; Lanning, *Compliant Child Victims*, *supra* note 13, at 59 (“[S]ome older child victims . . . may assist the offender in obtaining new victims.”).

²² *See* Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *The Varieties of Child Pornography Production*, in *VIEWING CHILD PORNOGRAPHY ON THE INTERNET*, *supra* note 13, at 38–40; Finkelhor et al., *Patterns From NIBRS*, *supra* note 8, at 6.

²³ Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190.

²⁴ TAYLOR & QUAYLE, *supra* note 13, at 22 (noting that “[a] common characteristic of child pornography is that the subject is smiling . . . [s]miling is important because it suggests that the child is happy, even enjoying, what is happening”).

²⁵ *Id.*

²⁶ “[C]hild pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children ‘having fun’ participating in such activity.” Child Pornography Prevention Act of 1996, P.L. 104–208, § 121(1)(3); *see also* Save the Children Europe, *Position Paper on Child Pornography and Internet-Related Sexual Exploitation of Children*, 9 (June 2003), http://ec.europa.eu/justice_home/daphnetoolkit/files/projects/2002_004/int_position_paper_on_child_pornography.pdf (“Abusers often use images in which children have been forced to smile so it can be claimed, especially with younger children, that they are ‘having fun’ and have given ‘consent’”).

²⁷ Taylor et al., *supra* note 11, at 104; TAYLOR & QUAYLE, *supra* note 13, at 22.

²⁸ Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190.

²⁹ *Id.* (approximately 22% of offenders used covert methods to produce images).

sleeping or drugged victims.³⁰ Child victims may also be too young to be aware of the abuse or of the recording.³¹

Child pornography victims, like victims of other types of sexual abuse, generally are reluctant to report child sexual abuse for a variety of reasons.³² Some victims do not report the crime because offenders have threatened to harm the victims or others if the victim reports the crime.³³ As mentioned, in some cases, the victim is pre-verbal and unable to communicate to the authorities or may not be aware that images were recorded.

It also appears that the existence of images of abuse can make a victim even less likely than other sex abuse victims to report the crime.³⁴ The “feelings of guilt, shame and self-blame”³⁵ regarding the images can be so powerful that some victims deny existence of pornographic images even when confronted with them.³⁶ Those who have studied child pornography victims note that “probably the greatest inhibitors to disclosing what has occurred is the humiliation that the children feel regarding who may have seen their images and their fear of being recognized.”³⁷ Victims report feelings of shame and embarrassment that are exacerbated by the images and prevent them from reporting the abuse.³⁸ Some victims fear the images will

³⁰ Wolak et al., *Varieties of Child Pornography*, *supra* note 22, at 39–40.

³¹ *Id.* at 39; Taylor et al, *supra* note 11, at 106 (discussing abuse of very young children).

³² Tink Palmer, *Behind the Screen: Children who are the Subjects of Abusive Images in VIEWING CHILD PORNOGRAPHY ON THE INTERNET* 63–64 (Ethel Quayle & Max Taylor eds. 2005). Studies relying on self-reports estimate that from one in six to one in nine men report that they were sexually abused as boys and one in three to one in five women report that they were sexually abused as girls. John Briere & Diana M. Elliot, *Prevalence and Psychological Sequelae of Self-reported Childhood Physical and Sexual Abuse in a General Population Sample of Men and Women*, 27 CHILD ABUSE & NEGLECT 1205, 1205 (2003) (32.3% of women and 14.2% of men reported child sex abuse). By contrast, official reports of child sex abuse are much lower. See Emily M. Douglas & David Finkelhor, *Childhood Sexual Abuse Fact Sheet*, CRIMES AGAINST CHILDREN RES. CTR., (May, 2005), www.unh.edu/ccrc/factsheet/pdf/CSA-FS20.pdf (official records reflect that approximately 0.1% children were victims of substantiated incidents of child sex abuse in 2003 and roughly 225,000 sex abuse crimes against children were reported to the police in 2001).

³³ See, e.g., *United States v. Snyder*, 189 F.3d 640, 643 (7th Cir. 1999) (defendant showed minor victim firearms and threatened to kill him if he reported the sexual abuse which the defendant had filmed).

³⁴ Palmer, *supra* note 32, at 63–64; see Muir, *supra* note 13, at 40–41.

³⁵ Prepared Statement of Dr. Sharon Cooper, Adjunct Professor, Pediatrics, University of North Carolina-Chapel Hill School of Medicine, to the Commission, at 10 (Feb. 15, 2012) (“Cooper Statement”).

³⁶ Lanning, *Compliant Child Victims*, *supra* note 13, at 71; see also Testimony of Dr. Sharon Cooper, to the U.S. Senate Committee on Commerce, Science and Transportation (Sept. 19, 2006) (available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=e81f4756-9ebe-43c1-9d6c-b853b51bfddb) (“children not only typically do not tell of their abuse, but will in fact deny the presence of images”); Muir, *supra* note 13, at 41 (“[i]n Sweden, a group of child victims of pornography denied the abuse despite visual evidence of its occurrence”).

³⁷ Palmer, *supra* note 32, at 63–64. Others have described the existence of the photos as establishing a “silent conspiracy” and explaining “[o]ne of the most destructive impacts on juveniles of their participation in pornography is the silent conspiracy into which they feel bound by their offender. TAYLOR & QUAYLE, *supra* note 13, at 25 (internal citation omitted).

³⁸ See Palmer, *supra* note 32, at 64.

make it appear as though they were complicit or actively participated in the abuse.³⁹ Other victims, at the behest of an adult offender, may have influenced other minor victims to participate in the abuse and are afraid that their own behavior was illegal.⁴⁰ Finally, even if the contact abuse is discovered, investigators may fail to ask the victim whether images were created and miss an opportunity to identify the child as a victim of child pornography production in addition to contact sex abuse.⁴¹

B. RECURRENT VICTIMIZATION THROUGH EXISTENCE OF IMAGES

Child pornography victims face other types of victimization that are separate from the harm of production. Even after the physical abuse has ended, child pornography victims suffer due to continued circulation of their images or the ongoing potential for circulation of their images.⁴² Both Congress and the Supreme Court have concluded that the ongoing distribution of child pornography images violates the victim's privacy and exacerbates the continued harms to the victim.⁴³ Congress has spoken about ongoing circulation, noting that "its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years."⁴⁴ The Supreme Court likewise has described child pornography images as "a permanent record" and explained that "the harm to the child is exacerbated by their circulation."⁴⁵ It further noted that this is a harm distinct from that caused during the production of the images: it is "the pornography's continued existence caus[ing] the child victims continuing harm by haunting the children in years to come."⁴⁶

³⁹ See Muir, *supra* note 13, at 40–41; TAYLOR & QUAYLE, *supra* note 13, at 22; see also Lanning, *Compliant Child Victims*, *supra* note 13, at 56–58.

⁴⁰ O'DONNELL & MILNER, *supra* note 5, at 74. Abusers sometimes convince their victims that they will be legally liable for involving participating in abuse with other children and this "can be used as blackmail to force the child to remain silent and compliant." *Id.*

⁴¹ Gemma Holland, *Identifying Victims of Child Abuse Images: An Analysis of Successful Identifications*, in VIEWING CHILD PORNOGRAPHY ON THE INTERNET *supra* note 13, at 79 (noting an instance in which one child disclosed abuse but failed to mention that she was photographed).

⁴² See, Prepared Statement of Susan Howley, Chair of the Commission's Victims Advisory Group, to the Commission, at 2–5 (Feb. 15, 2012)(discussing harm suffered by victims); see also Cooper Statement, *supra* note 35, at 7 (finding that many victims suffer from posttraumatic stress disorder, anxiety, depression, and non-delusional paranoia).

⁴³ See *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) ("distribution of the material violates the individual interest in avoiding disclosure of personal matters") (internal quotations and citation omitted); Child Pornography Prevention Act § 121(1)(7) ("the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests"); see also Cooper Written Testimony, *supra* note 35, at 7 (noting that "the invasion of privacy is a foremost concern" for child pornography victims).

⁴⁴ Child Pornography Prevention Act § 121, Pub. L. 104–208, §121, 110 Stat. 3009 (1996).

⁴⁵ *Ferber*, 458 U.S. at 759.

⁴⁶ *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (citation omitted); see also *United States v. Blinkensop*, 606 F.3d 1110, 1117 (9th Cir. 2010) (affirming the sentencing judge, who stated "it is a clear reality . . . that every time one of these web sites is opened and every time one of these images is viewed, additional harm is visited upon the victim. And the tiny children who frequently are displayed in these images are truly victims"); *United States v. Pugh*, 515 F.3d 1179, 1197 (11th Cir. 2009) ("Congress repeatedly has stressed the terrible harm child pornography inflicts on its victims, dating back to its first enactment of child pornography laws in 1977") (footnote omitted).

Unlike child sex abuse victims whose abuse has not been recorded, child pornography victims “grow up knowing that there are images of [themselves] being sexually abused which are available in perpetuity.”⁴⁷ For this reason, child pornography victims are subject to a greater long-term risk of depression, guilt, poor self-esteem, feelings of inferiority, interpersonal problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorder than other child sexual assault victims.⁴⁸ As one victim stated, “[u]nlike other forms of exploitations, this one is never ending. Everyday people are trading and sharing videos of me as a little girl being raped in the most sadistic ways.”⁴⁹

Victims have reported suffering from the knowledge that the images of their graphic abuse are being utilized for sexual gratification.⁵⁰ They also state that they fear that the images are being used to groom new victims for sexual abuse. One victim explained, “I am horrified by the thought that other children will probably be abused because of my pictures. Will someone show my pictures to other kids . . . then tell them what to do? Will they see me and think it’s okay for them to do the same thing?”⁵¹

Victims suffer from not knowing who has seen their images. Victims “report remaining always vigilant and fearful that any interaction with a computer might lead to exposure of the images of the sexual abuse that they have endured.”⁵² Victims fear that strangers they see on the street have seen images of their abuse, and they are ashamed and embarrassed that a teacher, a potential date, or a stranger in public will recognize them.⁵³ One victim explained that “[e]very day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them — at me — when I was just a little girl being abused for the camera.”⁵⁴

Consistent with a finding that some victims suffer a non-delusional paranoia,⁵⁵ victims also fear being stalked by viewers of images. Multiple victims have reported that they have been tracked down by those who have viewed their images. In one instance, a child pornography offender who discovered a victim’s real name used a social networking site to send the victim messages that he had enjoyed looking at her images for years, accused her of being a willing

⁴⁷ Palmer, *supra* note 32, at 71; *see also* Mimi Halper Silbert, *The Effects on Juveniles of Being Used for Prostitution & Pornography in* PORNOGRAPHY RESEARCH ADVANCES & POLICY CONSIDERATIONS at 228 (“The long term impact of participating in pornography appears to be even more debilitating than the immediate effects.”).

⁴⁸ *See* Palmer, *supra* note 32, at 71.

⁴⁹ Notice of Filing Victim Restitution Claim and Impact Statements, United States v. Faxon, No. 09-cr-14030 (S.D. Fla. Nov. 3, 2009), ECF No. 34-15 at 4.

⁵⁰ Palmer, *supra* note 32, at 63. Silbert, *supra* note 47, at 228 (identifying three stages of victimization and noting that they are exploitation, disclosure (for those victims who disclosed), and post-abuse).

⁵¹ Faxon, No. 09-cr-14030, ECF No. 34-9 at 3 (victim impact statement of “Amy” of the “Misty” series).

⁵² Cooper Statement, *supra* note 35, at 7.

⁵³ *See* O’DONNELL & MILNER, *supra* note 5, at 71.

⁵⁴ Faxon, No. 09-cr-14030, ECF No. 34-9 at 2–3.

⁵⁵ *See* Cooper Statement, *supra* note 35, at 7–9 (describing victims who feel they are constantly being watched).

participant in her abuse, and demanded that she make a pornographic video with him.⁵⁶ In another case, a victim and her mother reported that a collector of the victim's images was identified outside of the victim's middle school and followed her to softball games.⁵⁷ This victim explained that "I have had people follow me, find me from my pictures I didn't even know were out there. I have been found even by my [social networking website] profile"⁵⁸

The types of harm suffered by victims through the continued circulation (or fear of circulation of the images) are shared by family and guardians of these victims.⁵⁹ Family members also fear that their child will be recognized by strangers who have viewed the child's images.⁶⁰ One mother stated that due to her daughter's exploitation, "I do not foster her dreams as I normally would in a normal situation. I fear her becoming famous and someone digging up 'dirt' about her unfortunate past."⁶¹

Additionally, guardians of underage victims, in particular victims who may not remember the contact sexual abuse or be aware the images are being circulated, struggle with whether and when to share that the abuse occurred or that the images exist. Guardians may choose not to share the frequency with which a victim's image is traded for fear of exacerbating the harms. As a mother of a young victim whose images are in circulation explained, "[m]y daughter understands that some police and social workers have seen 'the pictures' . . . [b]ut now that she's older and realizing the extent of the [I]nternet, she's beginning to grasp the darker side — how many people saw those same pictures Someday the full realization will surely strike her. I dread the day the question 'have they seen the pictures?' becomes a daily trial for her . . . as I know it already is for me."⁶²

C. CRIME VICTIMS' RIGHTS ISSUES SPECIFIC TO CHILD PORNOGRAPHY VICTIMS

Children whose images appear in the collections of child pornography offenders are considered to be victims of federal non-production child pornography offenses. As such, they may be eligible for certain victims' services under the Victims Rights and Restitution Act (VRRRA)⁶³ and have rights under the Crime Victims Rights Act (CVRA).⁶⁴ The VRRRA provides

⁵⁶ The offender was convicted of child pornography and stalking offenses and sentenced to 300 months. See Judgment, *United States v. Hoffman*, No. 08-CR-027 (D. Nev. Apr. 30, 2010), ECF No. 64.

⁵⁷ *Faxon*, No. 09-cr-14030, ECF No. 34-6 at 2–3 (statement of mother of two girls who were four and five when they were photographed for ostensibly non-pornographic purposes but whose images have been morphed into pornographic images and are highly traded). One of these victims was contacted through a social networking website by a collector of her images. *Id.* at 8.

⁵⁸ *Id.*

⁵⁹ *Palmer*, *supra* note 32, at 70–72.

⁶⁰ One mother stated that "I have learned that these images of our sons on the Internet will never go away As their mother, this situation has caused me to fear for [my sons'] emotional health and their abilities to trust adults." She continued "[t]his is an open-ended and ongoing problem for my husband and me." *Faxon*, No. 09-cr-14030, ECF No. 34-1 (mother of victim).

⁶¹ *Faxon*, No. 09-cr-14030, ECF No. 34-13 (mother of victim).

⁶² *Faxon*, No. 09-cr-14030, ECF No. 34-5 at 3 (mother of victim).

⁶³ 42 U.S.C. § 10607.

that victims of federal crimes are to be kept informed during the investigation and about victims' services,⁶⁵ while the CVRA provides that victims of the charged offense are afforded certain enforceable rights during the federal prosecution.

The CVRA provides a victim with the rights: to reasonable notice of public court proceedings; to be reasonably heard at public proceedings involving release, plea, sentencing, or any parole; to full and timely restitution; to confer with the attorney for the government; to proceedings free from unreasonable delay; and to be treated with fairness and respect for their dignity.⁶⁶ Notification is considered by some victims' rights advocates to be a "gateway right" because "if a victim is unaware of his or her rights or proceedings in which those rights are implicated, the victim cannot participate in the system."⁶⁷

During the investigation and prosecution of child pornography offenses, child pornography victims face unique challenges. While most federal crime victims are victims in only one or a limited number of federal cases, child pornography victims can be victims in hundreds or thousands of cases each year. The potentially large number of prosecutions makes the provision of VRRRA services and the enforcement of CVRA rights a logistical challenge for victims and prosecutors,⁶⁸ particularly concerning the rights to notification and restitution.⁶⁹

1. *Victim Notification and the Right to be Heard*

When a child pornography victim is initially identified, the victim may elect to be notified if his or her image is possessed future cases. For minor victims, a non-offending parent or guardian will make decisions about victim notification until the victim reaches the age of majority. The victim, or victim's proxy, fills out a form indicating whether the victim wishes to be notified if his or her image appears in a future case.⁷⁰ When a victim "opts-in" to being notified, he or she is entered into the DOJ's Victim Notification System ("VNS"). The VNS is

⁶⁴ 18 U.S.C. § 3771. In the case of minor or incapacitated victims, a representative may enforce the victim's rights. 18 U.S.C. § 3771(e).

⁶⁵ Services include identification, access to mental health services, reasonable protection from the offender, and notification of ongoing case events. 42 U.S.C. § 10607.

⁶⁶ 18 U.S.C. § 3771(a).

⁶⁷ See NAT'L CRIME VICTIM L. INSTIT., *Featured Right: Notice*, http://law.lclark.edu/centers/national_crime_victim_law_institute/news/story/?id=9896 ("right to notice is at the heart of victims' participatory status") (last visited Nov. 30, 2012).

⁶⁸ Department of Justice policy recognizes the challenges of working with child pornography victims and determining victim status. It notes that "[c]hildren who are depicted in child pornography . . . are presumed to have been directly and proximately harmed as a result of those crimes for purposes of determining whether they are a victim under the VRRRA or CVRA." Attorney General Guidelines for Victim and Witness Assistance, 2011 Edition, at (Rev. May 2012) (available at http://www.justice.gov/olp/pdf/ag_guidelines2012.pdf)

⁶⁹ The FBI manages a program which works to ensure that child pornography victims know their rights throughout federal criminal proceedings. See FBI, CHILD PORNOGRAPHY VICTIM ASSISTANCE ("CPVA"): A REFERENCE FOR VICTIMS AND PARENT/GUARDIAN OF VICTIMS. http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf.

⁷⁰ See CPVA: A Reference for Victims and Parent/Guardian of Victims. http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf.

an electronic system of providing automatic notice and outcome information of court events to crime victims in order to comply with the CVRA.⁷¹ Victims may update their VNS notification status at any time and choose to withdraw a request to be notified.

For child pornography victims who have opted into notification, it is not unusual to receive multiple court notifications each week informing them that their images have been recovered from child pornography offenders.⁷² One victim stated, “I can’t tell you how many letters from the courts have come to me and how helpless they make me feel.”⁷³ A parent who opted to receive notification as the minor victim’s representative has described receiving enough “notices to overflow a 55 gallon drum.”⁷⁴ Thus, even as the victims’ rights laws have empowered victims and enabled them to be involved in the criminal justice process,⁷⁵ the notification process itself can have the unintended and incidental effect of exacerbating the harms associated with the ongoing distribution of the images.

As mentioned briefly above, an additional issue regarding notification has to do with the age of the victims. While victims may be minors during initial prosecution, many continue to be victims in new cases into adulthood. The CVRA permits a representative to assert a minor victim’s rights, but on reaching the age of 18, the victim is entitled to exercise his or her CVRA rights. Therefore, guardians must evaluate when the victim should be told that images of their sexual abuse are in circulation or the frequency of the circulation in a manner intended to minimize distress.⁷⁶ Guardians are faced with a quandary as to whether they should reveal the ongoing distribution early or wait until a child is closer to adulthood. This decision is more difficult if the victim does not recall the initial abuse.⁷⁷

Victims may also choose to be heard at sentencing in accordance with the CVRA.⁷⁸ In order to address the logistical challenge of affording a single victim the right to be heard at hundreds or thousands of sentencings each year, and the desire of most victims to retain as much

⁷¹ For additional information on the VNS see Criminal Division’s Victim Notification Program, <http://www.justice.gov/criminal/vns/>. See also FBI, CPVA NOTIFICATION PREFERENCE FORM, http://www.fbi.gov/stats-services/victim_assistance/notification-preference.

⁷² See, e.g., *Faxon*, No. 09-cr-14030, ECF No. 34-3 (“I can’t tell you how many letters from the courts have come to me and how helpless they make me feel”) (handwritten victim impact statement, no additional information provided). As one parent described, “I have been informed on a monthly basis of accounts where someone is being charged for having possession of her images that are on the internet. These images will never be erased.” *Faxon*, No. 09-cr-14030, ECF No. 34-10 at 2.

⁷³ *Id.* ECF No. 34-3 (victim impact statement of victim, no additional information provided).

⁷⁴ *Faxon*, No. 09-cr-14030, ECF No. 34-15 at 1 (stepfather of victim).

⁷⁵ See, e.g., *Faxon*, No. 09-cr-14030, ECF No. 34-13 (“I can choose to stop receiving the notifications, but I don’t. If my words can keep a pedophile off the streets to protect our young innocent children then that is what I need to do.”)

⁷⁶ The FBI has developed a protocol to notify victims of child pornography who are turning 18 and whose parents will no longer serve as representative victims and to notify adults who may not be aware that their image is in circulation. See <http://www.fbi.gov/hq/cid/victimassist/cpva>.

⁷⁷ See http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf.

⁷⁸ 18 U.S.C. § 3771(a)(4).

privacy as possible, the DOJ has developed a unique way to ensure that child pornography victims are able to contribute victim impact statements (VIS) to be considered by the sentencing court. Regardless of whether a child pornography victim has opted to be notified, he or she may submit a VIS and sign a release permitting the DOJ to attach the same VIS in each case where the victim's image has been possessed. Similar to opting into and out of notification, a victim may update or withdraw the VIS at any time.

2. *Restitution to Victims*

Enforcement of the restitution provision of the CVRA is complicated by the fact that child pornography victims' images are usually possessed, received, or distributed by individuals who have no other connection to the victim. Section 2259 of Title 18, United States Code, provides for mandatory and complete restitution for any victim harmed as a result of a commission of a child pornography crime or other child sex crime.⁷⁹ Section 2259 does not distinguish between production, distribution, receipt, or possession of child pornography with respect to victim status. If the offender committed one of those crimes and the victim was harmed by the commission of that crime, restitution is mandatory.

Victims have sought and received restitution from child pornography production offenders for some time.⁸⁰ A small number of child pornography victims have started seeking to enforce this statutory right to restitution against child pornography possession, receipt, and distribution offenders who may have no other connection to the victim.⁸¹ Courts have struggled with calculating restitution for this victim population and have reached different outcomes. While courts uniformly find that the child pornography victims are victims of the offenses and have suffered harm, many district courts refuse to order restitution because they find that the defendant's crime is either not the proximate cause of the victim's injury or that it is impossible to apportion an amount of restitution to an individual defendant.⁸² By contrast, other district courts that have granted restitution have agreed that apportioning restitution is a challenge but have concluded that it is clear that child pornography victims are "harmed as a result of the commission of a crime"⁸³ and, thus, are entitled to an appropriate restitution award.⁸⁴

⁷⁹ 18 U.S.C. § 2259(c).

⁸⁰ *See, e.g.*, *United States v. Laney*, 189 F.3d 954, 967 (9th Cir. 1999) (child pornography conspiracy participant liable for restitution to child victim of coconspirator).

⁸¹ *United States v. Faxon*, No. 09-14030-CR, 2010 WL 430760, at *12 (S.D. Fla. Feb. 5, 2010) (noting that the "difficulty" of finding that "restitution is due from this particular Defendant relates to causation").

⁸² *See, e.g.*, *United States v. Woods*, 689 F. Supp. 2d 1102, 1113 (N.D. Iowa 2010) (government failed to demonstrate the losses that the victim suffered as a result of defendant's child pornography receipt offense); *United States v. Rowe*, No. 09cr80, 2010 WL 3522257, at *5 (W.D. N.C. Sep. 7, 2010) (government failed to establish "the amount of losses proximately caused by the Defendant's conduct with any reasonable certainty"); *United States v. Church*, 701 F. Supp. 2d 814, 816 (W.D. Va. 2010) (finding that government failed to prove "'victim's losses'... proximately caused by the Defendant's offense of conviction," but awarding nominal restitution in the amount of \$100) (citation omitted).

⁸³ 18 U.S.C. § 2259.

⁸⁴ *See, e.g.*, *Order of Restitution, United States v. Baroun*, No. CR-09-64 (D. Mont. Mar. 25, 2010), ECF No. 61 at 9. ("[i]t is certainly difficult, if not impossible, to determine the exact degree of victimization [], however . . . every

This uncertainty has now extended to the appellate level, where a split in the circuits has developed as to the availability of restitution for child pornography victims in possession, receipt, and distribution cases. The United States Courts of Appeals for the Seventh Circuit, Second Circuit, Ninth Circuit, D.C. Circuit, and Eleventh Circuit have held that child pornography victims are entitled only to losses that were proximately caused by the individual offender who committed a non-production offense.⁸⁵ By contrast, the en banc Fifth Circuit recently held that victims are entitled to restitution for a variety of losses without a showing of proximate cause, including for medical and mental services, transportation, lost income, and attorneys' fees from those who offenders who possessed, received, or distributed child pornography depicting the victims.⁸⁶

D. CONCLUSION

- Like other child sex abuse victims, child pornography victims suffer physical and emotional harms during the production of child pornography images. Child pornography victims appear even less likely than other child sex abuse victims to report the abuse because of the existence of the images.
- Most identified victims of child pornography production offenses are abused by a family member or acquaintance. NCMEC reports that 24 percent of identified victims were pubescent, and 76 percent were prepubescent. Ten percent of the prepubescent identified victims were infants or toddlers.
- The ongoing nature of child pornography offenses causes a significant and separate harm to the victims depicted in the images. Some of these victims live their lives wondering who has seen images of their sexual abuse and suffer by knowing that their images are being used for sexual gratification and potentially to lure new victims into sexual abuse.
- Child pornography victims, like all federal crime victims, are entitled to certain services under the Victims Rights and Restitution Act and have rights under the Crime Victims Rights Act.
- Victims may choose to be notified when their image is found in a child pornography offender's collection. Because a victim's image may be possessed in hundreds or thousands of cases, some victims report that the notification itself has exacerbated the harm. Nevertheless, without notification, victims may be unable to enforce other rights.

person who possesses these images causes a real and cognizable harm to the victim.); *United States v. Laursen*, No. 08-00263, 2010 WL 3834322, at *1 (W.D. Mo. Sept. 27, 2010) (using estimated apportionment “analogous to the rough justice allowed in class action” to award \$3,000 to victim in child pornography possession case).

⁸⁵ *United States v. Laraneta*, 700 F.3d 983 (7th Cir. 2012), *United States v. Aumais*, 656 F.3d 147 (2d Cir. 2011); *United States v. Kennedy*, 643 F.3d 1251 (9th Cir. 2011); *United States v. Monzel*, 641 F.3d 528 (D.C. Cir. 2011); *United States v. McDaniel*, 631 F.3d 1204 (11th Cir. 2011).

⁸⁶ *In re Amy Unknown*, 701 F.3d 749 (5th Cir. 2012) (en banc).

- Many victims are minors when identified but will continue to be victims in new cases after they reach adulthood. The CVRA permits a representative to assert a minor victim's rights but, on reaching the age of 18, the victim is entitled to exercise his or her CVRA rights.
- The nature of child pornography offenses creates particular challenges for application of victims' rights. Enforcement of the CVRA, in particular the right to restitution, is complicated by the fact that child pornography victims' images are usually possessed or distributed by individuals who have no other connection to the victim. The lower federal courts have grappled with legal issues related to restitution in non-production cases.

