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Child Pornography and Community Notification: How an Attempt to Reduce Crime Can Achieve the Opposite



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I. Introduction

Convicted sex offenders in the United States are subject to a wide variety of requirements upon their conviction or release, including registration with local authorities, community notification, and residency and employment restrictions, among others. Ostensibly, these sex offender post-release laws are intended not to punish, but to regulate or control the behavior of previously convicted sex offenders in hopes of reducing recidivism.¹ Designing post-release laws, of course, requires making assumptions about sex offenders and the genesis of their criminal behavior.² Yet lawmakers often apply these laws across the board in a knee-jerk way to anyone convicted of *any crime* that happens to be termed a “sex offense,” with little regard to whether the assumptions underlying post-release laws are equally well suited to the nature of each and every triggering offense and covered offender.³

Many commentators and researchers have criticized the general application of post-release laws to all *sex offenders* as draconian, costly, anti-rehabilitative, and ultimately unlikely to reduce the frequency of sex offenses.⁴ Recent work even raises the possibility that post-release laws may increase sex offender recidivism by making life outside of prison so unpleasant that the threat of returning an offender to prison no longer provides much of a deterrent.⁵ Unfortunately, additional unintended and unfavorable consequences may develop when the premises of a post-release law are sharply at odds with the reality of how offenders commit one or more of the sex offenses covered by the law. Under certain conditions, in fact, applying a post-release law to the wrong kinds of sex offenders may not only increase their likelihood of reoffending but also induce other potential offenders to engage in the targeted criminal activity.

Just such a mismatch occurs in the application of community notification laws to individuals convicted of possessing and distributing child pornography. The misalignment of notification laws and the possession and distribution of child pornography runs alongside the related controversies raging over the nature of child pornography crimes, the threat or threats posed by child pornography offenders, and the extent to which child por-

nography offenders ought to be punished.⁶ The U.S. Sentencing Commission and the courts struggle with how to sentence possessors and distributors of child pornography because there is disagreement over the harm these individuals may cause to potential victims in the future.⁷ But all should agree that if community notification requirements actually facilitate the possession, distribution, and even production of child pornography, the decision to impose these requirements should be reconsidered. Furthermore, if community notification laws may actually enable the commission of crime, judges should be wary of relying on their application to offenders as a *substitute* for incarceration.

II. The Power of the Phrase *Sex Offense*

Under state and federal law, *all* child pornography crimes qualify as sex offenses, meaning that anyone convicted of possessing, distributing, or producing child pornography is legally designated a *sex offender* and must comply with a range of sex offender post-release laws.⁸ Community notification laws, arguably the most important of these post-release regulations, require that states and the federal government make a covered sex offender’s identity and criminal history easily available to the public,⁹ often via the well-known and controversial Web registries that now exist in every state and at the federal level.¹⁰ Consequently, once released from incarceration, child pornography offenders become *publicly known* criminals.

Are child pornography offenses appropriately characterized as sex offenses? Despite its incredible social, cultural, and political power, the phrase *sex offense* lacks any precise (or even meaningful) definition. Ask someone to describe a sex offense and you are likely to receive at best a list of qualifying crimes (e.g., forcible rape, child molestation, indecent exposure, peeping into a dwelling, etc.) rather than a list of required properties or a “precise statement of the essential nature of a thing.”¹¹ Accordingly, the term *sex offense* may be more profitably interpreted as a label or as a category grouping crimes together, presumably for similar treatment or for some other functional purpose.

To be sure, the array of crimes designated *sex offenses* do appear to be related to each other: The public generally

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views those who commit these crimes as especially (and viscerally) repugnant.¹² Sex offenders are sometimes considered evil and oftentimes considered dangerous, but they are uniformly perceived as “creepy,” “weird,” and “gross,” unknowable and unpredictable.¹³ Law-abiding citizens may be able to relate to a thief’s rationale for stealing and may find many types of violence at least understandable, if still inexcusable. Sex offenses, however, are often a world apart. Consequently, a legislature might label a crime a *sex offense* to make plain the public’s inability to comprehend the reasons for, or the preferences underlying, an offender’s actions, as well as to ratify the public’s deep fear and revulsion.¹⁴

The various crimes described as sex offenses therefore do share important attributes that seem legally relevant in justice systems that take into account “the nature and circumstances of the offense and the history and characteristics of the defendant.”¹⁵ However, once a collection of crimes are gathered together for one purpose or because they share certain qualities, they may remain perpetually fused for *every* purpose.¹⁶ Lawmakers, judges, and the general public may regard the varied crimes described as sex offenses as not simply possessing one or two important similarities, but as having parallel elements and harms and as involving the same set of offenders.¹⁷ For example, many people simply assume that individuals who possess child pornography are also highly likely to be child sex abusers. Yet, as one commentator has noted, individuals who watch violent movies are not similarly presumed by the average person to be violent aggressors.¹⁸

One feature of this general grouping phenomenon is that society comes to view all sex offenses and sex offenders through the lens of one or two orthodox or archetypal crimes that serve as *reference* offenses.¹⁹ For sex offenses, forcible rape and child molestation by a stranger, not surprisingly, have come to play this role because they are salient, culturally recognizable, and especially alarming.²⁰ Once all crimes in the *sex offense* category were transformed into the crimes of violent rapists and child molesters, at least in the minds of the public and lawmakers,²¹ it should come as no surprise that legislatures began to target *all* sex offenses with one-size-fits-all policies. The significant increase in the severity of child pornography sanctions over the last thirty years (as child pornography possessors and distributors became synonymous with rapists and child molesters) appears to fit this model.

Under normal circumstances, generic or blanket rules are likely to be both over-inclusive and under-inclusive, and therefore frequently wasteful, unfair, and ineffective. But, as the remainder of this article will make clear, the generic application of community notification laws to individuals convicted of possessing or distributing child pornography creates a significant additional risk of both facilitating recidivism and increasing the frequency of child pornography offenses even among those not subject

to notification, including the incidence of abuse associated with the production of child pornography.

III. The Theory Behind Community Notification Laws

Community notification seeks to reduce sex offender recidivism by empowering and deputizing the public, giving citizens tools to prevent crime in some cases and to speed capture in others. These tools are pieces of information (e.g., offenders’ names, addresses, identifying information, and criminal histories), seemingly inexpensive and innocuous by nature and made more powerful and easier to use by their availability on the Internet and the addition of search algorithms keyed to the questions potential victims are most likely to ask (e.g., “Do any sex offenders live near me?”). In theory, individuals at risk of being victimized will protect *themselves* from potential threats. Once informed that a sex offender lives nearby, for example, neighbors can avoid getting too close at the wrong time, can alter their lifestyles to reduce their chances of becoming victims, and can help others, too, by keeping eyes out for strange behavior or unsafe circumstances or conditions that might lead to an attack.

Lawmakers build their case for community notification laws on a very specific understanding of who sex offenders are and what will drive their future behavior. Sex offenders are taken to be impulsive predators who attack victims in their vicinity when the opportunity arises.²² These individuals are rarely seen as motivated by financial need or greed. They do not commit crimes for money. Instead, they are driven by illicit, deep-seated (even innate) preferences or passions.²³ Lawmakers even assume that, at least for some of these sex offenders, no threatened sanction will suffice to deter their future crimes.²⁴

The drafters of community notification laws were also clearly preoccupied with a particular type of violent or forcible sex offense. These are crimes against individual victims—victims who are strangers, but who potential offenders know can be found at the mall, in a parking lot, down the street, or at a park.²⁵ Lawmakers implicitly assume that sex offenders require no map to find these victims. No clutch of tools or band of accomplices, no instruction or study, just a predatory instinct, is needed to carry out these crimes. Finally, because these offenses require no preparation or contact with others, the “who,” “when,” and “where” of any incident are nearly impossible to predict and, therefore, seemingly random.

When sex offender recidivism consists of crimes that are violent, impulsive, and unpredictable, a policy that alerts possible victims to steer clear of released offenders and that asks the public to monitor these potential recidivists seems sensible. In fact, community notification laws are often named after victims of just these sorts of crimes. Megan Kanka,²⁶ for example, may have been spared had her parents known of her attacker’s criminal history of sexual violence. But does it make sense to apply community notification laws to individuals convicted not of rape and murder, but of possessing or distributing child

pornography? Even if in the child pornography context the critical assumptions of such laws do not hold? “It can’t hurt” may be the first reaction to these questions. Unfortunately, under certain conditions, publicizing the identities of child pornography offenders may do more harm than good.²⁷

IV. Typical Child Pornography Offenders Differ from Archetypal Sex Criminals

Community notification laws may lead to higher rates of recidivism among individuals convicted of child pornography offenses and may also grow the market for child pornography—expanding the total quantity being produced, distributed, and possessed. To see why there ought to be concern, consider these questions and note how different they are from the sorts of questions that might be asked about archetypal sex offenses (and how much closer they are to questions that might be asked about drug offenses): How does someone interested in producing and distributing child pornography find a buyer? How do potential buyers find distributors without triggering alarms? How do child pornography rings form? How does someone who is curious about child pornography find out more? Whom does one ask, whom can one trust? Are there ways to avoid detection when committing child pornography offenses? How does one learn these tricks of the trade? How is it possible that a multibillion-dollar Internet industry has emerged among individuals who are committing serious crimes and yet are, essentially, unknown to each other and therefore untrustworthy?

Most child pornography offenses depend crucially on the existence of a relatively well-functioning marketplace for selling, purchasing, and trading child pornography.²⁸ Absent that market, the child pornography problem looks very different. The vast bulk of child pornography offenses cannot occur without an offender’s involvement with another person (e.g., a producer or distributor) in some way, and so either trust or leverage of some sort is essential to an individual’s ability or willingness to commit an offense.²⁹ As in any setting involving other people and rapidly changing technology, successfully producing, distributing, or receiving child pornography (and evading arrest) is easier the more one knows about the market, its participants, and the constraints the law prescribes.³⁰ Child pornography offenders are more likely to avoid detection the more they understand about the child pornography industry and enforcement tactics.³¹

The key question, therefore, is whether *publicly identifying* child pornography distributors and possessors is likely to interfere with or facilitate the functioning of the child pornography market. With the exception of producers, who often commit other sex offenses,³² the mismatch analysis in the parts above suggests that there may be significant negative consequences on balance from publicly identifying child pornography offenders.

Consider the three principal types of child pornography offenses—possession, distribution, and production—and

the types of offenders who commit these offenses and the harms (or hypothesized harms) that each offense creates. Under federal law, possession, distribution, and production are distinct offenses, but in practice they are intimately connected in many important ways. Some individuals might produce and consume their own pornography,³³ having developed their interest and criminal human capital in child pornography absent any significant external aid or influence. But many of each type of offender need or at least benefit from the existence of other child pornography offenders of all types, and would commit less crime were they cut off entirely from these individuals.

Many of the harms that emanate from possession (or, really, from consumption and the risk of future consumption of caches of pictures or films) ultimately derive from the fact that producers produce and distributors distribute. Without these earlier links in the chain, much less possession and much less consumption would occur. Only would-be possessors willing and able to become their own producers would remain in a position to consume.

This observation is certainly not new. In fact, the hope of eliminating producers and distributors is at least one of the reasons why the production and distribution of child pornography are punished more severely than possession.³⁴ By making the production and distribution of child pornography more costly in terms of expected criminal sanctions, lawmakers supposedly can reduce the interest in and therefore the volume of production and distribution.³⁵ But if reducing interest in producing and distributing is the goal, law can do even more by reducing the financial profitability (and by increasing the likelihood of detection) of producing and distributing child pornography. If not carefully designed and executed, law might also unwittingly do the opposite, expanding the market by making the production and distribution of child pornography more profitable and less risky than it would otherwise be.

Now imagine that the vast majority of consumers who are willing to pay for child pornography could be eliminated. Or, alternatively, imagine either that many of these consumers could be rendered risky prospects in that they might be naïve criminals who are likely to attract attention, or that these consumers could be transformed into only *potential* consumers who need to be convinced to enter or reenter the market for child pornography. The elimination of consumers would eradicate most child pornography, zeroing out the harms caused by possession and distribution. Production might still occur, but there would be much less of it—not because expected criminal sanctions had increased, but because production would yield many fewer benefits. Furthermore, any remaining production would be hard to distinguish from traditional sex offenses unrelated to the creation of pictures or films, including child sex abuse involving contact and often violence.

This argument is not new, either. Scaring away the customers is one of the reasons society criminalizes possession and sentences possessors severely.³⁶ Many doubt

that consuming child pornography can *cause* someone to attack a child.³⁷ Others are skeptical of the idea that each viewing of a piece of child pornography constitutes a significant new harm to the children involved.³⁸ Yet few dispute the claims that producing child pornography involves child sex abuse and that one (perhaps costly) strategy to reduce abuse is to increase the penalties and stiffen the enforcement of laws criminalizing the *possession* of child pornography.

But is raising the expected criminal sanction the only way to reduce demand for child pornography? If law is able to isolate child pornography producers, distributors, and consumers from each other, for example, it might raise the transactions costs of trading or selling pornography by making it difficult for child pornography offenders to find each other.³⁹ Alternatively, if law can create uncertainty as to the identity, reliability, and experience of individuals seeking entry or greater involvement in the child pornography market, the greater likelihood of detection that results, even if slight, might make the effort no longer worth the candle.⁴⁰

The law currently tackles all child pornography crimes by raising the expected level of criminal sanctions—and, therefore, the costs—of criminal behavior. The law accomplishes this less by increasing the probability of detection,⁴¹ and more by increasing the penalty for someone who is caught and convicted. But, as the previous discussion shows, the calculus of the child pornography offender is more complicated,⁴² closely approximating, in many ways, the calculus of individuals involved in the illegal drug trade. A decision to engage in criminal behavior turns on (1) the benefits of committing the crime, (2) the costs (in time, effort, and money) of committing the crime, (3) the probability of being detected or caught, and (4) the criminal sanctions facing an individual who is caught. The law currently focuses on (3) and (4) in seeking to make child pornography crimes unattractive, but it would be unwise to ignore the possibly unintended effects that sex offender policies may have on (1) and (2).⁴³

V. Attacking Child Pornography by Keeping Some Offenders Anonymous

Markets, even illegal markets, need information to function well, and the purpose of community notification laws is to provide information. All individuals convicted of child pornography offenses will, upon release, have their identifying information, addresses, and the nature of their offenses made public. If potential possessors, distributors, and producers do indeed weigh the net benefits of their participation in the child pornography market, the same rubric can be used to consider the likely effects of notification laws on recidivism and the total size of the child pornography market (i.e., the frequency of all child pornography crimes).

First, consider possession offenses, the most controversial of the child pornography crimes. Take an individual with no criminal record who is interested in

learning more about child pornography.⁴⁴ He would like to explore it on the Internet, but he is uncertain about how to avoid detection and knows too little about child pornography, including whether he would enjoy it—or enjoy it enough—to make it worthwhile to proceed. (Compare the very similar situation of a person interested in trying an illegal drug.) In effect, the transactions costs of figuring out how to enter the child pornography market are simply too high. In one sense, costs are high because child pornography is illegal and immoral, so active and obvious hunting for child pornography or asking friends for advice may be viewed as too risky and too costly in time and effort. But, in another sense, costs are high because there is no easy *alternative* source of information, unless the interested individual happens to know someone involved in child pornography.

The application of notification laws to child pornography offenders can help fill these information gaps for this imagined potential consumer in a few ways. First, bizarrely, Web registries may essentially provide a contact list for individuals who wish to learn more about child pornography. Second, and more worryingly, a Web registry offers a shortlist of individuals potentially willing and able to supply child pornography directly and perhaps in person, a concern that may become more important if law enforcement succeeds in its attempts to render the Internet hostile to child pornography transactions. Counterintuitively, therefore, subjecting child pornography offenders to community notification requirements may *enable* rather than obstruct the growth and development of the illegal child pornography market.

An implicit but crucial assumption underlying any notification strategy is that members of the public will not use a Web registry to contact and conspire with individuals who have a verifiable (indeed, verified) history of engaging in a particular type of crime. In the cases of low-risk possessors and distributors of child pornography (as opposed to those individual possessors or distributors who appear more likely to commit child molestation and producers who, as a class, seem much more likely to take part in child sex abuse again), the benefits of enhancing the public's ability to avoid and monitor these individuals (from afar) may pale in comparison to the increase, say, in child sex abuse that results from the conspiracy-driven growth in demand for child pornography as people use the registry to network.

Notification laws may also increase the likelihood that *convicted* possessors and distributors return to their old ways of consuming, trading, buying, and selling child pornography. Abstracting away from other complaints about community notification's likely effects on recidivism,⁴⁵ picture the thought process of a recently convicted child pornography consumer who wants to consume again. Caught once, he is likely to hesitate, unless he can become a better criminal by being more careful (otherwise, the cost of returning to child pornography possession might be too high). If he needs advice, unfortunately, the expertise of a

community of released child pornography offenders—bound together forever by their shared sex offender label—awaits him on the nearest Web registry. Simply their stories of how they were caught would be useful to someone looking to reoffend.⁴⁶ But, should he desire their advice or assistance, his conviction and its verifiability may well earn their trust.⁴⁷

Second, consider distribution and production offenses. If producers or distributors are to make a financial profit or otherwise benefit from selling or trading child pornography, customers and trading partners are necessary. The greater the total demand for child pornography, the larger the potential profits or benefits for producers and distributors, and the more likely that individuals considering taking on these roles will enter the market by photographing or filming child sex abuse or by building another distribution node that adds value or reduces costs, leading to more total consumption.⁴⁸

The scale of the child pornography market is clearly enormous.⁴⁹ How producers (or distributors) establish themselves and gain the trust of other participants in this illegal market is, strangely, much less clear.⁵⁰ Nor is it clear what role, if any, community notification plays in that process. For reasons already discussed, public lists that identify those individuals previously convicted of child pornography offenses may be useful to someone producing or distributing child pornography: the individuals listed are potential partners (i.e., co-conspirators) who can provide advice and access to existing networks. But notification regimes that make public the identities of convicted child pornography possessors may also provide lists of potential customers, the use of which may reduce the per-person cost of advertising and recruiting, thereby increasing the profitability of the enterprise by expanding the customer base.

* * *

There are many potential objections to the contention that applying community notification requirements to child pornography possessors and distributors may *increase* rather than reduce the total harm flowing from child pornography. One important response is that individuals who possess (and so also those who distribute and produce) child pornography are either more likely to commit a child sex crime involving physical contact as a result of consuming child pornography or are already engaging in such crime undetected.⁵¹ Notification succeeds, the argument runs, because it encourages at-risk children to steer clear of (and their parents to monitor) these individuals.

But even if the claims supporting this objection are true, a big if,⁵² and even if notification is actually helpful at reducing recidivism in this context, another big if,⁵³ an empirical question still remains about the net benefits of community notification. For notification to make sense, the reductions, if any, in child sex crime that result from neighbors avoiding and monitoring child pornography

offenders would need to more than offset the effects of a possibly larger and more robust child pornography market, including the increase in child sex abuse that may occur to satisfy any additional demand.⁵⁴

A more direct challenge to this article's thesis would target the practical likelihood that community notification does or can, in fact, facilitate child pornography networks. Is there any evidence that people do or might use Web registries in ways that cause harm? Admittedly, attempts to locate evidence of any specific, verifiable instance in which child pornography offenders clearly used or benefited (in a direct or indirect way) from the identifying information contained in America's ubiquitous sex offender Web registries have so far proven fruitless. Nevertheless, circumstantial evidence demonstrates that lawmakers ought to be skeptical of the simple inferences that result from their equating child pornography possessors and distributors with archetypal sex offenders.

Community notification laws do more than simply reveal an individual's criminal history to potential victims (or even potential accomplices or co-conspirators): They create groups. "[G]roups cultivate a special social identity . . . [that] often encourages risky behavior, leads individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against nonmembers."⁵⁵ Child pornography offenders will typically have many interests and experiences in common, but their shared public identity may cause these offenders to trust one another more than they otherwise might. Many relational models of trust support this prediction, but two seem particularly important: "category-based trust," which forms on the basis of a person's "membership in a social or organizational category," and "role-based trust," which grows out of a group's "common knowledge regarding the barriers to entry" faced by someone in a particular role.⁵⁶ Were child pornography offenders to vary widely in their backgrounds, even arbitrary social divisions (such as *sex offender* status) would still create fierce intra-group loyalty, with group members more likely to believe and agree with other group members than nongroup members, and to listen to them for longer periods of time.⁵⁷ Furthermore, if child pornography offenders are able to interact with each other, they will be able to build additional trust through small acts of cooperation,⁵⁸ perhaps in the form of giving advice and support unrelated to child pornography.

Child pornography offenders do indeed interact when they discover each other in the world.⁵⁹ Individuals who commit child pornography crimes connect with others in public and private peer-to-peer networks to trade images.⁶⁰ They e-mail each other and chat with one another,⁶¹ announcing previous offenses as proof of trustworthiness.⁶² Experts in abuse prevention worry about the fact that the Internet, an "enabling tool," allows child pornography enthusiasts to "find like-minded individuals," "validat[ing] their ideas and thoughts."⁶³ Many offenders are convinced to experiment with child pornography

through advertisements or invitations they receive by e-mail,⁶⁴ and pornography marketing in general is “aggressive.”⁶⁵ Moreover, in-person interactions are not uncommon.⁶⁶ Offenders are often introduced to child pornography by more seasoned offenders,⁶⁷ and many derive satisfaction (sometimes sexual) from these conversations.⁶⁸

The public identification of child pornography offenders is likely to exacerbate the extent and consequences of these interactions, especially going forward. As technology evolves to allow better law enforcement monitoring of the Internet, potential offenders will presumably find it increasingly difficult to establish, expand, or locate child pornography networks without some means of identifying individuals with similar inclinations or experiences. Web registry data may provide the key, because offender listings “expressly indicate, or can be used to help establish, an individual’s proclivities—including sexual interest in children.”⁶⁹ Furthermore, when individuals do make contact, forming or expanding a child pornography conspiracy will be more likely to occur when one or more offenders can supply high-quality credentials,⁷⁰ such as a public child pornography record—one that includes pictures of the offender, his home address, and other details that can be verified.⁷¹ Moreover, advertisements or invitations targeted at individuals known to have been involved with child pornography in the past are more likely to be effective in terms of their yield and their safety relative to e-mail spam, a tactic sure to rouse law enforcement attention. Face-to-face interactions—and sharing of child pornography—may become more common in the future: as the detection of offenses becomes easier on the Internet, public lists of potential child pornography sources, customers, and partners will allow offenders to move off the grid and yet remain connected outside of an anonymous internet chat room to others who share their criminal ambitions.

Notification laws may also lead to smarter, more successful criminals. Child pornography offenders vary in their sophistication, but experienced offenders do counsel the inexperienced, suggesting that veterans are willing to supply guidance to interested newcomers.⁷² Although concern about criminals learning from each other is nothing new, recent empirical work hints that notification laws may enable child pornography offenders to form networks and exchange information more easily. Patrick Bayer, Randi Hjalmarsson, and David Pozen have found that offenders are more likely to recidivate when they are imprisoned with offenders convicted of similar offenses.⁷³ Of greater significance, they have shown that these peer effects are even stronger in nonresidential facilities for crimes “largely dependent on access to networks,” because “nonresidential facilities may inadvertently increase the formation and expansion of criminal networks by bringing together young offenders from surrounding neighborhoods.”⁷⁴ The successful commission of child pornography offenses depends undeniably on access to networks, and, in many ways, publicly listed sex offenders—still connected to other offenders through shared social status and the

weighty post-release restrictions they experience—have much in common with offenders who find it easier to identify and collaborate with other criminals when sentenced to a nonresidential facility.

VI. Conclusion and Next Steps

The use of community notification laws to address child pornography offenses flies in the face of conventional wisdom. When criminal activity involves markets and requires networks and co-conspirators, traditional strategy suggests *isolating* potential offenders from each other. By altering the legal and economic environment in ways that make communication more difficult and that reduce trust and sow discord, the law can raise the costs of group criminality.⁷⁵ Community notification laws appear to do the opposite. Lawmakers, blinded by a particular vision of sex offenses and sex offenders, may have forgotten that unlike in the rape or child molestation contexts, attacking child pornography and its associated abuses requires that child pornography possessors, distributors, and producers *not* be able to communicate and conspire.

Yet conspiracy among sex offenders has always been enough of a concern that a number of states have passed laws that prohibit offenders from living together,⁷⁶ despite simultaneously implementing community notification laws that unwittingly provide them the information necessary to find one another. In the child pornography context, the threat of complicity has led the International Centre for Missing & Exploited Children to recommend that governments make criminal the “[o]ffering [of] information on where to find child pornography [or] advice or taking actions necessary to facilitate” child pornography offenses.⁷⁷ Even the Justice Department prompts law enforcement officials investigating child pornography offenses to ask, “Do the offenders network with other offenders?”⁷⁸ Given that “[child pornography] entrepreneurs often rake in more money trafficking images than they could running drugs or guns,”⁷⁹ every policy targeting child pornography offenders should begin with the understanding that disrupting their networks is essential to stopping these crimes.

At the very least, lawmakers ought to reconsider their categorical approach to the application of post-release laws to all sex offenders, and judges ought to be wary of using notification as a substitute for longer sentences. That is not to say that judges ought to return to longer sentences. Instead, child pornography law and law enforcement strategies should focus on isolating released offenders from other potential offenders (and perhaps also from potential victims, but not from employers, family, and friends) both in real life and on the Internet. So long as the Internet remains the locus of these crimes, data retention requirements, hash value databases, filtering protocols, monitoring policies, Internet service provider liability, Internet stings, publicizing the existence of such stings, and even offering rewards for locating child pornography on the Internet all appear to be appealing options.⁸⁰

Notes

- * Thanks to Jelani Jefferson Exum and Corey Yung for helpful suggestions and to Nicholas Lee, Gene Magidenko and Aaron Markel for excellent research assistance. I am also grateful to Oliver Welch for useful conversations about related topics that helped solidify some of my ideas for this essay.
- 1 Smith v. Doe, 538 U.S. 84, 93–94 (2003).
 - 2 See, e.g., Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1453–58 (1999) (discussing the myths and realities of the nature of sex offenders and their victims).
 - 3 See Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1175–76 (1999) (describing “a compulsory approach, which requires that offenders satisfying statutory, offense-related criteria be subject to registration and notification”).
 - 4 See, e.g., Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 513–15 (2007) (citing “the proliferation of sex offender laws of questionable efficacy and constitutionality”).
 - 5 See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161 (2011) (concluding that sex offender notification laws may increase recidivism).
 - 6 See generally Melissa Hamilton, *The Child Pornography Crusade and Its Net Widening Effect*, 33 CARDOZO L. REV. (forthcoming 2012) [hereinafter Hamilton, *Crusade*]; Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL’Y REV. 545 (2011) [hereinafter Hamilton, *Efficacy*].
 - 7 See, e.g., United States v. Apodaca, 641 F.3d 1077, 1085-88 (9th Cir. 2011) (Fletcher, J., concurring) (“I write separately to state my view that the applicable statute . . . and Guidelines policy statement . . . grossly overestimate the risk that defendants like Apodaca, who are convicted only of possessing child pornography downloaded from the Internet, and who have no prior contact child sex abuse convictions, will commit contact sex offenses against children.”).
 - 8 Sex Offender Registration and Notification Act of 2006, 42 U.S.C. § 16911(5) (2006) (defining “sex offense” to include, *inter alia*, production, transportation, distribution, reproduction, advertisement, sale, and possession of child pornography); see also, e.g., MICH. COMP. LAWS § 28.722 (2010).
 - 9 See, e.g., G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMORY L.J. 1633, 1638 (1995) (“Rather than simply collecting information and making it available . . . community notification laws direct police to actively disseminate the information.”).
 - 10 FBI, *Sex Offender Registry Websites*, at <http://www.fbi.gov/scams-safety/registry> (last visited Oct. 11, 2011).
 - 11 OXFORD ENGLISH DICTIONARY ONLINE (2010), <http://oed.com> (last visited Oct. 14, 2011) (defining “definition”).
 - 12 See Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan’s Laws*, 42 HARV. J. ON LEGIS. 355, 389 (2005) (noting that “from the perspective of the sanctioning public, there exists a cross-cultural consensus about the shamefulfulness of sex crimes”); cf. Roxanne Lieb, Vernon Quinsey & Lucy Berliner, *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 43 (1998) (observing that the label of “sexual predator” separates particularly heinous sexual crimes from general sex offenses).
 - 13 See, e.g., Kathy Lane, Commentary, *A Vile Woman*, TAMPA TRIB. (Fla.), Aug. 8, 2004, at 3 (responding to a sex offender’s release from prison with “she is nothing more than a common, disgusting, sex offender”).
 - 14 Sex offenses now sometimes include serious crimes—such as kidnapping of a child by someone other than a parent—that are only tenuously related to traditional sex crimes. See, e.g., N.Y. CORRECT. LAW § 168-A (McKinney 2010). Perhaps once the phrase *sex offender* became as powerful as, or even more powerful than, such terms as *murderer*, legislatures responded by applying the sex offender label to borderline crimes to indicate their seriousness, even if the public still does not view conventional kidnapping as a sex crime.
 - 15 18 U.S.C.A. § 3553(a)(1) (2010).
 - 16 Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 455–56 (2010).
 - 17 See, e.g., *People v. Dash*, 104 P.3d 286 (Colo. App. 2004) (“[S]ex offenses are considered particularly heinous crimes . . . and the General Assembly has determined that sex offenders present a continuing danger to the public.”).
 - 18 TROY STABENOW, *DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES* 32–33 (2009).
 - 19 See Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317, 1321–22 (1998) (“These rationales [administrative inefficiency, public furor, and political haste] blur the moral and legal distinctions between those persons who rouse the greatest social fear—violent predators of children—and those persons who create minimal social concern (minor offenders or simply the sexually different).”).
 - 20 See, e.g., Yung, *supra* note 16, at 453–55.
 - 21 See Hamilton, *Crusade*, *supra* note 6, at 5 (“Lawmakers and law enforcers often conflate child pornography consumption with contact sex offending against children such that child pornography offenses are generically used as a proxy to incapacitate undetected child molesters.”).
 - 22 See, e.g., Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 886–90 (2011); Yung, *supra* note 16, at 453–55.
 - 23 See generally David P. Bryden & Maren M. Grier, *The Search for Rapists’ “Real” Motives*, 101 J. CRIM. L. & CRIMINOLOGY 171 (2011).
 - 24 See Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 44 (2003). By definition, only tactics that work to incapacitate undeterrable offenders can be effective. If the Constitution or budgetary concerns take prison or civil commitment off of the table, then community notification provides a substitute by approximating imprisonment, outside of prison. By giving potential victims information, lawmakers contend, released offenders can be rendered less able to reoffend.
 - 25 On the persistence of the “myth of stranger danger,” see, for example, Yung, *supra* note 16, at 453–55, and Jill S. Levenson, *Sex Offense Recidivism, Risk Assessment, and the Adam Walsh Act*, 10 SEX OFFENDER REPORT 1, at 8 (2009).
 - 26 See, e.g., 42 U.S.C. § 16921(a) (2006); N.J. STAT. ANN. § 2C:7-19 (West 2010).
 - 27 Amy Adler has argued that child pornography law is “yet another way in which our culture drenches itself in sexualized children,” leading perhaps to more, rather than less, child pornography. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 213 (2001). Her theory is related to, but clearly distinct from, the concerns with publicizing the identity of child pornographers that I develop here.
 - 28 See, e.g., Alexandra Gelber, *Response to “A Reluctant Rebelion,”* at 4 (July 1, 2009), available at <http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf> (arguing, while referencing a paradigmatic case, that “[q]uite literally, if there had been no market for these illegal videos of child abuse, they would not have been made in the first instance”).

- ²⁹ See Neal K. Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1346 (2003).
- ³⁰ See generally Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003 (2001); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).
- ³¹ See Wade Luders, *Child Pornography Web Sites: Techniques Used to Evade Law Enforcement*, 76 FBI L. ENFORCEMENT. BULL. 17 (2007).
- ³² Producers, after all, either commit or are complicit in the commission of child sex abuse (ignoring producers who work only by digitally altering existing images).
- ³³ See, e.g., *United States v. Gann*, 160 Fed. App. 466, 468 (6th Cir. 2005) (“Defendant admitted to being addicted to child pornography, to using his daughters to produce child pornography . . . and to downloading child pornography from the Internet.”).
- ³⁴ *New York v. Ferber*, 458 U.S. 747, 760 (1982) (“While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious . . . method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.”).
- ³⁵ United Nations Research Institute for Social Development, *Illicit Drugs: Social Impacts and Policy Responses*, at 3, Nov. 1994 (noting that favored strategies of combating illicit drugs focus on decreasing supply and arguing that these efforts have been ineffective as “the economic incentives are such that producers and traffickers always spring up to fill any gaps in the market that result from drug control efforts”), available at [http://www.unrisd.org/80256B3C005BCCFF9/\(httpAuxPages\)/4C3D0BE90FAD550480256B6400419B57/\\$file/bp2.pdf](http://www.unrisd.org/80256B3C005BCCFF9/(httpAuxPages)/4C3D0BE90FAD550480256B6400419B57/$file/bp2.pdf).
- ³⁶ See, e.g., *United States v. Cunningham*, 680 F. Supp. 2d 844, 856 (N.D. Ohio 2010) (noting that users “drive the demand” for child pornography); Hamilton, *Efficacy*, *supra* note 6, at 551 (“[Congress’s] intent [in creating the crime of pandering in the 2003 PROTECT Act] was to criminalize more material in an effort to shrink the wider market for child pornography.”); W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing A Lesser Juvenile Charge with an “Aggravating Factors” Framework*, 77 TENN. L. REV. 1, 10 (2009) (“[C]riminalizing these materials would serve to reduce their demand and production, thereby ‘dry[ing] up the market.’”).
- ³⁷ See *United States v. Goff*, 501 F.3d 250, 253 (3d Cir. 2007) (“Counsel repeatedly implied that Goff had committed a victimless crime, saying, for example, that the crime was committed ‘by Mr. Goff all by himself, in his room, in his house’, that a psychiatrist had ‘found that Mr. Goff was no danger to the community, . . . not a pedophile’ . . .”); Hamilton, *Efficacy*, *supra* note 6, at 573–84; Hessick, *supra* note 22, at 870–80; Julian Sher & Benedict Carey, *Debate on Child Pornography’s Link to Molesting*, N.Y. TIMES, July 19, 2007, <http://www.nytimes.com/2007/07/19/us/19sex.html?pagewanted=all#>.
- ³⁸ See Hessick, *supra* note 22, at 865–70.
- ³⁹ See Katyal, *supra* note 29, at 1391–92.
- ⁴⁰ See *id.* at 1390–91.
- ⁴¹ Law enforcement, of course, does work to decrease the likelihood of child pornography crime by actively investigating possible players in the child pornography market, employing new technological monitoring tools, and partnering with private parties who have something to lose (i.e., co-conspirators or informants whose help may lead to a charge or sentence reduction, or companies that control cyberspace property who fear bad publicity and perhaps even the loss of their physical property). See Steven R. Morrison, *What the Cops Can’t Do, Internet Service Providers Can: Preserving Privacy in Email Contents*, 16 VA. J.L. & TECH. 253 (2011); Julia Scheeres, *ISP Guilty in Child Porn Case*, WIRED, Feb. 6, 2001, <http://www.wired.com/culture/lifestyle/news/2001/02/41878>.
- ⁴² One reaction might be that sex offenders are not rational. Indeed, this reaction is a symptom of all sex offenders being viewed as impulsive rapists and child molesters. But, at the very least many, if not most, child pornography offenders do take into account, at least to a degree, the costs and benefits of their behavior. People spend money on and make money off of child pornography, after all.
- ⁴³ See Katyal, *supra* note 29, at 1313 (noting that conspiracy law can be effective because it allows “the possibility of cultivating greater compartmentalization and other inefficiencies within the criminal firm, thereby preventing some crime before it happens, not simply because of standard deterrence, but also because the financial rewards from crime are reduced [i.e., cost deterrence]”).
- ⁴⁴ For a useful discussion of the modern child pornography possessor, see Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8, *32–*35 (2010).
- ⁴⁵ For example, community notification can isolate individuals from family and friends, interfere with finding and maintaining employment, and generate significant psychological costs, perhaps to the point of making recidivism attractive. See generally Prescott & Rockoff, *supra* note 5.
- ⁴⁶ Cf. John D. Gleissner, *Some Reasons Why Incarceration Does Not Work Very Well*, CORRECTIONS.COM, Feb. 28, 2011, <http://www.corrections.com/news/article/27870>.
- ⁴⁷ See Wendy M. Craig et al., *The Road to Gang Membership: Characteristics of Male Gang and Nongang Members from Ages 10 to 14*, 11 SOC. DEVELOPMENT 53, 54 (2002) (observing that gangs typically “recruit individuals who are already delinquent or who have a propensity toward delinquency”).
- ⁴⁸ See J. Elizabeth McBath, *A Case Study in Achieving the Purpose of Incapacitation-Based Statutes: The Bail Reform Act of 1984 and Possession of Child Pornography*, 17 WM. & MARY J. WOMEN & L. 37, 64–65 (2010). Organized crime’s involvement in producing and distributing child pornography makes clear that these crimes are often about money, as these organizations presumably have no (or very little) interest in child pornography beyond its economic value. See Sergey Stefanov, *Porn Business Funds Terrorism*, PRAVDA.RU, Apr. 12, 2002, available at <http://english.pravda.ru/hotspots/terror/04-12-2002/1620-porn-0/>; see also Beth Kamp-schorr, *O.C. Delivers 90% of Child Porn?*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT, Feb. 26, 2009, available at <http://www.reportingproject.net/occrp/index.php/ccwatch/cc-watch-briefs/230-oc-delivers-90-of-child-porn>.
- ⁴⁹ See, e.g., Adler, *supra* note 27, at 231–32 (putting the market in the billions of dollars).
- ⁵⁰ See, e.g., Nicola M. Döring, *The Internet’s Impact on Sexuality: A Critical Review of 15 Years of Research*, 25 COMPUTERS IN HUM. BEHAV. 1089, 1092 (2009) (finding a “lack of critical attention” devoted to “providing a differentiated account of the processes and parties involved in [pornography’s] production”); see generally PETER REUTER, *DISORGANIZED CRIME: THE ECONOMICS OF THE VISIBLE HAND* (1983).
- ⁵¹ See Hessick, *supra* note 22, at 870–73, 880–82 (describing both theories).
- ⁵² See *id.* at 873–80, 883–86 (arguing against both theories).
- ⁵³ See generally Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207 (2011); Prescott & Rockoff, *supra* note 5.
- ⁵⁴ Child pornography producers actually do commit child sex abuse in the typical case and so are presumably more likely

- to pose a threat to the individuals around them. A stronger case for notification, therefore, can be made, but only because of their status as child sex abusers, not because they are child pornographers.
- ⁵⁵ See Katyal, *supra* note 29, at 1312.
- ⁵⁶ Roderick M. Kramer, *Trust and Distrust in Organizations: Emerging Perspectives, Enduring Questions*, 50 ANN. REV. PSYCHOL. 569, 577–78 (1999).
- ⁵⁷ See Katyal, *supra* note 29, at 1320–22.
- ⁵⁸ See *id.* at 1349.
- ⁵⁹ Bernard Gallagher, *Internet-Initiated Incitement and Conspiracy to Commit Child Sexual Abuse (CSA): The Typology, Extent and Nature of Known Cases*, 13 J. SEXUAL AGGRESSION 101, 102 (2007) (dividing interacting abusers into those who confine their contact to online interactions and those who meet offline).
- ⁶⁰ See, e.g., United States v. C.R., No. 09-CR-155, 2011 WL 1901645, at *6 (E.D.N.Y. May 16, 2011).
- ⁶¹ See RICHARD WORTLEY & STEPHEN SMALLBONE, CHILD PORNOGRAPHY ON THE INTERNET 9–12 (2006) available at <http://www.cops.usdoj.gov/files/ric/Publications/e04062000.pdf>; Mark Hansen, *A Reluctant Rebellion*, 95 ABA J. 54 (June 2009); see also, e.g., United States v. Grossman, 513 F.3d 592 (6th Cir. 2008).
- ⁶² See, e.g., United States v. Irey, 612 F.3d 1160, 1168 (11th Cir. 2010); McBath, *supra* note 48, at 76.
- ⁶³ Stacia Glenn, *Child Porn Thriving on Web*, INLAND VALLEY DAILY BULL., Nov. 5, 2006, available at http://www.dailybulletin.com/ci_4608174 (quoting John Shehan, CyberTipline's program manager at the time); see also Döring, *supra* note 50, at 1097.
- ⁶⁴ See, e.g., United States v. White, 244 F.3d 1199, 1201 (10th Cir. 2001); United States v. Polizzi, 549 F. Supp. 2d 308, 326 (E.D.N.Y. 2008), *vacated and remanded*, United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009).
- ⁶⁵ Glenn, *supra* note 63.
- ⁶⁶ Gallagher, *supra* note 59, at 102, 112.
- ⁶⁷ See, e.g., United States v. C.R., No. 09-CR-155, 2011 WL 1901645, at *4 (E.D.N.Y. May 16, 2011).
- ⁶⁸ Gallagher, *supra* note 59, at 114 (“Some offenders [in this study] engaged in the fantasies inherent in these communications in order to become sexually aroused. Others collected such communications and used them subsequently for masturbatory purposes.”).
- ⁶⁹ See *id.* at 111–12.
- ⁷⁰ See *id.* at 112 (“Some offenders [in this study] resorted to more specific checks or tests, such as asking the individual in question to send them [child abuse images]—something which they believed law enforcement would not do on legal or moral grounds.”)
- ⁷¹ See *id.*; WORTLEY & SMALLBONE, *supra* note 61, at 10; cf. United States v. Williams, 553 U.S. 285, 291 (2008); Polizzi, 549 F. Supp. 2d at 326.
- ⁷² WORTLEY & SMALLBONE, *supra* note 61, at 26 (noting the concern that sting operations only succeed at apprehending the inexperienced and usually less dangerous); see also Rachel O’Connell, *Paedophile Information Networks in Cyberspace, in CHILDREN IN THE NEW MEDIA LANDSCAPE: GAMES, PORNOGRAPHY, PERCEPTIONS 208–09* (Cecilia von Feilitzen & Ulla Carlsson eds., 2000) (describing the specialization that occurs within so-called pedophile groups which allows them to function more efficiently).
- ⁷³ Patrick Bayer, Randi Hjalmarsson, & David Pozen, *Building Criminal Capital Behind Bars: Peer Effects in Juvenile Corrections*, 124 Q. J. ECON. 105, 133 (2009) (“[E]xposure to peers with a history of felony drug offenses or sex offenses does not increase the recidivism of all individuals, just those individuals with histories of these offenses.”). These peer effects exist for sex offenders, although child pornography offenses may not be included in this class of offenses. Note that criminal activity is measured in terms of how likely these individuals are to be reconvicted, meaning that if learning reduces the likelihood of being arrested or convicted conditional on arrest, exposure to peers who have committed the same crime has a larger effect on crime commission.
- ⁷⁴ *Id.* at 134–35.
- ⁷⁵ See Katyal, *supra* note 29, at 1353.
- ⁷⁶ See, e.g., CAL. PENAL CODE § 3003.5(a) (West 2010) (preventing a registered sex offender parolee from living with unrelated registered sex offenders in a single family dwelling); IDAHO CODE ANN. § 18-8331 (2010) (prohibiting a registered sex offender from living with more than one other registered sex offender, with certain exceptions); OKLA. STAT. tit. 57, § 590.1 (2010) (prohibiting two or more unrelated registered sex offenders from living together in an individual dwelling); OR. REV. STAT. § 144.642 (2010) (prohibiting a sex offender from residing in any dwelling where another sex offender—on probation, parole, or postprison supervision—resides, unless specially authorized). In Minnesota, the authorities are required to mitigate the concentration of high-risk offenders upon their release. MINN. STAT. § 244.052(4a) (2010).
- ⁷⁷ INTERNATIONAL CENTRE FOR MISSING & EXPLOITED CHILDREN, CHILD PORNOGRAPHY: MODEL LEGISLATION & GLOBAL REVIEW 3 (2010).
- ⁷⁸ WORTLEY & SMALLBONE, *supra* note 61, at 30.
- ⁷⁹ Glenn, *supra* note 63.
- ⁸⁰ See, e.g., WORTLEY & SMALLBONE, *supra* note 61, at 37, 44; Katyal, *supra* note 29, at 1386–90.