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A CASE STUDY IN ACHIEVING THE PURPOSE OF
INCAPACITATION-BASED STATUTES: THE BAIL REFORM
ACT OF 1984 AND POSSESSION OF CHILD PORNOGRAPHY

J. ELIZABETH MCBATH*

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INTRODUCTION

One morning a district court judge sentenced three defendants in separate cases. In the first case, the defendant's offense had no victims. In the second case, the defendant's offense resulted in a handful of victims, whose harm constituted small financial loss. In the third case, the defendant's crime directly facilitated a multi-billion dollar worldwide criminal enterprise with thousands of victims, all of whom are children.

In only one of these cases did the judge sentence the defendant *below* the Sentencing Guidelines range: the case resulting in the greatest harm.

The defendant's crime in that case facilitated criminal activity that caused children, including babies, to be violently sexually abused. This crime was possession of child pornography.

The hypothetical does not present a unique scenario. Even though district courts now have the discretion to sentence defendants below the United States Sentencing Guidelines range, their sentences still fall within the recommended range in the vast majority of cases; in fact, in 2009, district court judges sentenced defendants below the recommended Guidelines range in only 16.9% of all cases.¹ If a defendant was charged with possessing child pornography, however, nearly *half* of all federal judges in 2009 gave below-Guidelines sentences.² Some of these defendants even received probation, a sentence well below the Guidelines imprisonment range.³

In one example, the defendant, an elementary school teacher for more than thirty years, possessed hundreds of images of child pornography, including images of “an adult male performing oral sex on a prepubescent female” and children being raped.⁴ The defendant argued that he should not be sentenced within the recommended Guidelines range of thirty-seven to forty-six months because he was simply a “curious, casual user” and his viewing of the images constituted a “solitary, private activity.”⁵ The defense attorney capitalized on this argument, asserting that the defendant's crime was something that the defendant did alone and never involved “another human being.”⁶ The prosecutor responded that possession of child pornography is a serious crime, but the judge interrupted her, stating that it was really only “a psychological crime.”⁷ The judge sentenced the defendant to four months' imprisonment.⁸

Another case involved a defendant who downloaded hundreds of child pornographic images, “some depicting children as young as 2 or 3 being vaginally penetrated by adult males.”⁹ He masturbated while he watched them.¹⁰ Although the Guidelines range for this

1. Amir Efrati, *Judges Trim Jail Time for Child Porn*, WALL ST. J., Jan. 20, 2010, at A2.

2. *Id.*

3. *Id.*

4. *United States v. Goff*, 501 F.3d 250, 251, 258 (3d Cir. 2007) (quoting the presentence report); Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 848 (2008).

5. *Goff*, 501 F.3d at 252, 258 (quoting the defendant's brief).

6. *Id.* at 253, 258 (citation omitted).

7. *Id.* at 258 (citation omitted).

8. *Id.* at 251.

9. *United States v. Goldberg*, 491 F.3d 668, 669 (7th Cir. 2007) (citation omitted); see also Rogers, *supra* note 4, at 849 (discussing the defendant's actions and sentence received in *United States v. Goldberg*).

10. *Goldberg*, 491 F.3d at 669.

defendant was sixty-three to seventy-eight months of prison, the district court sentenced him to one day in jail.¹¹ In justifying this sentence, the district court found “that the defendant was not a real deviant because he had committed the crime out of ‘boredom and stupidity,’” and that sending him to jail “would ruin his life.”¹² The judge further relied on her conclusion that no “actual children are at risk” from the defendant.¹³

Federal judges’ views that possession of child pornography is not that serious were brought to the United States Sentencing Commission recently, with some federal judges asking the Sentencing Commission to lower the Guidelines offense level and enhancements for this offense because they are too harsh.¹⁴

Unfortunately, these judges’ views are all too common. In the last six months of 2009, publications ranging from those that address the law, to those that address politics and the economy, to those that address women’s fashion have all published articles critical of the criminal justice system’s treatment of those charged with and convicted of child sex offenses.

For example, the June 2009 edition of the *A.B.A. Journal* featured an article entitled *A Reluctant Rebellion* in which the author described critics’ views that possession of child pornography laws carry penalties that “far exceed the seriousness of the crime.”¹⁵

Two months later, the August 8, 2009, cover story of the *Economist* was entitled *America’s Unjust Sex Laws*, with the author of that article questioning our country’s sex offender registration requirements.¹⁶

A few months after that, in the December 2009 edition of *Vanity Fair*, an article entitled *A Crime of Shadows* scrutinized law enforcement techniques employed in investigating and apprehending individuals who use the computer to prey on children, and seemed to question the general culpability of these defendants as well.¹⁷

Unlike many sentencing judges and some of society at large, our federal legislature and executive branch have committed themselves to fighting possession of child pornography.¹⁸ Still, there remains

11. *Id.*

12. *Id.* at 671.

13. *Id.*

14. Lynne Marek, *Sentences for Possession of Child Porn May Be Too High*, *Judges Say*, NAT’L L.J. (Sept. 10, 2009), <http://www.law.com/newswire/cache/1202433693658.html>.

15. Mark Hansen, *A Reluctant Rebellion*, A.B.A. J., June 2009, at 54, 56.

16. *Illiberal Politics: America’s Unjust Sex Laws*, *ECONOMIST*, Aug. 8, 2009, at 9.

17. See Mark Bowden, *A Crime of Shadows*, *VANITY FAIR*, Dec. 2009, at 244 (analyzing both sides of an actual case and the techniques used to catch child predators).

18. See U.S. DEPT’ OF JUSTICE, FACT SHEET: DEPARTMENT OF JUSTICE PROJECT SAFE CHILDHOOD INITIATIVE (2006), [hereinafter FACT SHEET] available at <http://www.justice>

one statute that does not treat this offense as seriously as it treats the other federal sex crimes against children: the Bail Reform Act of 1984.¹⁹

The Bail Reform Act of 1984 was promulgated by Congress to help protect society against crimes committed by defendants on pretrial release.²⁰ In doing so, Congress declared that defendants charged with certain sex crimes against minors be subjected to mandatory pretrial release conditions, and, if the government moved to detain them pretrial, that they would be subject to a rebuttable presumption of detention.²¹ Unlike other federal sex crimes against children, possession of child pornography is not included in the mandatory-release-condition category of cases or in the rebuttable presumption category.²²

Amending the Bail Reform Act of 1984 to treat possession of child pornography offenses the same way it treats other sex crimes against children is important because we simply cannot continue to ignore the true nature of this offense. A belief that the defendants who commit this offense are not dangerous rests on a misunderstanding of the offense itself.²³ This offense results in grave harm to real children—more harm than most other offenses.²⁴ These harms include the physical and emotional abuse endured by the real child victims who are portrayed in the pornographic images; the continued abuse these victims suffer each time that the image is viewed; the continued market that is fueled by demand for more and more pornographic images; the injurious effects on the defendants themselves when they view and share the images; and the use of child pornography to abuse additional children.²⁵ By not recognizing the true nature of the crime, we are complicit in allowing the horrific abuse being endured by children worldwide to continue unabated.

Analyzing the Bail Reform Act of 1984 is timely for two reasons. First, this statute is based on an incapacitation theory of justice, a theory on which more and more statutes are being based.²⁶ Under an incapacitation theory, statutes are promulgated to benefit society

.gov/opa/pr/2006/February/06_opa_081.html (discussing actions taken in the fight against the sexual exploitation of children on the internet).

19. 18 U.S.C. §§ 3141-3156 (2006).

20. Kenneth Fredrich Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 686 (1985).

21. 18 U.S.C. § 3142(c), (e).

22. *Id.*

23. See Rogers, *supra* note 4, at 860-62 (discussing the perceived harmlessness of child pornography possession).

24. *Id.* at 853.

25. See *infra* Parts III.B.1-4 (discussing harm caused by viewing child pornography).

26. See Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217, 1232-33 (2002) (discussing how the incapacitation theory has become dominant in criminal law and how the Bail Reform Act of 1984 is based on that theory).

at large by protecting it from dangerous defendants.²⁷ One of the Bail Reform Act's main purposes is to protect society from crimes committed by defendants on pretrial release.²⁸ It is important that an incapacitation-based statute be properly crafted so as to fully achieve its purpose. As incapacitation-based statutes are becoming increasingly popular, the Bail Reform Act of 1984 provides a useful example of how best to analyze these statutes.

This article argues that the proper way for a legislature to craft an incapacitation-based statute is to: (1) identify the statute's benefits and its costs and burdens; (2) look at the harm caused by a particular offense and the defendant's culpability in committing the offense so as to determine whether a defendant poses a danger to society and thus determine whether society needs to be protected from the offense; and (3) if the defendant does pose a danger to society, determine how to best protect society by balancing and weighing the harm caused by the offense against the statute's costs and burdens. In addition, the legislature should ensure that, if all offenses result in the same harm, and if the statute's costs and burdens are the same for each of these offenses, the statute should treat these offenses similarly.

When the grave harm resulting from possession of child pornography is weighed against the costs and burdens of detaining a defendant pretrial or releasing him subject to mandatory release conditions, and when it is recognized that the other, included sex crimes against children result in the same harm as possession of child pornography, it becomes clear that the Bail Reform Act of 1984 must be amended for it to fully achieve its underlying purpose. At present, the statute does not treat possession of child pornography in proportion to the danger posed by a defendant who commits this offense. The statute also does not properly weigh the harm that results from this offense against pretrial treatment's costs and burdens, nor does it treat possession of child pornography offenses consistently with other offenses resulting in the same harm. Simply put, by amending the statute to treat possession of child pornography with the seriousness that it deserves, Congress would help it to achieve its underlying incapacitation-based purpose.

Analyzing the Bail Reform Act of 1984 is also timely because federal judges are increasingly forced to make pretrial decisions in possession of child pornography cases as the number of these prosecutions has increased.²⁹ This is true because the Department of Justice

27. *Id.* at 1232.

28. *See id.* at 1233 (noting the Bail Reform Act of 1984 permitted detention without bail and that this was done to protect the community).

29. *See* Efrati, *supra* note 1 (noting that in 2009 the Justice Department handled its highest number of child pornography cases since beginning to track the statistic).

has targeted child pornography offenses as a national concern and has designated prosecuting this offense a national priority.³⁰

With the Department of Justice's new priority, sex crime offenses are now "among the fastest growing crimes handled by the federal justice system,"³¹ with pornography offenses becoming the majority of these cases.³² In 1994, 74% of all sexual exploitation cases referred for federal prosecution involved sexual abuse.³³ That percentage fell to 16% by 2006, but child pornography cases referred for federal prosecution increased from 22% to 69% during this same time period.³⁴ In 2008, United States Attorney's Offices around the country prosecuted 2211 computer-based child exploitation cases, the vast majority of which were for possession of child pornography.³⁵ This number is more than double the number prosecuted five years earlier.³⁶ Thus, this issue is of pressing concern.

Part I of this article will address the history of bail in our country and explain how that history led us to the current bail statute, the Bail Reform Act of 1984. In doing so, the article will discuss the legislative incapacitation-based intent behind the statute. Part II will explain how incapacitation-based statutes should be crafted so as to fully achieve their goals. Part III will apply this analysis to the Bail Reform Act of 1984 and argue that it should be amended to treat possession of child pornography offenses the same way that the Act treats other federal sex crimes against children. Lastly, Part IV addresses an anticipated argument against the proposed amendments.

I. BAIL IN THE UNITED STATES OF AMERICA: ITS HISTORY AND CURRENT PRACTICE

A. *History of Bail in the United States*

Bail has always been part of our criminal justice system, but the Constitution provides only that, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."³⁷

30. FACT SHEET, *supra* note 18.

31. James M. Byrne, Arthur J. Lurigio & Roger Pimentel, *New Defendants, New Responsibilities: Preventing Suicide among Alleged Sex Offenders in the Federal Pretrial System*, 73 FED. PROBATION, 40, 42 (Sept. 2009) (quoting M. MOTIVANS, FEDERAL PROSECUTION OF CHILD EXPLOITATION OFFENDERS 1 (Bureau of Justice Statistics 2007) (2006)).

32. *Id.* at 41.

33. *Id.*

34. *Id.*

35. Amir Efrati, *Making Punishments Fit the Most Offensive Crimes*, WALL ST. J., Oct. 23, 2008, at A14.

36. *Id.*

37. U.S. CONST. amend. VIII.

The mechanics of bail are instead governed by our Federal Rules of Criminal Procedure and by our bail statute.³⁸ They require that, after a defendant is arrested, he or she be taken to a judge “without unnecessary delay.”³⁹ At the first court appearance, the judge must inform the defendant of the complaint against him, his right to be represented by counsel, his right to a preliminary hearing, and his right to remain silent.⁴⁰ Also, the judge must determine whether the defendant should be detained pretrial or released, and, if released, what, if any, amount of bond applies and what, if any, conditions of release should be imposed.⁴¹

Historically, courts have detained defendants only if they posed a risk of flight or were charged with a capital crime.⁴² The rationale for detaining those charged with capital crimes was that they were more likely to flee.⁴³ Whether a defendant posed a danger to society was irrelevant to bail determinations.⁴⁴

Although the traditional purpose of bail was simply to ensure the appearance of a defendant at trial, pretrial release was often unavailable to defendants who could not afford it.⁴⁵ This apparent inequity “led to a national bail reform movement in the early 1960s.”⁴⁶

During that time, Congress began investigating bail practices around the country and discovered a wide disparity in bail procedures: “[s]ome district courts routinely released . . . defendants on their own recognizance while other[s] . . . never granted such releases,” and others seemed to detain a high percentage of indigent defendants who could not afford bail.⁴⁷ These inconsistencies prompted passage of the Bail Reform Act of 1966.⁴⁸

The underlying goal of the Bail Reform Act of 1966 was to enact a system in which all defendants, no matter their net worth, would be released pretrial on their own recognizance.⁴⁹ Under this Act, a court was required to release any defendant not charged with an

38. FED. R. CRIM. P. 46; 18 U.S.C. §§ 3141-3156 (2006).

39. FED. R. CRIM. P. 5(a)(1)(A).

40. *Id.* at 5(d)(1).

41. *Id.* at 5(d)(1)(C), (d)(3).

42. JoAnn M. Arkfeld, Comment, *The Federal Bail Reform Act of 1984: Effect of the Dangerousness Determination on Pretrial Detention*, 19 PAC. L.J. 1435, 1436 (1988) (citation omitted).

43. *Id.* (citation omitted).

44. *Id.* at 1437 (citing Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214, 214 (1966) (repealed 1984)).

45. *Id.* at 1438 (citing W. THOMAS, JR., BAIL REFORM IN AMERICA 4-5 (1976)).

46. *Id.* (citing W. THOMAS, JR., BAIL REFORM IN AMERICA 4-5 (1976)).

47. *Id.* at 1439-40 (citing W. THOMAS, JR., BAIL REFORM IN AMERICA 161-62 (1976)).

48. Arkfeld, *supra* note 42, at 1440 (citing W. THOMAS, JR., BAIL REFORM IN AMERICA 162-63 (1976)).

49. *Id.*

offense punishable by death on the defendant's own recognizance or on an unsecured bond, unless the judge believed that the defendant posed a flight risk.⁵⁰ Only if the judge believed that a defendant posed a risk of flight, could the judge detain a defendant or impose restrictions on his pretrial release.⁵¹ Notably, the Bail Reform Act of 1966 did not allow judges to detain a defendant pretrial if the judge believed that the defendant posed a danger to the community or another person.⁵²

B. The Bail Reform Act of 1984

1. Legislative History

Congress and the public became increasingly concerned with the courts' inability to consider a defendant's dangerousness when making pretrial decisions.⁵³ In 1984, Congress addressed this concern and passed the Bail Reform Act of 1984.⁵⁴

This Act changed bail in our country in a radical way: with this statute, judges were given the authority to detain a defendant, not only because he posed a risk of flight, but also because he posed a risk of danger to the community or to another person if released pretrial.⁵⁵

Congress recognized the radical nature of their actions, stating, "[t]he adoption of these changes marks a significant departure from the basic philosophy of the Bail Reform Act, which is that the sole purpose of bail laws must be to assure the appearance of the defendant at judicial proceedings."⁵⁶ Congress engaged in this "significant departure" because of its concern, shared by the public, of the "alarming problem of crimes committed by persons on release."⁵⁷

In addition to trying to protect the public, in passing the Bail Reform Act of 1984 Congress also gave district courts the ability to conduct bail hearings fairly, thereby benefitting defendants.⁵⁸

50. *Id.* (citation omitted).

51. *Id.* (citing Bail Reform Act of 1966, Pub. L. No. 89-465, 80 Stat. 214, 214 (1966) (repealed 1984)).

52. *See id.* at 1441 (citing R.A. Powers, *Detention Under the Federal Bail Reform Act of 1984*, 21 CRIM. L. BULL. 413, 414 (1985)) (noting that the only reason judges could detain defendants is if they posed a flight risk).

53. S. REP. NO. 98-225, at 6 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188-89.

54. 18 U.S.C. § 3142 (2006).

55. *Id.* § 3142(e).

56. S. REP. NO. 98-225, at 3.

57. *Id.* In passing the statute, the Senate referenced a study of release practices in eight jurisdictions, finding that approximately one out of every six defendants was re-arrested while on pretrial release. *Id.* at 6. Of these, one-third were arrested more than once, "and some were rearrested as many as four times." *Id.* (citing LAZAR INSTITUTE, PRETRIAL RELEASE: AN EVALUATION OF DEFENDANT OUTCOMES AND PROGRAM IMPACT 48 (1981)).

58. Arkfeld, *supra* note 42, at 1446 (citation omitted).

Before the Act, a court concerned that a defendant was dangerous, could either “release the defendant prior to trial despite these fears,” or it could detain the defendant by imposing a high money bond.⁵⁹ Congress wrote, “it is intolerable that the law denies judges the tools to make honest and appropriate decisions regarding the release of such defendants.”⁶⁰ Congress hoped the Act “would allow the courts to address the issue of pretrial criminality honestly and effectively.”⁶¹ It also hoped that the defendant would benefit from a more open system because he would be fully informed of the issue before the court, and because the government would be required to come forward with information to support a finding of dangerousness, to which the defendant could directly respond.⁶² Congress believed that the new bail procedures would “promote candor, fairness, and effectiveness for society,” crime victims, and defendants.⁶³

Congress recognized that the Act constituted a departure from our country’s prior bail proceedings, but reiterated the principle, “[n]othing in this section shall be construed as modifying or limiting the presumption of innocence.”⁶⁴ In the end, Congress attempted to balance a defendant’s presumption of innocence with the government’s duty and mandate to protect the public while a defendant awaits trial.⁶⁵

2. The Mechanics For Determining Pretrial Bail and Detention

The Bail Reform Act of 1984 provides that, after a defendant is arrested and brought to his first court appearance,⁶⁶ the judge has four options. She can: (1) release the defendant on his own recognizance or upon the defendant signing an unsecured bond; (2) release the defendant on conditions; (3) temporarily detain the defendant pending “revocation of conditional release, deportation, or exclusion”; or (4) detain the defendant.⁶⁷

59. S. REP. NO. 98-225, at 5.

60. *Id.*

61. *Id.* at 11.

62. *Id.*

63. *Id.*

64. 18 U.S.C. § 3142(j) (2006).

65. *See* S. REP. NO. 98-225, at 8-9 (discussing a defendant’s constitutional rights and the possibility of pretrial detention).

66. The defendants charged with committing possession of child pornography offenses are: 99% middle-aged male, 89% white, 96.3% United States citizens, 42% with some level of college education, and 79.9% have no prior felony convictions. Byrne, Lurigio & Pimentel, *supra* note 31, at 41-42. Because these defendants are 99% male, this article refers to them by using the masculine pronoun “he,” but it should be noted that women do account for a small percentage of defendants charged with possessing child pornography.

67. 18 U.S.C. § 3142(a).

Just as with the Bail Reform Act of 1966, the Act of 1984 makes pretrial release the preferred option.⁶⁸ To that end, the Bail Reform Act of 1984 still requires a judge to release a defendant pretrial on his own personal recognizance or on an unsecured bond unless the judge determines that such release would not reasonably ensure the defendant's presence at trial or unless the judge determines that doing so would "endanger the safety of any other person or the community."⁶⁹ The Act also specifically prohibits a judge from imposing bail that would, in effect, result in the pretrial detention of a defendant who could not afford it.⁷⁰

a. Pretrial Release with Conditions

Only if the judge determines that pretrial release on the defendant's own recognizance or on an unsecured bond would not reasonably assure the defendant's appearance or the safety of another person or community may the judge order that a defendant's pretrial release be subject to certain conditions.⁷¹

If the judge determines that pretrial release conditions should be ordered, the court must choose the "least restrictive further condition, or combination of conditions . . . [to] reasonably assure the appearance of the person as required and the safety of any other person and the community" ⁷² The judge may impose, but is not limited to, the following conditions requiring that the defendant: (1) remain in the custody of a particular person; (2) "maintain employment"; (3) "commence an educational program"; (4) "abide by specified restrictions on personal associations, place of abode, or travel"; (5) "avoid all contact with an alleged victim . . . and with a potential witness"; (6) "report . . . to a designated law enforcement agency"; (7) "comply with a specified curfew"; (8) "refrain from possessing a firearm"; (9) "refrain from excessive use of alcohol" or illegal drugs; (10) undergo medical, psychiatric, and/or substance abuse treatment; (11) provide security for the bond; and/or (12) "execute a bail bond with solvent sureties."⁷³

68. Bail Reform Act of 1966, Pub. L. No. 89-465, § 3146(a), 80 Stat. 214, 214 (1966) (repealed 1984); 18 U.S.C. § 3142(c).

69. 18 U.S.C. § 3142(b); *see also* Arkfeld, *supra* note 42, at 1441-42 (discussing what a judge must find in order to deny pretrial release).

70. 18 U.S.C. § 3142(c); *see also* Arkfeld, *supra* note 42, at 1442 (noting that a judge cannot impose a financial condition that, as a result of the financial situation of the defendant, results in pretrial detention).

71. 18 U.S.C. § 3142(c).

72. *Id.* § 3142(c)(B).

73. *Id.*

Other release conditions not specifically listed in the statute, but which are nonetheless available to a judge, include remote computer monitoring, field inspections, and full forensic searches of a defendant's computer.⁷⁴

If a defendant is charged with committing certain sex crimes against minors, and if the judge determines that the defendant may be released pretrial, the judge *must* impose the following conditions: (1) electronic monitoring; (2) specific restrictions on the defendant's associations, residence, and travel; (3) no contact with the alleged victim and any potential witness at trial; (4) mandatory reporting "on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency"; (5) a curfew; and (6) a prohibition against "possessing a firearm, destructive device, or other dangerous weapon."⁷⁵ Possession of child pornography is one of the only federal sex crimes against minors that is not included in the list of offenses requiring mandatory release conditions.⁷⁶

b. Pretrial Detention

With respect to detention, a judge is not authorized to detain all defendants pretrial; instead, the judge is restrained by several statutory requirements and prohibitions.

First, only if a defendant has been charged with certain offenses that are specifically enumerated in the statute, or if the defendant poses a flight risk, may the court impose pretrial detention.⁷⁷ Second, the government must move for detention.⁷⁸

If the defendant qualifies for detention and if the government has moved to detain him, a detention hearing should be held at the defendant's first court appearance or within five days thereafter.⁷⁹ At the detention hearing, the defendant has a right to be represented by counsel, "to testify, to present witnesses, to cross-examine witnesses,"

74. Jon Muller, *Implementing Pretrial Services Risk Assessment with a Sex Offense Defendant Population*, 73 FED. PROBATION, 45, 46 (2009).

75. 18 U.S.C. § 3142(c)(B).

76. *See id.* (listing the offenses requiring a conditioned pretrial release). Besides possession of child pornography, the sexual abuse of a minor or ward under 18 U.S.C. § 2243 is also not included in § 3142(c). This statute criminalizes the sexual act with a minor who is in prison, who is between twelve and sixteen years old, and who is at least four years younger than the defendant. *Id.* § 2243. The exclusion of this offense is beyond the scope of this article.

77. *Id.* § 3142(f).

78. *Id.* The government or the court may also move for detention in a case that involves a serious risk that the defendant will flee or a serious risk that the defendant "will obstruct or attempt to obstruct justice." *Id.* § 3142(f)(2).

79. 18 U.S.C. § 3142(f).

and to proffer information.⁸⁰ Before ordering pretrial detention, the judge must find that no pretrial release condition or combination of conditions would reasonably assure the defendant's presence or another's safety by clear and convincing evidence.⁸¹

At this hearing, the judge must consider the following factors: (1) "the nature and circumstances of the offense";⁸² (2) "the weight of the evidence against the [defendant]";⁸³ (3) "the history and characteristics of the [defendant]";⁸⁴ and (4) "the nature and seriousness" of the danger to the community or any person should the defendant be released.⁸⁵

As stated above, unless the defendant is a flight risk, detention is not available in every case, but instead is limited to those cases in which a defendant has been charged with an offense that Congress specifically delineated as allowing the possibility of pretrial detention; if a defendant is charged with an offense not listed, a judge may not order that defendant detained.⁸⁶ This decision to limit the availability of detention was made after Congress determined that, "there is a small but identifiable group of particularly dangerous defendants as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons."⁸⁷ Congress only granted judges the power to deny pretrial release to this very limited group of offenders.⁸⁸

If the defendant is not a flight risk, the government may seek detention only if the case involves: (1) "a crime of violence";⁸⁹ (2) the sexual trafficking of children under 18 U.S.C. § 1591;⁹⁰ (3) acts of terrorism under 18 U.S.C. § 2332b(g)(5)(B) for which the maximum

80. *Id.*

81. *Id.* § 3142(e)-(f).

82. *Id.* § 3142(g)(1). This factor includes "whether the offense is a crime of violence, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device." *Id.*

83. *Id.* § 3142(g)(2).

84. 18 U.S.C. § 3142(g)(3). This factor includes:

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law

Id.

85. *Id.* § 3142(g)(4).

86. *Id.* § 3142(f).

87. S. REP. NO. 98-225, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189.

88. *Id.* at 7.

89. 18 U.S.C. § 3142(f)(1)(A).

90. *Id.*

term of imprisonment is ten years or more;⁹¹ (4) “an offense for which the maximum sentence is life imprisonment or death”;⁹² (5) a controlled substance offense for which the maximum term of imprisonment is ten years or more;⁹³ (6) any felony if the defendant has been previously convicted of two or more of the following offenses: a crime of violence, an act involving terrorism which has a maximum term of imprisonment of ten years or more, an offense for which the maximum sentence is life imprisonment or death, or a controlled substance offense for which the maximum term of imprisonment is ten years or more;⁹⁴ or (7) “any felony that is not otherwise a crime of violence that involves a minor victim,” use or possession of a dangerous weapon, or failure to register as a sex offender.⁹⁵

Under provision (7) above, the government may seek detention in all cases involving felony sex crimes against a minor, including cases charging a defendant with possession of child pornography.⁹⁶

c. The Rebuttable Presumption of Detention

Just as a defendant walks into court at trial bearing a presumption of innocence, the defendant typically walks into court at the bond hearing with the related presumption that he should be released pending trial.⁹⁷ In the Bail Reform Act of 1984, however, Congress included what is known as the “rebuttable presumption” for certain serious offenses.⁹⁸

Under this doctrine, if a defendant has been charged with a specific type of offense and if the government has moved for detention, a defendant will walk into court at the bond hearing facing a presumption that he should be detained pending trial.⁹⁹ In this case, the defendant bears the burden of production; that is, the defendant must establish a basis for concluding that there are conditions of release sufficient to assure that he will not engage in dangerous criminal activity pending trial.¹⁰⁰

91. *Id.*

92. *Id.* § 3142(f)(1)(B).

93. *Id.* § 3142(f)(1)(C).

94. *Id.* § 3142(f)(1)(D).

95. 18 U.S.C. § 3142(f)(1)(E).

96. *Id.* Under the sentencing classifications in the United States Code, a felony is any offense punishable by more than one year. *Id.* § 3559(a)(1)-(5). The sentencing range for possession of child pornography exceeds one year, and therefore, the offense is classified as a felony. *Id.* §§ 2252(b)(1), 2252A(b)(1).

97. *Id.* § 3142(b).

98. *Id.* § 3142(e).

99. 18 U.S.C. § 3142(e).

100. *Id.*

It is presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required *and* the safety of the community if the judicial officer finds that there is probable cause to believe that the person: (1) committed a controlled substance offense for which the maximum term of imprisonment is ten years or more; (2) used, carried, or possessed a firearm in, during, and in relation to or in furtherance of a crime of violence or a drug trafficking offense in violation of 18 U.S.C. § 924(c);¹⁰¹ (3) conspired to kill, kidnap, maim or injure persons or damage property in a foreign country under 18 U.S.C. § 956(a);¹⁰² (4) engaged in acts of terrorism under 18 U.S.C. § 2332b;¹⁰³ or (5) engaged in certain offenses involving a minor.¹⁰⁴

Possession of child pornography is one of the only federal sex crimes against minors that is not listed as one of the offenses that triggers the rebuttable presumption.¹⁰⁵

3. The Bail Reform Act of 1984's Different Treatment of Possession of Child Pornography Offenses

The Bail Reform Act of 1984 treats possession of child pornography differently from other sex crimes against children in two ways: (1) it is not included in the list of sex crimes against children that mandates imposition of release conditions if the defendant is released pretrial;¹⁰⁶ and (2) it is not included in the list of sex crimes against children that triggers a rebuttable presumption of detention.¹⁰⁷

With the rebuttable presumption, the Bail Reform Act of 1984 states that the following offenses involving a minor trigger the rebuttable presumption: kidnapping; sex trafficking; aggravated sexual abuse; sexual abuse; abusive sexual contact; offenses against minors resulting in death; sexual exploitation; selling or buying children; transporting child pornography; receiving child pornography; selling

101. *Id.* § 924(c).

102. *Id.* § 956(a).

103. *Id.* § 2332b.

104. These sex offenses are: 18 U.S.C. §§ 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, and 2425. *Id.* § 3142(e).

105. 18 U.S.C. § 3142(e). Just as with the mandatory release conditions under 18 U.S.C. § 3142(c), another federal sex crime against a minor that is not included in § 3142(e) is the sexual abuse of a minor or ward under § 2243. *Id.* Again, the exclusion of this offense is beyond the scope of this article.

106. The mandatory conditioned release provision, 18 U.S.C. § 3142(c), does not mention § 2252(a)(4) or § 2252A(a)(5). *Id.* § 3142(c).

107. 18 U.S.C. § 3142(e) does not mention § 2252(a)(4) or § 2252A(a)(5) as creating a rebuttable presumption of detention. *Id.* § 3142(e).

child pornography; reproducing child pornography or advertising/soliciting child pornography; producing child pornography; transporting someone for sexual activity; coercing or enticing a minor to engage in illegal sexual activity; transporting minors; or using interstate facilities to transmit information about a minor.¹⁰⁸ A glaring omission, possession of child pornography is not included.¹⁰⁹

Similarly, defendants subject to mandatory release conditions are defendants charged with these exact same crimes involving a minor, in addition to defendants charged with failing to register as a sex offender.¹¹⁰ Here again, possession of child pornography is omitted.¹¹¹

4. The Bail Reform Act of 1984 Constitutes an Incapacitation-Based Statute

As explained above, in passing the Bail Reform Act of 1984, Congress acted on the “deep public concern” about crimes committed by people on pretrial release and promulgated a statute concerned with protecting the public.¹¹²

To that end, Congress crafted a statute that, although trying to balance the rights of the accused with its obligation to protect the citizenry, treated certain offenses differently than others.¹¹³ That is, Congress hand-picked certain offenses that it believed defendants charged with, and ultimately proven to have committed, posed a risk of danger to the community.¹¹⁴ Congress did this in three ways: (1) by limiting the availability of detention to only certain crimes;¹¹⁵ (2) by further providing a rebuttable presumption of detention to an even narrower category of offenses;¹¹⁶ and (3) by mandating certain release

108. *Id.*

109. *Id.*

110. These offenses include violations of 18 U.S.C. § 1201 (kidnapping); § 1591 (sex trafficking); § 2241 (aggravated sexual abuse); § 2242 (sexual abuse); § 2244(a)(1) (abusive sexual contact); § 2245 (offenses resulting in death); § 2251 (sexual exploitation of children); § 2251A (selling or buying of children); § 2252(a)(1) (transporting child pornography); § 2252(a)(2) (receiving child pornography); § 2252(a)(3) (selling child pornography); § 2252A(a)(1) (transporting child pornography); § 2252A(a)(2) (receiving child pornography); § 2252A(a)(3) (reproducing child pornography or advertising/soliciting child pornography); § 2252A(a)(4) (selling child pornography); § 2260 (production of child pornography); § 2421 (transporting someone for sexual activity); § 2422 (coercion and enticement); § 2423 (transportation of minors); § 2425 (use of interstate facilities to transmit information about a minor); § 2250 (failure to register under the Sex Offender Registration and Notification Act). 18 U.S.C. § 3142(c).

111. *Id.*

112. S. REP. NO. 98-225, at 6 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188.

113. *Id.* at 7.

114. *Id.* at 6-7.

115. 18 U.S.C. § 3142(f)(1).

116. *Id.* § 3142(e).

conditions if a defendant is released pretrial but has been charged with committing certain crimes.¹¹⁷

By attempting to protect the public against crimes committed by defendants on pretrial release, the Bail Reform Act of 1984 adopts an incapacitation theory, one of the four penological theories existing today.¹¹⁸ These four theories are: retribution, rehabilitation, incapacitation, and deterrence.¹¹⁹

A criminal justice system seeking retribution tailors the punishment of a crime to the moral blameworthiness of the criminal act itself.¹²⁰ A retributive system considers only the defendant's past actions when fashioning a sentence.¹²¹ In determining the degree of blameworthiness for a particular offense, society looks to "the nature and seriousness of the harm caused or threatened by the crime," and to "the offender's degree of culpability," such as his intent, motive, and role.¹²²

The remaining three purposes—rehabilitation, incapacitation, and deterrence—constitute utilitarian models of justice.¹²³ Under these utilitarian theories, the goal of the criminal justice system looks forward, not backwards, and its purpose is to treat criminal offenders in ways that benefit society in the future; thus, societal benefit is of primary concern when dealing with a defendant.¹²⁴

Under a deterrence theory, the criminal justice system will treat offenders in ways that will deter that offender and society in general from committing similar criminal acts in the future.¹²⁵ Under a rehabilitation theory, the criminal justice system will attempt to rehabilitate the offender, thereby benefiting society at large.¹²⁶ Finally, incapacitation theory attempts to protect the public by imprisoning dangerous individuals so that they cannot continue to inflict harm.¹²⁷

The past several decades have seen an emergence of incapacitation theory as society has begun to believe that a small number of

117. *Id.* § 3142(c).

118. See Note, *supra* note 26, at 1233 (discussing the incapacitation theory behind the Bail Reform Act); Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000) (noting the four theories of criminal punishment).

119. Cotton, *supra* note 118, at 1315.

120. *Id.*

121. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 590 (2005).

122. *Id.*

123. Cotton, *supra* note 118, at 1316.

124. Frase, *supra* note 121, at 592.

125. Cotton, *supra* note 118, at 1316.

126. *Id.*

127. *Id.*

repeat offenders account for a disproportionate share of criminal offenses committed.¹²⁸

The penological theory underlying the Bail Reform Act of 1984 is clear: one of the statute's main goals is to protect the public from crimes committed by defendants on pretrial release.¹²⁹ Thus, the Bail Reform Act of 1984 has a utilitarian goal and constitutes an incapacitation-based statute. To that end, the statute is consistent with the dominating penological theory of the day.

II. PROPER ANALYSIS OF INCAPACITATION-BASED STATUTES

At first blush it would seem easy to craft and implement an incapacitation-based statute, but upon closer review it becomes apparent that legislatures do not always engage in proper analysis, with the result being a statute that does not fully achieve its goal or does more harm than good. Many believe that incapacitation-based statutes need not concern themselves with tailoring the criminal justice system's treatment of a defendant to the charged offense, and in so believing, ignore the offense's resulting harm.

Even though "[t]he principle that a punishment should be proportionate to the crime is deeply rooted" in our jurisprudence,¹³⁰ some retribution theorists assert that proportionality principles are not relevant to incapacitation-based statutes.¹³¹ This initially seems to make sense because, under retribution theory, the key question in determining the proper treatment of a defendant is to assign a level of moral blameworthiness to the offense and then tailor the treatment to that assignment.¹³² In assessing the moral blameworthiness,

128. Paul H. Robinson, *Criminal Law Scholarship: Three Illusions*, 2 THEORETICAL INQUIRIES L. 287, 309 (2001). One well-known example of a recent incapacitation-based statute is the "three strikes" law. See *Ewing v. California*, 538 U.S. 11, 14 (2003) (considering CAL. PENAL CODE § 667(b) (West 1999)).

129. S. REP. NO. 98-225, at 6-7 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3189.

130. *Solem v. Helm*, 463 U.S. 277, 284 (1983).

131. For example, Justice Scalia has opined that, "[p]roportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution." *Ewing*, 538 U.S. at 31 (Scalia, J., concurring). He further wrote, "it becomes difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight." *Id.* (quoting *Harmelin v. Michigan*, 501 U.S. 957, 989 (1991)). Scalia continues, "not to mention giving weight to the purpose of California's three strikes law: incapacitation." *Id.* See also Frase, *supra* note 121, at 589 n.98 (quoting Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 192 (1995) (noting that "proportionality [of a forfeiture] can only be measured in relationship to the owner's culpability."); Allyn G. Heald, Comment, *United States v. Gonzalez: In Search of a Meaningful Proportionality Principle*, 58 BROOK. L. REV. 455, 455 n.2 (1992) (describing how "the proportionality principle is inherently a retributive concept").

132. Frase, *supra* note 121, at 590.

society looks to the harm caused by the act and to the culpability of the defendant in committing the act.¹³³ In the end, the criminal justice system's treatment of a defendant must be proportional to both.

In contrast, under a utilitarian theory, the criminal justice system should benefit society as a whole, and under the incapacitation theory, a subset of utilitarian theory, the criminal justice system's treatment of an offender should be tailored to protecting the public.¹³⁴ According to some theorists, then, no proportionality between the crime committed and the subsequent treatment of the defendant is needed because the goal of that theory is not to connect the treatment with the offense, but simply to protect the public from future harm.¹³⁵ So if a dangerous defendant commits a minor offense, he should receive a severe prison sentence simply because he is dangerous, and conversely if a benign defendant commits a serious offense, he should not receive a severe prison sentence because he is not dangerous.¹³⁶

At least one commentator, however, has argued that proportionality principles *do* apply to incapacitation models of justice, and has introduced two non-retributive proportionality concepts.¹³⁷ Specifically, Richard Frase has proposed two types of proportionality that should be achieved under an incapacitation-based system: (1) means proportionality; and (2) ends proportionality.¹³⁸

Under Frase's means proportionality principle, the criminal justice system's treatment of a defendant is disproportionate if less costly or burdensome treatments will achieve the same societal benefit.¹³⁹

Under the ends proportionality principle, the criminal justice system's treatment of a defendant may be disproportionate to the societal benefit if the costs and burdens of the defendant's treatment outweigh these benefits.¹⁴⁰

Here, one of the main goals or benefits of the Bail Reform Act of 1984 is to protect society against crimes committed by defendants on pretrial release.¹⁴¹ According to Frase's theory, to avoid issuing disproportionate punishment, society needs to employ the least costly

133. *Id.*

134. Cotton, *supra* note 118, at 1316.

135. *See* Frase, *supra* note 121, at 573 (noting Justice Scalia's view that courts can consider theories of justice, such as incapacitation, that have nothing to do with proportionality).

136. *See* Cotton, *supra* note 118, at 1318 (discussing sentencing principles in a utilitarian theory under which dangerous crimes would receive longer sentences and "less socially harmful crimes" would receive shorter sentences).

137. Frase, *supra* note 121, at 576.

138. *Id.*

139. *Id.* at 592-93.

140. *Id.*

141. S. REP. NO. 98-225, at 6-7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3189.

or burdensome pretrial treatment that will protect society and the costs and burdens of the treatment should not be greater than the protection offered.¹⁴²

It seems to reason that the harm resulting from a charged offense is relevant to the analysis because it speaks directly to the question of how dangerous a defendant may be and how much protection against him is needed, which in turn speaks directly to the question of how to compare the protection needed against the costs and burdens.

The Supreme Court has recognized the relevance of harm, even if the proportionality analysis is based on an incapacitation-based "three strikes" statute.¹⁴³ Specifically, the Supreme Court has consistently considered the proportionality of the penalty in deciding whether the Eighth Amendment's prohibition against cruel and unusual punishment is violated.¹⁴⁴ In determining whether the treatment is grossly disproportionate to the offense, the Court has looked to "the gravity of the offense" and "the harshness of the penalty."¹⁴⁵ In determining the gravity of the offense, courts may further look to "harm caused or threatened to the victim or society, and the culpability of the offender."¹⁴⁶ Because the Court has "recognized that the Eighth Amendment imposes 'parallel limitations' on bail," this line of cases seem to support the proposition that bail decisions should be in proportion to the harm a defendant threatens if released.¹⁴⁷ Thus, applying the Supreme Court's analysis for excessive punishment, determining whether the treatment of a defendant pending trial is proportionate to the offense for which he is charged requires the lawmaker to look to the "gravity of the offense," which, in turn, requires the legislature to look to the "harm caused."¹⁴⁸

142. Frase, *supra* note 121, at 592-93.

143. See *Ewing v. California*, 538 U.S. 11, 28 (2003) (discussing the seriousness of the defendant's offenses); *Solem v. Helm*, 463 U.S. 277, 290-92 (1983) (stating that courts should look at the nature of the offense to determine proportionality).

144. See Frase, *supra* note 121, at 576-88 (discussing major cases that have considered the proportionality of punishment requirements under the Eighth Amendment) (citing *Rummel v. Estelle*, 445 U.S. 263 (1980); *Hutto v. Davis*, 454 U.S. 370 (1982); *Solem*, 463 U.S. 277; *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Ewing*, 538 U.S. 11; *Lockyer v. Andrade*, 538 U.S. 63 (2003)).

145. *Ewing*, 538 U.S. at 28.

146. *Solem*, 463 U.S. at 292.

147. *Id.* at 289 (quoting *Ingraham v. White*, 430 U.S. 651, 664 (1977)).

148. Frase also notes that "utilitarian theory might consider not only the harm associated with a particular act similar to the defendant's, but also the aggregate harm caused by all such actions and the difficulty of detecting and deterring such actions." Frase, *supra* note 121, at 594-95 (citing Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 851-52 (1972)).

Using both Frase's proportionality concept with the Supreme Court's recognition of harm, crafting and implementing an incapacitation-based statute like the Bail Reform Act of 1984 requires the legislature to do several things.

First, Congress should identify the goal of the statute and the statute's costs and burdens.

After these two elements have been identified, Congress should then examine the statute's goal, and if that goal is to protect society, it should look at the harm caused by a particular offense and the defendant's culpability in determining whether a defendant poses a danger to society. If the defendant does pose a danger to society, Congress should next determine how to best protect society against this danger by balancing and weighing the offense's resulting harm against the costs and burdens of protection. Whenever Congress weighs the harm against the costs and burdens, it is required to make public policy decisions.¹⁴⁹ In addition, Congress should ensure that when all offenses result in the same harm, and when the statute's costs and burdens are the same for each of these offenses, the statute should treat these offenses similarly so as to fully achieve the law's purpose.

In applying this analysis to the Bail Reform Act of 1984, it becomes clear that the statute is deficient and should be amended in at least two ways: (1) the statute's rebuttable presumption category, found at 18 U.S.C. § 3142(e)(3), should be amended to add possession

149. Some will argue that this test is not useful because a less serious offense still justifies a severe sentence if the defendant who commits the offense is dangerous. Although this argument makes sense in the abstract, in reality we simply cannot know if a defendant who commits a minor offense does indeed present a danger. In fact, the best single predictor of future criminal activity—*i.e.*, the best predictor that a defendant is dangerous—is prior criminality. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 423 (2006). "Indeed, no risk factor has been more thoroughly studied and none have generated more reliable results." *Id.* (citing Alfred Blumstein, *Preface to 2 CRIMINAL CAREERS AND "CAREER CRIMINALS,"* at vii (Alfred Blumstein et al., eds.) (1986)). "[A] history of violence has been consistently shown to be the best single predictor of future violent behavior." *Id.* (quoting Dale E. McNiel, *Empirically Based Clinical Evaluation and Management of the Potentially Violent Patient*, in *EMERGENCIES IN MENTAL HEALTH PRACTICE: EVALUATION AND MANAGEMENT* 95, 96 (Phillip M. Kleespies ed., 1998)). Under this test, many "three strikes and you're out" statutes would likely fail if they do not take into account the harm that results from a defendant's current and/or prior offenses. It is doubtful that "three strikes and you're out" statutes that do not account for the harm resulting from a defendant's offenses would pass the proposed test here, because the statutes' costs and burdens would arguably outweigh its benefits. In addition, a related question to ask is how the Bail Reform Act should treat a defendant who has prior convictions involving sex crimes against minors, but whose present charge does not qualify for a rebuttable presumption or mandatory release conditions. Specifically, should the defendant's prior criminal activity, which shows that he is dangerous, speak to whether the defendant should be subject to pretrial detention, or, if released, subject to mandatory release conditions? The answer is likely "yes," but this analysis requires more time than can be devoted to it here.

of child pornography offenses; and (2) the statute's mandatory release conditions, found at 18 U.S.C. § 3142(c)(1)(B), should be amended to include possession of child pornography offenses.

The Bail Reform Act of 1984's current exclusion of possession of child pornography in those sections addressing sexual offenses against minors fails to achieve the goals of an incapacitation system: (1) by not treating possession of child pornography commensurate with, and proportionate to, the danger that a defendant charged with this offense may pose and with the harm that results from the offense; and (2) by not treating possession of child pornography consistently with other crimes resulting in the same harm. Until the Bail Reform Act of 1984 is amended, it will not fully achieve its purpose of protecting society against child sexual exploitation offenses committed by defendants on pretrial release.

III. APPLYING PROPER ANALYSIS TO THE BAIL REFORM ACT OF 1984

A. Defining the Statute's Benefits and Its Costs and Burdens

One of the Bail Reform Act's main goals and benefits is the protection of society from crimes committed by defendants while on pretrial release.¹⁵⁰

The statute's costs and burdens consist of: (1) the burdens to both the wrongly-charged and the correctly-charged defendant when he is detained pretrial or subject to pretrial release conditions; and (2) the potential negative effect that the criminal justice system's pretrial treatment of a defendant has on society's perception of the criminal justice system.

B. Determining Whether a Defendant Who Is Charged with Possessing Child Pornography Poses a Danger to Society

After determining that one of the main goals of the Bail Reform Act is to protect society, Congress should next analyze whether possession of child pornography results in harm from which society needs protection and whether defendants charged with committing this offense may be dangerous.

Only after we truly recognize the harm caused by possession of child pornography, does it become clear that defendants who are ultimately proven to have engaged in this offense are dangerous and that society needs to be protected from them.¹⁵¹

150. Arkfeld, *supra* note 42, at 1437.

151. See Rogers, *supra* note 4, at 863 ("If we focus on the harm inflicted to a child when an image of him being sexually abused is possessed and viewed, we can help dispel misperceptions that possession is a victimless crime.").

Generally speaking, under an incapacitation-based system, a defendant who commits a crime resulting in more serious harm will be treated more severely than a defendant who commits a crime resulting in less serious harm.¹⁵² This is so because society needs more protection from serious harms than from less serious ones.

However, if a defendant commits an offense that results in great harm, the system need not treat him as seriously as the resulting harm if that defendant, for whatever reason, does not pose a danger to society.¹⁵³ It is here that defendants charged with possessing child pornography try to make their case.¹⁵⁴ They argue that their offense—if proven—is not serious, and that they themselves are not dangerous, because: (1) they have simply viewed pictures in the privacy of their own home and have never actually harmed a real child;¹⁵⁵ (2) they have no criminal history and are otherwise law-abiding, upstanding citizens;¹⁵⁶ and (3) they will never engage in this conduct again.¹⁵⁷

Based on recent statistics showing district court judges sentencing defendants far below the Sentencing Guidelines range, many people want to believe this argument.¹⁵⁸ The problem, however, is that the offense *is* serious because it *does* result in great harm, and thus the individuals who commit these offenses *are* dangerous.

*1. Possessors of Child Pornography Have Not Passively Viewed Innocuous Pictures in the Privacy of Their Homes; Instead, They Have Viewed “Crime Scene Photographs” of Real Children Suffering Real Harm*¹⁵⁹

a. Real Children, Real Harm

Legally, what is child pornography? When we hear the term, we often think of an eighteen-year-old girl dressed to look younger in a Catholic school girl uniform, or we fear that we will be prosecuted

152. Cotton, *supra* note 118, at 1318.

153. *Id.*

154. Alexandra Gelber, Assistant Deputy Chief, Child Exploitation and Obscenity Section, U.S. Dep’t of Justice, Response to “A Reluctant Rebellion” 5 (July 1, 2009), <http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf> (citing Hansen, *supra* note 15, at 56).

155. *United States v. Goff*, 501 F.3d 250, 253 (3d Cir. 2007).

156. *See* Hansen, *supra* note 15, at 54, 57 (describing defendant Jon Hanson).

157. *See* Muller, *supra* note 74, at 46 (discussing defendants who scored low on the Risk Prediction Index (RPI) for repeated offenses based in part on employment, education, and prior criminal history factors).

158. Efrati, *supra* note 1.

159. Ernie Allen, President & CEO, Nat’l Ctr. for Missing & Exploited Children, Statement at United States Sentencing Commission Regional Hearing on the 25th Anniversary of the Passage of the Sentencing Act of 1984 2 (Oct. 20, 2009), http://www.ussc.gov/AGENDAS/20091020/Allen_testimony.pdf [hereinafter Sentencing Commission Hearing].

for the picture we took of our newborn baby taking his first bath. Neither image constitutes child pornography.¹⁶⁰

Title 18 U.S.C. § 2252(a)(4) makes it illegal in part for any person to: (1) knowingly possess; (2) one or more matters containing a visual depiction; (3) that has been transported in interstate commerce, including by computer, or that has been produced using materials that have been; (4) if the visual depiction is of, and was produced using, a minor engaging in sexually explicit conduct.¹⁶¹

A minor is defined as someone less than eighteen years old.¹⁶² The minor must be a real child, and cannot be a digitally created image.¹⁶³ “[S]exually explicit conduct” means actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person¹⁶⁴ Factually, this means that child pornography consists of pictures of real children suffering real sexual abuse.

“In the 1970’s and 80’s, the typical sexually abusive images of children involved photos of nude children in sexual poses.”¹⁶⁵ Unfortunately, the children in these images are becoming younger and younger, and the images more graphic and violent.¹⁶⁶

According to data from the National Center for Missing & Exploited Children, 83% of defendants charged with child pornography possess pornographic images of prepubescent children.¹⁶⁷ Of these, 19% possess images of children younger than three years old and 39% possess images of children younger than six years old.¹⁶⁸

A study of all national arrests for possession of child pornography in 2000 found that 80% of defendants possessed images graphically depicting sexual penetration.¹⁶⁹ Twenty-one percent possessed “images

160. See 18 U.S.C. § 2256(8) (2006) (giving the definition of “child pornography”).

161. *Id.* § 2252(a)(4).

162. *Id.* § 2256(1).

163. See *id.* § 2256(9) (defining an “identifiable minor” as a real person).

164. *Id.* § 2256(2)(A).

165. Gelber, *supra* note 154, at 1.

166. *Id.*

167. *Combating Child Pornography by Eliminating Pornographers’ Access to the Financial Payment System: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 109th Cong. (2006) (testimony of Ernie Allen, President & CEO, National Center for Missing & Exploited Children) [hereinafter *Bank Hearing*] available at http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2792; Rogers, *supra* note 4, at 852.

168. *Bank Hearing*, *supra* note 167.

169. JANIS WOLAK ET AL., CHILD PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL ONLINE JUVENILE VICTIMIZATION STUDY vii (2005), http://www.missingkids.com/en_US/publications/NC144.pdf.

depicting sexual violence to children such as bondage, rape, and torture.”¹⁷⁰ Additionally, “39% had at least 1 video with moving images of child pornography.”¹⁷¹

The abuse that young children endure in the pornographic images affects them both physically and emotionally. Due to their small size, children often suffer severe physical injuries when they are victims of the sexual abuse that is portrayed in pornographic images. One looks no further than case law to see this harm. In *State v. Kennedy*, the eight-year-old victim suffered profuse vaginal bleeding, “[h]er entire perineum was torn and her rectum protruded into her vagina.”¹⁷² In *State v. Mundt*, the seven-year-old victim’s “vaginal walls were ‘very abraded’ and had lacerations extending ‘practically the full length of the vaginal canal’ and ‘all the way through the side walls of the vagina’ on either side.”¹⁷³ In *State v. Smith*, “[i]t took more than an hour of surgery to repair some of the physical injuries” suffered by the six-year-old victim.¹⁷⁴ In *State v. Goodwin*, the seven-year-old victim suffered “a severe laceration in the vaginal area extending all the way to the cervix,” requiring major surgery and making it questionable whether the victim would ever be able to engage in normal sexual intercourse or have children of her own.¹⁷⁵

In addition to physical harm, victims may experience psychological problems, including “sudden school failure, unprovoked crying, dissociation, depression, insomnia, sleep disturbances, nightmares, feelings of guilt and inferiority, and self-destructive behavior, including an increased incidence of suicide.”¹⁷⁶

In addition, one study has “estimated that as many as 40% of 7- to 13-year-old sexual assault victims are considered ‘seriously disturbed.’”¹⁷⁷

170. *Id.*

171. *Id.*

172. 957 So. 2d 757, 760-61 (La. 2007), *quoted in* Brief for U.S. Representatives Lamar Smith et al., as Amici Curiae Supporting Appellants at 16, *United States v. Farley*, No. 08-15882-BB (11th Cir. Feb. 18, 2009) [hereinafter Brief of Amici Curiae].

173. 873 N.E.2d 828, 832, 844 (Ohio 2007) (quoting testimony of the urologist who assisted in the victim’s autopsy), *quoted in* Brief of Amici Curiae, *supra* note 172, at 16.

174. 909 P.2d 236, 238-39 (Utah 1995), *quoted in* Brief of Amici Curiae, *supra* note 172, at 16.

175. 679 P.2d 231, 232, 234 (Mont. 1984), *quoted in* Brief of Amici Curiae, *supra* note 172, at 16.

176. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2677 (2008) *modified on denial of reh’g*, 129 S. Ct. 1 (2008) (Alito, J., dissenting) (citing Melissa Meister, Note, *Murdering Innocence: The Constitutionality of Child Rape Statutes*, 45 ARIZ. L. REV. 197, 209 (2003); J. Richard Broughton, “On Horror’s Head Horrors Accumulate”: A Reflective Comment on Capital Child Rape Legislation, 39 DUQ. L. REV. 1, 38 (2000); Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana’s Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79, 88 (1997)).

177. *Id.* at 2677 (citing A. Lurigio, M. Jones, & B. Smith, *Child Sexual Abuse: Its*

b. The Harm Continues Beyond the Sexual Abuse Itself

Unique to this offense, the harm that a victim suffers continues far beyond the sexual abuse itself. Unlike traditional crimes in which the harm results from the crime committed and may continue with the victim's recollection of that crime thereafter, the victim of child pornography offenses is abused in the making of the images themselves, but is also re-victimized each time the image is viewed.¹⁷⁸

The victims feel just as strongly about the individuals who are looking at—and enjoying—the abuse they have endured as they feel toward the person who made the pornographic image itself. One victim has said, “[i]t terrifies me that people enjoy viewing things like this [E]ven though I don’t know them, they are hurting me still. They have exploited me in the most horrible way.”¹⁷⁹ Another victim has stated:

Usually, when a kid is hurt and the abuser goes to prison, the abuse is over. But because [the defendant] put my pictures on the Internet the abuse is still going on. Anyone can see them. People are still downloading them . . . I’m more upset about the pictures on the Internet than I am about what [the defendant] did to me physically.¹⁸⁰

These feelings are not surprising given that “a significant part of the healing process for children traumatized by sexual abuse is the ability to control the disclosure of the abuse.”¹⁸¹ Victims, who previously felt powerless, “may feel empowered by choosing when, how, and to whom to disclose their abusive experiences.”¹⁸² “[C]hildren whose pornographic images are circulated online” lose control over the disclosure.¹⁸³

“The repeated distribution and possession of child pornography . . . re-victimizes children and exposes them to further shame and humiliation and the attendant physical and mental ramifications.”¹⁸⁴ The

Causes, Consequences, and Implications for Probation Practice, 59 FED. PROBATION 69, 70 (1995).

178. Rogers, *supra* note 4, at 853.

179. Gelber, *supra* note 154, at 3 (quoting a child pornography victim).

180. *Id.* (quoting a victim of child pornography) (alterations in original).

181. Sentencing Commission Hearing, *supra* note 159, at 13 (citing ETHEL QUAYLE ET AL., CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE (2008), http://www.childcentre.info/public/Thematic_Paper_ICTPsy_ENG.pdf).

182. *Id.*

183. *Id.*

184. *Id.* (citing NAT’L SOC’Y FOR THE PREVENTION OF CRUELTY TO CHILDREN, IMAGES OF ABUSE: A REVIEW OF THE EVIDENCE ON CHILD PORNOGRAPHY (2006), http://www.nspcc.org.uk/Inform/publications/downloads/imagesofabuse_wdf48065.pdf).

harm that victims endure during the abuse continues every day of their lives. This harm should not be ignored.

In addition to the harm associated with each viewing, the victims often suffer physical and emotional harm long after the actual abuse is over.

An *amici curiae* brief filed in the Northern District of Georgia by certain Republican Representatives on the Judiciary Committee lays out in detail the social science evidence demonstrating that “[s]exually [a]bused [c]hildren [s]uffer [s]evere [p]sychological, [s]ocial, and [c]ognitive [p]roblems that [l]ast [l]ong into [a]dulthood.”¹⁸⁵

Resulting psychological problems include “multiple personality disorder, refractory psychosis, borderline personality disorder, somatoform disorder, and panic disorder.”¹⁸⁶ Victims of child sexual abuse often experience depression as an adult.¹⁸⁷ In addition, one survey has found that there is “a twofold increased risk for suicide attempts.”¹⁸⁸ A strong link also exists between childhood victims and post traumatic stress disorder later in life.¹⁸⁹

As Justice Alito noted in *United States v. Kennedy*, the social problems resulting from child sexual abuse “often become society’s problems as well,” in the form of later “substance abuse, dangerous sexual behaviors or dysfunction, inability to relate to others on an interpersonal level, and psychiatric illness.”¹⁹⁰

For example, “[v]ictims of child rape are nearly 5 times more likely than nonvictims to be arrested for sex crimes and nearly 30 times more likely to be arrested for prostitution.”¹⁹¹ In addition, “women who report child sexual abuse are at greater risk during adolescence of sexually transmitted diseases, teenage pregnancy, multiple sexual partnerships, and sexual revictimisation.”¹⁹² Further,

185. Brief of Amici Curiae, *supra* note 172, at 6.

186. *Id.* at 7 (quoting Yutaka Ito et al., *Preliminary Evidence for Aberrant Cortical Development in Abused Children: A Quantitative EEG Study*, 10 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 298, 298 (1998) and citing Elliot C. Nelson et al., *Association Between Self-reported Childhood Sexual Abuse and Adverse Psychological Outcomes*, 59 ARCHIVES OF GEN. PSYCHIATRY 139, 139 (2002)).

187. *Id.* at 8 (quoting Kathleen A. Kendall-Tackett et al., *The Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164, 175 (1993)).

188. *Id.* at 9 (quoting Sharon R. Dube et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREVENTIVE MED. 430, 433 (2005)).

189. *Id.* at 9-10 (quoting Joan Archart-Treichel, *Dissociation Often Precedes PTSD in Sexually Abused Children*, 40 PSYCHIATRIC NEWS 34, 34 (2005) and citing Cathy Spatz Widom, *Posttraumatic Stress Disorder in Abused and Neglected Children Grown Up*, 156 AM. J. PSYCHIATRY 1223, 1223 (1999)).

190. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2677 (2008) *modified on denial of reh’g* 129 S. Ct. 1 (2008) (Alito, J., dissenting) (citation omitted).

191. *Id.* (citation omitted).

192. Brief of Amici Curiae, *supra* note 172, at 13 (quoting Paul E. Mullen & Jillian

“children who have been sexually abused are disproportionately victims of rape and sexual assault as adults.”¹⁹³

Women who were sexually abused as a child have higher rates of alcohol abuse than women who were not abused, and those who were abused “were roughly three times more likely than unabused girls to report drug dependence as adults.”¹⁹⁴ Even accounting for women who grew up in lower socioeconomic status homes, women who were sexually abused as children were more likely to find themselves in the lowest socioeconomic status categories than women who were not abused.¹⁹⁵

In addition to the resulting psychological, social, and health problems, studies also show that many child abuse victims suffer neurological damage from the abuse, which causes lifelong cognitive problems.¹⁹⁶

2. Possessors of Child Pornography Have Not Passively Viewed Innocuous Pictures in the Privacy of Their Homes; Instead, the Crime Provides a Demand That Fuels Worldwide Supply

In addition to the abuse endured during the making of the pornographic image and the harm a victim suffers with each new viewing, the offense of possessing child pornography presents a third harm, unique to it. Each time an individual possesses child pornography, he provides a demand that fuels supply—and with supply, more and more children are abused.¹⁹⁷

A 2006 report by McKinsey Worldwide projected that “commercial child pornography is a multi-billion-dollar industry worldwide.”¹⁹⁸ With the potential to make large amounts of money, many are producing child pornography for the market.¹⁹⁹ They create child pornography because it is profitable to do so.²⁰⁰

Fleming, *Long-term Effects of Child Sexual Abuse*, 9 ISSUES IN CHILD ABUSE PREVENTION 7 (1998).

193. *Id.* at 9.

194. *Id.* at 12 (quoting K. S. Kendler et al., *Childhood Sexual Abuse and Adult Psychiatric and Substance Use Disorders in Women: An Epidemiological and Co-twin Control Analysis*, 57 ARCHIVES OF GEN. PSYCHIATRY 953, 959 (2000)).

195. *Id.* (citing Paul E. Mullen & Jillian Fleming, *Long-term Effects of Child Sexual Abuse*, 9 ISSUES IN CHILD ABUSE PREVENTION 5 (1998)).

196. *Id.* at 10 (citing Carryl P. Navalta et al., *Effects of Childhood Sexual Abuse on Neuropsychological and Cognitive Function in College Women*, 18 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 45, 45 (2006)).

197. Gelber, *supra* note 154, at 4 (quoting *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990)).

198. *Bank Hearing*, *supra* note 167.

199. See Gelber, *supra* note 154, at 4 (describing a website operator who created child pornography for his customers).

200. *Id.*

One example illustrating the demand involves a commercial on-line child pornography enterprise. In that prosecution, investigators identified 70,000 customers who were using a credit card to pay \$29.95 a month to access graphic child pornography images.²⁰¹

The demand exists worldwide. An example of the market's worldwide span can be found in the prosecution of the Regpay Company, "a major Internet processor of subscriptions for third-party commercial child pornography websites."²⁰² The Regpay site "was managed in Belarus, the credit card payments were processed by a company in Florida, the money was deposited in a bank in Latvia, and the majority of the almost 300,000 credit card transactions on the sites were from Americans."²⁰³

Even when money is not involved, many are producing child pornography in response to a demand for new material. Law enforcement has discovered pedophile website communities where, to be accepted into the online community, an individual needs to submit a new photograph or videotape of child pornography; in other words, an applicant seeking membership must produce new child pornography that no one has ever seen before.²⁰⁴

Unfortunately, it is clear a market exists that "constantly demands that more children be abused in order to create new images," and that supply is meeting that demand.²⁰⁵ Ignoring the seriousness of this offense allows this horrific market to continue to grow unabated, making cruel predators rich at the expense of our children and creating more and more child abuse victims.

3. Possessors of Child Pornography Have Not Passively Viewed Innocuous Pictures in the Privacy of Their Homes; Instead, the Possessor Himself Has Suffered a Deleterious Effect from Viewing the Images

Viewing child pornography harms not only the child abused, but the defendant himself. Michael Bourke and Dr. Andres Hernandez, Director of the Federal Sex Offender Treatment Program, note that viewing child pornography has an injurious effect on the viewer by normalizing adult/child sexuality, by dehumanizing children, and

201. *Bank Hearing*, *supra* note 167.

202. *Id.*

203. *Id.*

204. *See 4 Arrested During Child Porn Raids*, WSBTV.COM, Nov. 30, 2009, <http://www.wsbtv.com/news/21726107/detail.html> (noting that one website requires members to post their own content as part of their membership).

205. Gelber, *supra* note 154, at 4.

by desensitizing the viewer “to the harmful consequences of child victimization.”²⁰⁶ They report that they have never seen a defendant who has not experienced these effects after viewing child pornography.²⁰⁷

The desensitization that occurs from viewing the images also continues in internet communities where possessors provide each other with a sense of community and give each other validation that their interest in children is normal.²⁰⁸ They also encourage each other to act out on their interests.²⁰⁹ This message “erodes the societal mores which could otherwise inhibit them from satisfying that impulse.”²¹⁰ These effects should not be ignored.

4. Possessors of Child Pornography Oftentimes Use the Images Against Other Children

A fourth harm also results from this offense. Not only are the child victims of sexual abuse harmed by their pornographic images, but defendants often use these images to abuse even more children. Michael J. Heimbach of the FBI testified to Congress on May 1, 2002 that defendants will show child pornography to children to demonstrate sexual acts to them, to lower their sexual inhibitions, and to desensitize them to sex.²¹¹ In addition, defendants may also use the images to blackmail a victim child into not disclosing the images or into engaging in additional sexual acts with the adult.²¹²

5. Child Pornography Possessors' Lack of Criminal History Is Not Proof That They Are Not Dangerous

A common argument that a defendant charged with possessing child pornography asserts during his initial appearance is that he has no criminal history.²¹³ The argument goes, then, that his actions in this case constitute an isolated incident and that he poses no danger

206. Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 188 (2009).

207. *Id.*

208. Gelber, *supra* note 154, at 5.

209. *Id.*

210. *Id.*

211. *Enhancing Child Protection Laws After April 16, 2002 Supreme Court Decision*, Ashcroft v. Free Speech Coalition: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 107th Cong. 9-10 (2002) (statement of Michael J. Heimbach, Unit Chief, Crimes Against Children Unit, Criminal Investigative Division, FBI).

212. *Id.* at 10.

213. Gelber, *supra* note 154, at 6.

to society.²¹⁴ Judges rely heavily on this argument when deciding whether to detain a defendant or how to treat him while he is on pretrial release.²¹⁵

The problem with this argument is that the defendant's assertion does not correctly lead to the conclusion; that is, just because a defendant has no reported prior criminal history does *not* mean that his charged conduct, if proven, is an isolated act and that he does not pose a danger to society. What it *does* mean is that the defendant may simply have never been caught.

The fact that the defendant previously may have not been caught is not surprising given how difficult it is to catch someone committing this offense in their own home on their own computer, and, if the defendant did engage in a hands-on offense, the vast majority of child victims keep their abuse silent.²¹⁶

In addition to all the crimes we never learn about, the one crime, if proven, for which the defendant has been charged illustrates that he in fact does have a criminal history. Given that the above-described harms occur with each separate possession and viewing, a defendant who has hundreds, if not thousands of images has committed the offense a commensurate number of times. Ernie Allen has testified that "the reviews conducted by NCMEC at law enforcement's request demonstrate that many offenders set about building libraries of child pornography images with each single image representing the sexual exploitation of one or more children."²¹⁷ In other words, the defendant's actions in the charged case show that he has recidivated hundreds, if not thousands, of times. These crimes are not counted as prior criminal history, however, because they are tried in one case for judicial efficiency.²¹⁸

As one commentator has noted, "the lack of a criminal history [often] hides years of systemic criminal behavior. The defendants simply had never been caught," and "[t]hat their fall from grace may have been more dramatic than other criminals does not mitigate the seriousness of the crime."²¹⁹

214. *Id.*

215. See discussion *supra* Part I.B (considering the dangerousness of the defendant as a factor in pretrial release under the Bail Reform Act of 1984).

216. Gelber, *supra* note 154, at 6.

217. Sentencing Commission Hearing, *supra* note 159, at 4.

218. Similarly, the criminal justice system typically does not treat a defendant's commission of new offenses while on pretrial release towards his recidivism rate. Studies examining sex offender recidivism rates measure recidivism by looking at re-arrest or new convictions. Muller, *supra* note 74, at 46. Often defendants who commit new offenses while on pretrial release would not be classified as recidivists, however. Because the new activities they engaged in on pretrial release were not charged as separate offenses, this new activity was simply used as another factor to account for at sentencing. *Id.* at 45.

219. Gelber, *supra* note 154, at 6-7.

6. Disturbing New Evidence Links Defendants Who Possess Child Pornography to Those Who Commit Hands-On Offenses

As explained above, possession of child pornography is a serious offense in and of itself, regardless of whether the possessor has ever molested an actual child. Disturbing new evidence, though, continues to emerge illustrating that possessors have, more likely than not, molested a real child.

In a recent study, researchers set out to determine whether convicted possessors of child pornography posed little risk for engaging in hands-on offenses or if they were contact sex offenders whose criminal sexual behavior had never been detected.²²⁰

They studied 155 defendants who were convicted in federal court of possessing child pornography.²²¹ They divided the offenders into two groups:

men whose known sexual offense history at the time of judicial sentencing involved the possession, receipt, or distribution of child abuse images, but did not include any “hands-on” sexual abuse; and men convicted of similar offenses who had documented histories of hands-on sexual offending against at least one child victim.²²²

The subjects completed questionnaires regarding their sexual histories when they began treatment and every six months thereafter.²²³ In addition, each participant voluntarily underwent a polygraph examination.²²⁴ Researchers compared the number of known hands-on victims reported in the sentencing documents with the number ultimately disclosed after at least six months of treatment.²²⁵

“At the time of sentencing, 115 (74%) subjects had no documented hands-on victims. Forty (26%) had known histories of abusing a child via a hands-on sexual act.”²²⁶ There were 75 known victims at the time of sentencing averaging 1.88 victims per offenders.²²⁷

“By the end of treatment . . . 131 subjects (85%) admitted they had at least one hands-on sexual offense, a 59% increase in the number of subjects with known hands-on offenses.”²²⁸ Also by the end of

220. Bourke & Hernandez, *supra* note 206, at 183.

221. *Id.* at 185-86.

222. *Id.* at 183.

223. *Id.* at 186.

224. *Id.*

225. *Id.*

226. Bourke & Hernandez, *supra* note 206, at 187.

227. *Id.*

228. *Id.*

treatment, the number of reported victims was 1777, averaging 13.56 victims per offender.²²⁹ Dramatically, the acknowledged number of sexual contact offenses increased by 2369%.²³⁰

“[O]f the 24 subjects . . . who denied they committed a hands-on offense at the end of treatment, nine were polygraphed, and only two ‘passed.’”²³¹ That means that “less than 2% of subjects who entered treatment without known hands-on offenses were verified to be ‘just pictures’ cases.”²³² “[B]oth of these offenders remarked that while they had not molested a child prior to their arrest for the instant offense,” they would have been at risk for doing so had they had the access and opportunity.²³³

Based on these findings, the researchers questioned “whether it is pragmatically, not to mention theoretically, useful to discriminate between ‘child pornographers’ and ‘child abusers’ or even ‘pedophiles.’”²³⁴

7. All Three Branches of the Federal Government Have Recognized These Harms

All three branches of federal government have recognized that children depicted in pornographic images can suffer severe physical and emotional harm, that the harm continues with each separate viewing, that demand fuels supply, that child pornography possessors are encouraged to act out on their desires by viewing the pornographic images, and that possessors use the contraband to harm even more children.

In passing the Child Pornography Prevention Act of 1996, Congress found that “[t]he use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child,”²³⁵ and that “[c]hild pornography stimulates the sexual

229. *Id.*

230. *Id.* at 188.

231. *Id.*

232. Bourke & Hernandez, *supra* note 206, at 188.

233. *Id.*

234. *Id.* Similarly, a 1980 study by the Chicago Police Department found that in almost 100% of their annual child pornography arrests, officers found visual media depicting the defendant engaging in sex with real children. Stephen T. Fairchild, Note, *Protecting the Least of These: A New Approach to Child Pornography Pandering Provisions*, 57 DUKE L.J. 163, 168 (2007) (quoting *Stopping Child Pornography: Protecting our Children and the Constitution: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 60-61 (2002) (statement of Ernest E. Allen, President and Chief Exec. Officer of the Nat’l Ctr. for Missing & Exploited Children, and Daniel S. Armagh, Dir. of the Legal Res. Div., Nat’l Ctr. for Missing & Exploited Children)).

235. S. REP. NO. 104-358, at 14 (1996) (quoting *New York v. Ferber*, 458 U.S. 747, 758 (1982)).

appetites and encourages the activities of child molesters and pedophiles, who use it to feed their sexual fantasies.”²³⁶ Congress further found that, “[c]hild molesters and pedophiles use child pornography to convince potential victims that the depicted sexual activity is a normal practice; that other children regularly participate in sexual activities with adults or peers.”²³⁷

In recently passing the Adam Walsh Child Protection and Safety Act on July 27, 2006, Congress noted that, “[e]very instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”²³⁸

Likewise, the Supreme Court has recognized that, “[b]ecause the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place”;²³⁹ and that “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.”²⁴⁰

Through the Department of Justice, the executive branch on February 15, 2006, announced the initiation of Project Safe Childhood.²⁴¹ With this initiative, the Justice Department allocated more than \$14 million to the Internet Crimes Against Children Program, which is comprised nationally of 46 regional task forces, to better coordinate partnerships between state, local, and federal law enforcement in prosecuting child exploitation offenses.²⁴² The Justice Department stated one of its goals is to have “[i]ncreased federal involvement in child pornography and enticement cases,” and that “[g]iven the beneficial investigative tools and stiffer punishment available under federal law, U.S. Attorneys and the federal investigative agencies will be expected to increase the number of sexual exploitation investigations and prosecutions.”²⁴³

Thus, it is accepted by all three branches of the federal government that defendants’ arguments as to why they are not dangerous, and relatedly, why there is little to no harm from their offense, hold no merit. These defendants are dangerous and the harm resulting from their offense is grave, and therefore, it is apparent that society needs

236. *Id.* at 12.

237. *Id.* at 13-14.

238. Adam Walsh Child Protection Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (2006).

239. *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982) (citing David P. Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

240. *Id.*

241. FACT SHEET, *supra* note 18.

242. *Id.*

243. *Id.*

to be protected from this offense. Accordingly, the criminal justice system's incapacitation-based treatment of that defendant must be tailored to the harm.

The next question, then, is how much protection is needed. In other words, what constitutes proportional pretrial treatment of a defendant whose alleged actions result in the harm previously described? In addressing this question, Congress should weigh the offense's resulting harm against the statute's costs and burdens. In doing so, Congress must necessarily make public policy decisions as to what weight to assign both elements. If the benefit of amending the statute outweighs the costs and burdens of doing so, the Bail Reform Act should be amended so as to fully achieve its incapacitation-based goals.

C. Weighing the Offense's Resulting Harm Against the Statute's Costs and Burdens

As already explained, the harms resulting from possession of child pornography—harms to the individual victim portrayed in the abuse, to future victims, to society at large, and even to defendants themselves—are great; indeed, very few criminal offenses carry greater harm.

After recognizing this harm and society's need for protection, the benefit of protection should be weighed against the statute's costs and burdens. The costs and burdens consist mainly of the burdens to defendants, both wrongly and correctly charged, and to the criminal justice system's credibility if society does not approve of the system's pretrial treatment.

In weighing these two elements, policy decisions ultimately dictate the end result. For example, a minor shoplifter with a high risk of flight may flee unless bail is high, but the burdens of high bail or pretrial detention may outweigh this risk.²⁴⁴ Conversely, a harm that is not likely to occur, but which is very serious, may outweigh the burdens of conditional bail or detention.²⁴⁵

Each category of costs and burdens is discussed below, with each discussion weighing the particular cost and burden with society's need for protection.

244. Frase, *supra* note 121, at 604.

245. Marie A. Bochnewich, Comment, *Predictions of Dangerousness and Washington's Sexually Violent Predator Statute*, 29 CAL. W. L. REV. 277, 298 (1992) (“[A] harm which is not likely to occur but which is very serious may add up to dangerousness,” whereas “a trivial harm even though it is likely to occur, might not add up to dangerousness.”) (quoting SEYMOUR HALLECK, *THE MENTALLY DISORDERED OFFENDER* 85 U.S. Dep't. of Health & Human Serv. Pub. No. 86-1471 (1974)).

1. Weighing Possession of Child Pornography's Resulting Harms Against the Bail Reform Act's Costs and Burdens to a Defendant

a. Costs and Burdens to Defendants Wrongly Charged

Defendants who are wrongly charged with possessing child pornography obviously face a great cost while awaiting trial, whether they are released or detained. Unfortunately, however, this is true for all defendants wrongly charged with an offense, whatever that offense may be. Our system is not perfect; it is a tragedy that sometimes innocent people are charged with crimes they did not commit. Hopefully our system discovers this mistake and the innocent walk free.

The Supreme Court, although recognizing that simply because a defendant has been charged with an offense does not mean that the defendant committed the offense, still found, in *United States v. Salerno*,²⁴⁶ that a defendant's substantive due process rights are not violated by pretrial detention because this detention does not constitute impermissible punishment; in fact, the Court stated, pretrial detention is not punishment at all, but instead serves only to further the government's legitimate regulatory interest in preventing danger to society.²⁴⁷

In determining whether the Act's restriction on liberty constituted punishment or legitimate, nonpunitive regulation, the Court first looked to Congressional intent.²⁴⁸ It concluded that Congress "perceived pretrial detention as a potential solution to a pressing societal problem," and that there was "no doubt that preventing danger to the community is a legitimate regulatory goal."²⁴⁹

The Court further found that the government's regulatory interest in protecting society can, at times, outweigh a defendant's liberty interest and, here, the authorized pretrial detention was not excessive in relation to the regulatory goal.²⁵⁰ This is true because the Act carefully limits detention to the most serious of crimes, affords defendants a prompt detention hearing, and the Speedy Trial Act limits the maximum length of pretrial detention.²⁵¹

In addition, "the Government must convince a neutral decision-maker by clear and convincing evidence that no conditions of release

246. 481 U.S. 739 (1987).

247. *Id.* at 747 (citation omitted).

248. *Id.* (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984)).

249. *Id.* (citation omitted).

250. *Id.* at 748, 750-51.

251. *Id.* at 747.

can reasonably assure the safety of the community or any person.”²⁵² The Court concluded that, “[u]nder these narrow circumstances, society’s interest in crime prevention is at its greatest,”²⁵³ and the government’s “concern for the safety and indeed the lives of its citizens” authorized the Bail Reform Act of 1984.²⁵⁴

Furthermore, the Bail Reform Act requires the district court to consider “the weight of the evidence” against the defendant when determining how to treat a defendant pretrial.²⁵⁵ Thus, if the evidence against a defendant is weak, the court is required to factor that consideration into its pretrial decisionmaking.

In the end, the costs and burdens to a defendant wrongly charged with possessing child pornography are the same as the costs and burdens to defendants wrongly charged with any offense. The statute is designed to account for these costs and burdens, and therefore, they do not alter the analysis presented here.

b. Costs and Burdens to Defendants Correctly Charged

The correctly charged defendant is also burdened by pretrial treatment to the extent that the treatment is not commensurate to the risk he poses of committing the offense while on pretrial release. Also, if a defendant poses no risk, but is incarcerated anyway, his burden is great. Similarly, if he poses no risk but is subject to mandatory release conditions, he suffers a burden.

In attempting to predict a correctly charged defendant’s propensity for future criminal activity, two approaches are used: clinical prediction and actuarial prediction.²⁵⁶ Clinical predictions are made by psychologists, psychiatrists, parole boards, and judges, all of whom analyze the defendant personally.²⁵⁷ Actuarial, or statistical, prediction relies on explicit rules that list risk factors, weigh each factor, and then mathematically combine these numbers to yield an objective measure of violence risk.²⁵⁸ Actuarial prediction has been proven to be a more accurate, and thus preferred, method of prediction.²⁵⁹ Nevertheless,

252. *Salerno*, 481 U.S. at 750 (citing 18 U.S.C. § 3142(f)).

253. *Id.*

254. *Id.* at 755.

255. 18 U.S.C. § 3142(g)(2).

256. Monahan, *supra* note 149, at 405.

257. *Id.*

258. *Id.* at 405-06 (citing Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgement*, 88 YALE L.J. 1408, 1420-22 (1979)).

259. *Id.* at 408 (citing William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUBL. POLY & L. 293 (1996)).

“[i]t has been widely accepted for some time that predictions of an individual’s likelihood of committing future serious violent crime are only one-third accurate.”²⁶⁰

Even in the face of generally accepted views that we cannot always accurately predict the likelihood that a defendant will commit future crimes, the Office of the Federal Detention Trustee, a federal government agency tasked with managing and regulating federal detention programs, with support from the Administrative Office of the United States Courts, recently sponsored a study to identify relevant predictors of pretrial outcomes so as to better identify which federal defendants “are most suited for pretrial release,” and to develop a risk classification scheme to rate the risk a defendant poses if released pending trial.²⁶¹

The study found that nine factors are statistically significant in predicting pretrial risk:

- (1) whether there were other charges pending against the defendant at the time of arrest, (2) the number of prior misdemeanor arrests, (3) the number of prior felony arrests, (4) the number of prior failures to appear, (5) whether the defendant was employed at the time of arrest, (6) the defendant’s residency status, (7) whether the defendant suffered from substance abuse problems, (8) the nature of the primary charge, and (9) whether the primary charge was a misdemeanor or felony.²⁶²

Weights were then assigned to these nine factors.²⁶³ On a scale from one to five, defendants classified as risk level one posed the least risk for pretrial failure, while defendants classified as risk level five posed the greatest risk.²⁶⁴

Eighty-seven percent of defendants in the lowest risk category were released pending trial.²⁶⁵ They had a 97.7 percent success rate, and were thus concluded to be “the best candidates for release.”²⁶⁶ The study also found that pretrial release conditions generally did not increase these defendants’ success level, and in some cases increased the risk of pretrial failure.²⁶⁷

260. Bochnewich, *supra* note 245, at 293-94 (citing JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR, 47 U.S. Dep’t. of Health & Human Services Pub. No. 81-921 (1981)).

261. Marie VanNostrand & Gena Keebler, *PreTrial Risk Assessment in the Federal Court*, 73 FED. PROBATION 3, 3 (2009).

262. *Id.* at 5.

263. *Id.*

264. *Id.*

265. *Id.* at 19.

266. *Id.*

267. VanNostrand & Keebler, *supra* note 261, at 19.

“Sixty-two percent of all defendants classified in level 2 were released pending trial,” and those released had an average pretrial success rate of ninety-four percent.²⁶⁸ The study concluded that “[d]efendants classified as level 2 are good candidates for release, yet, similar to risk level 1, [pretrial release conditions] . . . generally do[] not increase success and in some cases increases the risk of pretrial failure.”²⁶⁹

Less than half of all defendants classified as risk level three were released pending trial and those who were “had an average success rate of 90.8 percent.”²⁷⁰ Defendants who were subjected to release conditions were more likely to be successful pending trial.²⁷¹

Forty percent of defendants classified as risk level four were released pending trial and, of these, 88.2% completed pretrial release successfully.²⁷² Ninety-two percent of those released were subjected to release conditions.²⁷³

Finally, “[a]pproximately 30 percent of the highest risk defendants, risk level 5, were released pending trial,” with nearly all of these defendants being subjected to pretrial release conditions.²⁷⁴ These “defendants had an average success rate of 84.5 percent.”²⁷⁵

The study concluded that the majority of defendants charged with federal crimes present a low risk of pretrial failure, meaning that they are purportedly at low risk of committing an offense while on pretrial release or of failing to appear in court on the presently charged crime.²⁷⁶ Generally, sex crime defendants fall into a lower risk category for which the study recommends pretrial release with no release conditions attached.²⁷⁷ The study admonishes that “[l]ower-risk defendants are the most likely to succeed if released pending trial. Release conditions that include alternatives to detention—with the exception of mental health treatment, when appropriate—generally decrease the likelihood of success for lower-risk defendants and should be required sparingly.”²⁷⁸

Several problems exist with this study. First, the defendants’ lack of prior criminal history weighs heavily in their categorization

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. VanNostrand & Keebler, *supra* note 261, at 19.

274. *Id.*

275. *Id.*

276. Byrne, Lurigio & Pimentel, *supra* note 31, at 42 (citation omitted).

277. VanNostrand & Keebler, *supra* note 261, at 22.

278. *Id.* at 6.

as low risk defendants.²⁷⁹ As explained above, however, the defendant who views child pornography will often go undetected because it is difficult to discover what someone is doing in their home and on their computer.

In addition, the study fails to recognize the unique nature of the possession of child pornography offense. Those who supervise defendants charged with possessing child pornography caution against the study's conclusions for this subcategory of defendants.²⁸⁰ Addressing the study's findings, a probation officer who deals with sex offenders on pretrial release published an article alongside the study urging restraint in applying the study's findings to what he termed the "special population" of federally charged sex offenders.²⁸¹

In urging restraint, this probation officer provided specific examples from his work of defendants continuing to reoffend while on pretrial release. In one of his cases, a defendant faced with possession of child pornography charges was found to possess more than 600 child pornographic images.²⁸² "This defendant initially scored a 1 on the [risk assessment test], was professionally employed, and educated."²⁸³ The probation officer discovered chat logs on the defendant's computer that confirmed he had attempted to make online contact with children while on pretrial release.²⁸⁴

Another example involved a defendant charged in the federal District of New Jersey.²⁸⁵ The defendant was aware that his computer activity was being monitored while on release, yet he chatted with an individual who identified himself as a fifty-five-year-old convicted sex offender.²⁸⁶ The two "exchanged stories of fantasy rape of children and subsequently exchanged images of child pornography."²⁸⁷ The probation officer went to the defendant's home and discovered numerous images of child pornography.²⁸⁸ The defendant scored a zero on a risk assessment test, "was educated, employed, and had no prior criminal history."²⁸⁹

Given both of these defendants' assessed risk levels, the study would have recommended that judges release them pretrial with no

279. *See id.* at 12-13 (discussing the increased likelihood of pretrial failure if defendants had prior arrests and the use of this factor in assigning defendants a risk category).

280. Muller, *supra* note 74, at 45.

281. *Id.*

282. *Id.* at 46.

283. *Id.*

284. *Id.*

285. *Id.*

286. Muller, *supra* note 74, at 46.

287. *Id.*

288. *Id.*

289. *Id.*

release conditions attached. We would not have known of the defendants' continued criminal activity, however, *but for* the release conditions that were imposed.²⁹⁰ In the end, at best, the correctly-charged defendant's risk level is unknown.

Next, in weighing the harm against the unknown risk, public policy decisions must be made. As recognized above, most commentators accept that predictions of future criminal activity are approximately one-third accurate.²⁹¹ Bochnewich argues, however, that those who say these numbers mandate abandoning preventive detention from our criminal justice system are incorrect.

First, she says critics are incorrect because assuming that a two-thirds false positive is inadequate unfairly incorporates our legal standards of proof into what is, essentially, policy making.²⁹² Deciding what level of risk a defendant must present in determining how to treat a defendant pretrial is a question of public policy, and this public policy determination is unfettered by legal constraints and standards established by probable cause, reasonable doubt, reasonable probability, and the like.²⁹³

Next, she asserts critics of pretrial detention are incorrect because "some of the 'false positives' are actually true positives, whose real violent acts were undetected by authorities, unreported by the victims, or not prosecuted for a variety of reasons."²⁹⁴ Bochnewich cites a study similar to the above-described Butner study, of defendants prosecuted and convicted in Washington of child molestation.²⁹⁵ The study found that although records uncovered a median of one victim per defendant, the defendants reported in an anonymous survey that they had a median of seven victims each.²⁹⁶ In terms of real numbers, this translated to an increase from 136 known victims to 959 total victims.²⁹⁷ She concludes, therefore, that "there is compelling evidence

290. *Id.*

291. Bochnewich, *supra* note 245, at 293-94 (citing JOHN MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR, 47 U.S. Dep't of Health & Human Services Pub. No. 81-921 (1981)).

292. *Id.* at 295 (quoting Marc Miller & Norval Morris, *Predictions of Dangerousness: Ethical Concerns and Proposed Limits*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393, 424 & n.67 (1986)) ("We reject on logical grounds any tie between standard of proof and the level of prediction necessary to justify preventive detention."); *see also* John Monahan & David Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAV. 37, 38 (1978) (discussing using standards of proof in predictions of dangerousness).

293. Bochnewich, *supra* note 245, at 295-96 (citing Monahan & Wexler, *supra* note 292, at 37-39).

294. *Id.* at 296.

295. *Id.* at 296-97 (citing Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 291 (1991)).

296. *Id.* at 297.

297. *Id.*

that the widely accepted two-thirds 'false positive' incidence seriously understates the rate of re-offense by convicted sex offenders."²⁹⁸

Even if we are to accept the two-thirds "false positive" analysis, Congress should still decide that a defendant who poses a risk of committing additional child pornography offenses or engaging in a hands-on sexual offense of a child while on pretrial release should be subject to release conditions if released or a rebuttable presumption if the government moves for detention because even if the risk is small, a realized risk results in harm that is great. The question is, quite simply: is it worth any risk to treat possession of child pornography differently from other sex crimes against children? Given possession of child pornography's resulting harm, the answer should be a resounding "no."

2. Weighing Possession of Child Pornography's Resulting Harms Against the Bail Reform Act's Costs and Burdens to the Criminal Justice System Itself

Another cost or burden associated with a defendant's pretrial treatment is the system's effect on public perception. Critics assert that an incapacitation-based system is not fair because it treats people based on what they might do and not on what they have done, and treats people differently even though they have committed the same offense, thereby leading to a loss in the public's acceptance of, and abidance by, the criminal justice system. Thus, this criticism speaks directly to the costs and burdens associated with the criminal justice system's treatment of a defendant pretrial.

In support of retribution, and against incapacitation theory, Kant wrote, "[p]unishment by a court . . . can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. . . . For a man can never be treated merely as a means to the purposes of another" ²⁹⁹ These same sentiments underlie

298. *Id.* at 298.

299. IMMANUEL KANT, METAPHYSICS OF MORALS 140 (Mary Gregor trans., Cambridge University Press 1991) (1797), *quoted in* Andrew Strauss, Note, *Losing Sight of the Utilitarian Forest for the Retributivist Tress: An Analysis of the Role of Public Opinion in a Utilitarian Model of Punishment*, 23 CARDOZO L. REV. 1549, 1558 (2002). Similarly, Robinson and Darley argue that an incapacitation-based system is fundamentally flawed because offenders are treated differently from what the community regards as just punishment for the offense committed. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 467-68 (1997). To support this argument, they state that this system will assign different sentences to two individuals who commit the exact same crime, that the offender is being punished for an action that he has not yet done, and that the penalty is based on factors that are irrelevant to the community's perception of an appropriate sentence, such as race, gender, and age. *Id.* at 468.

the criticisms of preventive pretrial detention to protect society from crimes committed by defendants on pretrial release.

Critics also argue that under an incapacitation-based system that treats individual defendants based on predictions of future behavior, defendants who commit the same offense will be treated differently. Long writes:

I think the ultimate fault with selective incapacitation is its incompatibility with some basic values of a free, democratic society. Selective incapacitation constitutes an illegitimate exercise of state power because, its employment, and specifically its appeal to predictions of individual dangerousness, results in something other than equal, just, and uniform treatment of criminal offenders in particular, and of citizens in general.³⁰⁰

As a result of these two assertions, Robinson and Darley conclude that, “an incapacitation-based sentencing system undercuts the moral credibility of the criminal law”³⁰¹ According to Robinson and Darley, our criminal justice system maintains credibility, and, as a result, is able to help build, shape, and maintain society’s norms and principles, only when it criminalizes and punishes offenses which deserve moral condemnation.³⁰² If our system does not reflect the community’s perception of “moral blameworthiness,” then our system is no longer credible.³⁰³ Long has further asserted that “[c]itizens could not unanimously recognize the legitimacy of state actions, policies, and legal rules that treated some of them as mere means for the benefit of others.”³⁰⁴

Weighing the grave harm resulting from possession of child pornography offenses against this argued cost, however, does not defeat an argument to amend the statute. This is true because the purported “costs and burdens” are, in reality, not costs and burdens at all.

First, critics’ fear of dissimilar treatment for defendants who commit similar offenses does not apply to the Bail Reform Act of 1984. The rebuttable presumption and mandatory release conditions apply to *all* defendants charged with the enumerated offenses.³⁰⁵ So all defendants, no matter their personal characteristics or history, are subjected to a rebuttable presumption of detention and mandatory

300. Leonard J. Long, *Rethinking Selective Incapacitation: More at Stake than Controlling Violent Crime*, 62 UMKC L. REV. 107, 111 (1993) (citation omitted).

301. Robinson & Darley, *supra* note 299, at 468.

302. *Id.* at 477.

303. *Id.*

304. Long, *supra* note 300, at 142.

305. 18 U.S.C. § 1342(c), (e) (2006).

release conditions if they have been charged with the enumerated statutory offenses.

Second, the critics' assertions fail because they completely disregard the public's true expectations and requirements of its criminal justice system. The public wants and demands that the criminal justice system protect them and their family. These expectations are heightened when the threat posed is to our children. If the criminal justice system fails to meet this public demand, it is then that the system loses its moral credibility and legitimacy.

Although Robinson and Darley's proposition that "the criminal law's moral credibility is essential to effective crime control" and that this credibility "is enhanced if the distribution of criminal liability is perceived as 'doing justice,'" is true,³⁰⁶ their theory is deficient to the extent that it ignores the public's expectations of protection.

Indeed, these expectations are at the heart of the very reason we have our government. Classical political philosophers cite to the "State of Nature" as the reason individuals submit to governmental authority, and John Locke's arguments for the social contract were extremely influential on the founding of this country.³⁰⁷ John Locke explained that the state of nature is the state of complete liberty to conduct one's life as one wants, without any interference from others.³⁰⁸ Because the state of nature can dissolve into a state of war, however, it is advantageous for individuals to contract together and form a civil government.³⁰⁹ Government is formed only when individuals come together and agree to relinquish their individual power to punish those who transgress the "Law of Nature," and to give that power to a government.³¹⁰ The government's justification to exist is to protect people's property and well-being, and "when such protection is no longer present . . . [citizens] have a right, if not an outright obligation, to resist" the government.³¹¹

Thus the costs and burdens of amending the Bail Reform Act of 1984 to include possession of child pornography are nonexistent when it comes to the effect an amendment would have on the criminal justice system's moral legitimacy. Indeed, it is only if the Act is *not* amended that the criminal justice system's moral legitimacy could suffer. The offense's resulting harm mandates that the statute be

306. Robinson & Darley, *supra* note 299, at 457.

307. Celeste Friend, *Social Contract Theory*, THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY (Oct. 15, 2004), <http://www.iep.utm.edu/soc-cont>.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

amended to treat possession of child pornography similarly to the other sex crimes against minors.

D. Analyzing Whether the Bail Reform Act of 1984 Treats Possession of Child Pornography Consistently with Other Crimes Resulting in the Same Harm

In addition to treating an offense in proportion to its harm, as weighed against its costs and burdens, in order for an incarceration-based statute to fully achieve its goals, it should treat similar offenses consistently. By carving out possession of child pornography offenses from other federal child exploitation offenses, the Bail Reform Act of 1984 fails to treat similar harms similarly, and thus fails to fully achieve its utilitarian, incapacitation-based goal. Two examples are provided below.

First, the Bail Reform Act of 1984 classifies receipt of child pornography as a rebuttable presumption offense and a mandatory-release-condition offense.³¹² To violate the receipt statute, the defendant must: (1) knowingly receive; (2) any visual depiction; (3) that has been transported in interstate commerce, including by computer, or that has been produced using materials that have been; (4) if the visual depiction was produced using a minor engaging in sexually explicit conduct.³¹³ The only difference between possessing child pornography and receiving it are the elements “possession” versus “receipt”; otherwise, the offenses are identical.³¹⁴

The harm resulting from a defendant who commits the offense of receiving child pornography and the resulting harm from a defendant who possesses child pornography is the same. The only difference in these two cases is a matter of proof. In one case, the prosecutor can prove how, where, and when the defendant received the child pornography, but in the other case, the government lacks this evidence. In both scenarios, however, a child has been abused and that abuse is portrayed in the images; the victim is revictimized by both defendants; both defendants supply the demand that fuels the market; both defendants suffer injurious effects themselves; and both defendants can use the images to abuse more children.³¹⁵ By treating offenses that result in the exact same harm differently, the Bail Reform Act of 1984 fails to fully meet its underlying incapacitation-based purpose.

312. 18 U.S.C. § 1342(c), (e) (2006).

313. *Id.* § 2252(a)(2).

314. Compare *id.* § 2252(a)(2) (receipt of child pornography statute) with *id.* § 2252(a)(4) (possession of child pornography statute).

315. See the discussion of harm caused by viewing images of child pornography *supra* Part III.B and accompanying text.

Another important point to note is that, by not including possession but by including receipt, the Bail Reform Act of 1984 rewards the savvy defendant. Technology is becoming much more advanced and defendants are able to wipe their hard drives clean, thereby eliminating evidence of when, where, and how they received the child pornography and thus inhibiting a prosecutor from being able to charge and prove receipt. In contrast, the less savvy defendant will not eliminate the traces of when, where, and how he came to possess the child pornography, and he will thus be charged with receipt, face a rebuttable presumption at the bail hearing, and face mandatory release conditions if he is released pretrial.

Similarly, if a defendant receives child pornography through the mail, and if law enforcement finds the mailing envelope, prosecutors can charge the defendant with receipt because the prosecutor can prove where, when, and how the defendant came to possess the contraband. Here again, the savvy defendant may discard traces of his receipt, but the less savvy defendant may not. Where receipt of child pornography and possession of child pornography result in exactly the same harm, the law should not reward the defendant who knowingly attempts to hide his crime. By doing so, we reward the defendant who is arguably more dangerous.

Another example shows that the Bail Reform Act of 1984 treats an offense resulting in arguably less harm—or, at the very least, the same harm—more severely. Soliciting child pornography is included in the rebuttable-presumption category of cases and in the mandatory-release-condition category of cases.³¹⁶ This offense makes it illegal in part for any person who “advertises, promotes, presents, distributes, or solicits . . . any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains” child pornography.³¹⁷ An individual violates this statute, then, if he advertises to another person that he has child pornography to view or sell, even if he does not. If a defendant is charged with such conduct, although serious and rightly criminalized, the resulting harm from this action is arguably less than the resulting crime of possessing actual child pornography.

This is true because, with advertisement no child pornography actually exists. Although the supply-and-demand harm is perpetuated and a defendant may suffer certain injurious effects, such as the belief that his desires are normal and socially acceptable, a real

316. Note the presence of 18 U.S.C. § 2252A(a)(3) in the provisions of § 1342(c) and (e). 18 U.S.C. § 1342(c), (e).

317. *Id.* § 2252A(a)(3)(B).

child has not been abused to create the image and is not revictimized with additional viewings. Consequently, the Act treats an offense with arguably less harm more seriously than an offense with arguably greater harm. Thus, in this example too, the Bail Reform Act of 1984 fails to fully achieve its purpose of adequately protecting the public in a consistent, and thus most effective, manner.

Amending the Bail Reform Act of 1984 to include possession of child pornography offenses alongside the other child sexual exploitation offenses would result in consistent treatment of the same harm and thus help fulfill one of the statute's main purposes.

IV. RESPONDING TO OBJECTIONS

The best argument that critics have against amending the Bail Reform Act of 1984 is that the mandatory-release provision itself is unconstitutional. This argument has some support from the courts.

For example, to date at least six courts have found that this portion of the Bail Reform Act violates the Constitution's procedural due process clause.³¹⁸ At least one court has found that mandatory conditions of release do not violate procedural due process.³¹⁹

At least four courts have found that this portion of the Act violates the excessive bail clause under the Eighth Amendment.³²⁰ At least two courts have found that the mandatory conditions do not violate the Eighth Amendment.³²¹

318. See *United States v. Merritt*, 612 F. Supp. 2d 1074, 1080 (D. Neb. 2009) (holding Bail Reform Act of 1984 provisions allowing for the imposition of electronic monitoring and curfew violate the Due Process Clause); *United States v. Arzberger*, 592 F. Supp. 2d 590, 607 (S.D.N.Y. 2008) (holding the imposition of a curfew with electronic monitoring under the Bail Reform Act of 1984 violates the Due Process Clause); *United States v. Kennedy*, 593 F. Supp. 2d 1221, 1224 (W.D. Wash. 2008) (holding conditions of pretrial release mandated by Bail Reform Act of 1984 violate the Excessive Bail Clause, the Due Process Clause, and the separation of powers doctrine); *United States v. Torres*, 566 F. Supp. 2d 591, 599, 601-02 (W.D. Tex. 2008) (holding the provision of the Bail Reform Act of 1984 mandating curfew with electronic monitoring for pretrial release facially denies procedural due process and, as applied, violates the defendant's Eighth Amendment right "to be free from excessive bail"); *United States v. Vujnovich*, No. 07-20126-01, 2007 WL 4125901, *3 (D. Kan. Nov. 20, 2007) (holding the imposition of electronic monitoring requirement as a condition of release under the Bail Reform Act is unconstitutional because it denies procedural due process and violates the Eighth Amendment and the separation of powers doctrine); *United States v. Crowell*, No. 06-CR-291E(F), 2006 WL 3541736, *11 (W.D.N.Y. Dec. 7, 2006) (holding the conditions of release under the Bail Reform Act of 1984 deny procedural due process and violate the Eighth Amendment and the separation of powers doctrine).

319. *United States v. Gardner*, 523 F. Supp. 2d 1025, 1034 (N.D. Cal. 2007).

320. *Kennedy*, 593 F. Supp. 2d at 1224; *Torres*, 566 F. Supp. 2d at 601-02; *Vujnovich*, No. 07-20126-01, 2007 WL 4125901 at *3; *Crowell*, No. 06-CR-291E(F), 2006 WL 3541736 at *11.

321. *Arzberger*, 592 F. Supp. 2d at 607; *Gardner*, 523 F. Supp. 2d at 1031.

Finally, at least three courts have found that the mandatory release conditions violate the separation of powers doctrine.³²² At least two cases hold that they do not violate this doctrine.³²³

These numbers may be skewed because they account only for published district court orders. Most district courts, however, do not publish their orders, so it is possible that many judges have found that the mandatory release conditions do not violate the Constitution, but have not published these findings.

The constitutionality of this statutory provision is beyond the scope of this article, but even if the mandatory release conditions were ultimately found to be unconstitutional, the argument asserted here that possession of child pornography offenses should be treated in the exact same manner as other child sex offenses does not change. Assuming the Supreme Court was to find the mandatory release provision unconstitutional, Congress should treat possession of child pornography the same way that it treats the other federal sex crimes against minors.

If, for example, Congress were to amend the statute to make the release conditions a rebuttable presumption, possession of child pornography should be included in the rebuttable presumption category alongside the other child sex crimes. In this way, the statute would continue to fully achieve its purpose.

CONCLUSION

The Bail Reform Act of 1984 currently treats possession of child pornography offenses differently from other federal sex crimes against children in two ways: (1) it does not include possession of child pornography offenses in the mandatory-release-condition category of cases; and (2) it does not include possession of child pornography offenses in the rebuttable-presumption category of cases.³²⁴ This omission inhibits the statute from fully achieving its incapacitation-based purpose.

Simply put, the statute fails to fully achieve its underlying incapacitation-based purpose because, though Congress, the Supreme Court, and the executive branch have recognized that possession of child pornography results in grave and exceptional harms, the Act does not treat possession of child pornography offenses proportionally

322. *Kennedy*, 593 F. Supp. 2d at 1224; *Vujnovich*, No. 07-20126-01, 2007 WL 4125901 at *3; *Crowell*, No. 06-CR-291E(F), 2006 WL 3541736 at *11.

323. *Arzberger*, 592 F. Supp. 2d at 607; *Gardner*, 523 F. Supp. 2d at 1036.

324. *See supra* notes 106-07 and accompanying text for a discussion of how possession of child pornography is treated differently from similar offenses.

to those resulting harms. The Act does not give proper weight to the harms caused by the offense relative to pretrial treatment's costs and burdens, and also does not treat the offense consistently with other offenses resulting in the same harms. If these harms are properly weighted, it becomes clear that the Bail Reform Act of 1984 should treat possession of child pornography the same way that it treats the other federal sex offenses against minors.

The analysis applied here to the Bail Reform Act of 1984 is useful because, as federal judges are presented with an increasing number of defendants charged with possession of child pornography offenses, and as many of these same judges fail to recognize the harms resulting from this offense, amending the Bail Reform Act of 1984 would treat the offense with the seriousness that it deserves. The analysis is also useful because, as legislatures around the country promulgate more and more incapacitation-based statutes, the test, if applied, helps ensure that new statutes are crafted to benefit society. Protecting society is, after all, one of the main purposes of our criminal justice system. This is especially true when it comes to protecting the most vulnerable—our children.