

12-6-2017

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Recommended Citation

Kfoury, Michelle, "To Catch a Predator Abroad: A Call for Greater Extraterritorial Enforcement of Sexual Exploitation of Children" (2017). *Utah Law Student Scholarship*. 3.
https://dc.law.utah.edu/student_scholarship/3

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To Catch a Predator Abroad: A Call for Greater Extraterritorial Enforcement of Sexual Exploitation of Children

Posted on December 6, 2017

By Michelle Kfoury for GlobalJusticeBlog.com

Click. An image of a grown man sodomizing his eleven-year old niece. Click. A video of a four-year-old boy enduring sexually sadistic torture. Click. A sexual predator escaping arrest in a country that does not criminalize sexual exploitation of children. This all-too-common scenario is the unfortunate reality of many sexual exploitation cases.

How should law enforcement address this unfortunate reality? The United States Code criminalizes engaging in “sexually explicit conduct” with a person under 18 years of age, whose purpose is to produce visual depictions of minors engaged in the sexually explicit conduct when the person knows or has reason to know the visual depictions will affect interstate or foreign commerce.[i] The United States Code also criminalizes the possession and subsequent intent to view materials visually depicting a minor engaged in sexually explicit conduct when those materials can be shown to have traveled in interstate or foreign commerce. [ii] These crimes are colloquially known as the production, distribution, or possession of child pornography, and are the most common crimes prosecuted under the Sexual Exploitation of Children statutes. Punishing child pornography crimes is a relatively new criminal development.[iii] It wasn’t until 1982 that the Supreme Court removed child pornography from First Amendment protection and gave states greater authority to regulate child pornography.[iv] The rapid rise of the Internet has led to an exponential growth in the production and distribution of child pornography. What used to be a somewhat risky criminal enterprise conducted through mail or in-person purchases has shifted almost exclusively online, creating a new level of anonymity and instant gratification. In some cases, viewers can even access live streams of child sex abuse.[v] As technology continues to advance so does the difficulty in enforcing child pornography crimes both domestically and abroad.

It is difficult to pinpoint exact statistics about the number of child pornography victims and the number of visual depictions circulating worldwide. As of 2013, UNICEF estimated as many as two million children are victimized by sexual exploitation every year. That number will continue to grow as technology continues to advance at a breakneck pace. With that comes an increase in child sex tourists—offenders travelling abroad to engage in sexual exploitation

of children. Child sex tourism happens at all tourist destinations and is becoming easier to commit.

NGOs and individual governments face two massive hurdles to globalized enforcement and punishment of child sexual exploitation crimes. The first hurdle is seeking out offenders. As technology continues to advance, offenders are employing more sophisticated concealment techniques. For example, both producers and possessors of child pornography now use more heavily encrypted, anonymous networks over the “Dark Web,” and even create manuals containing protocols and encryptions designed to escape detection by law enforcement.[vi] Just as the rise of the Internet caused exponential growth in child pornography crimes, the Internet facilitates an increase in child sex tourism.[vii] Offenders can now make instant, anonymous contact with pimps or potential victims and make travel arrangements in a matter of minutes.[viii]

The second hurdle is the inadequacy of legal provisions protecting children worldwide. In 1995, the United Nations established the Convention on the Rights of the Child, defining a child as a person under the age of eighteen and requiring all nations who ratify the Convention to “ensure to the maximum extent possible the survival and development of the child.”[ix] Five years later, the UN followed up on the Convention and enacted the Second Optional Protocol, requiring signatories to prohibit child pornography and the sale and prostitution of children.[x] Currently, 196 states are parties to the convention, with the United States refusing to ratify.. Additionally, the International Centre for Missing and Exploited Children has been tracking the criminal status of sexual exploitation laws since 2006, and found 127 states have either enacted or strengthened sexual exploitation laws since the study began.[xi] IMEC determined their findings based on a list of six criteria to determine the adequacy of sexual exploitation laws: 1) whether a state has existing laws criminalizing child pornography; 2) whether the existing laws contain a definition of child pornography; 3) whether the existing law criminalizes possession of child pornography; 4) whether the existing statute criminalizes distribution of child pornography; 5) whether existing law requires Internet Service Providers to report child pornography to law enforcement; and 6) whether existing laws criminalize “computer facilitated offenses.”. IMEC concluded 71 states substantially complied with the criteria and 11 states have laws to effectively combat sexual exploitation of children.

If over 100 states acknowledge an obligation to criminalize sexual exploitation and 81 have laws adequate to provide protection for children, why is there no international convention on child pornography? The answer is threefold. While independent federal law criminalizes sexual exploitation abroad, local

prosecutorial agencies often reach dead ends when trying to obtain evidence. For example, the prosecutorial division I work with could not go forward with sexual exploitation charges on a Utah citizen because the state where he committed the crime did not want to cooperate with the investigation. The state, despite being a signatory nation to the Convention and Second Protocol and having laws criminalizing child pornography, could turn over evidence because their law enforcement had bigger priorities, like investigating child trafficking crimes. The UN Office of the High Commissioner on Human Rights also cites a lack of training sufficient to detect combat sexual exploitation crimes.[xii]

The states that do have laws adequate to combat sexual exploitation crimes are outweighed by the states lacking sufficient laws. 114 states either lack sufficient laws or have no laws addressing sexual exploitation of children, almost all of them located in the Middle East, Eastern Europe, and Asia.[xiii] 35 states do not have laws criminalizing sexual exploitation of children. Of the 79 states who have some laws in place, 50 do not criminalize mere possession of child pornography, 60 do not define child pornography, and 26 do not criminalize computer-based offenses.[xiv] Furthermore, only 79 states total have legislation requiring Internet Service Providers to report possible offenders and save that data for investigative and prosecutorial use. Offenders can easily obtain this information and focus their foreign travel to states lacking the tools available to apprehend them. This trend implies the majority of states do not believe sexual exploitation of minors is a problem for which to devote resources.

It is unclear why so many states lack sufficient laws to combat child pornography, but the actual harm associated with sexual exploitation and its underlying statistics can give the international community some insight. The sexual exploitation of children causes harm to a child's emotional, mental, and physiological well-being. [xv] It also causes harm to the overall well-being of society. Children are at a greater risk of developing substance abuse problems. Sexual exploitation victims struggle to develop healthy social and sexual relationships in adulthood and have a higher risk of becoming sexual predators.[xvi] Furthermore, the harm associated with the sexual abuse depicted in child pornography extends well beyond the abuse itself. The pornographic materials are a permanent record of the sexual abuse. The children are re-victimized every time the materials are distributed and viewed. And because it is almost unheard-of for a purveyor or possessor of child pornography to report the sexual abuse depicted in the materials, the purveyors and possessors are considered to be complicit in the sexual abuse. In fact, some scholars posit the materials inflict greater harm on the victims than the actual abuse because it can haunt the victims for the rest of their

lives.[xvii] For example, Amy Unknown, the victim of one of the most widely-circulated child pornography series worldwide, claims she is unable to live a normal life. She is aware her abuse is a permanent fixture on the Internet worldwide and lives in daily fear. Amy was unable to complete college and still struggles to hold full-time employment because she is afraid someone will recognize her from the images. She attends weekly therapy sessions to cope, putting a financial strain on her family.[xviii]

The study of sexual exploitation of children has produced some alarming statistics. Most studies estimate recidivism rates hover around 3-5%. That may seem low, but these estimates are flawed. Most agencies remove case files from databases after ten years, making it harder to track those who reoffend. Additionally, most recidivism studies only track recidivism for child pornography offenses instead of all sexual offenses.[xix] What makes the flawed recidivism statistic most alarming is the likelihood that child pornography offenders will commit future or admit to previous sexual abuse of a child. The crossover rate between offenders' merely possessing child pornography and committing actual sexual abuse on a child is as high as 40%.[xx] But fewer than one in three offenders convicted for sexual exploitation admit to contact offenses at sentencing, making it impossible for courts to impose sentences that truly reflect the severity of a defendant's behavior.[xxi] In sum, there is a substantial gap in what the world knows about sexual exploitation offenses and what is being done to enforce sexual exploitation laws worldwide.

So what can be done to increase extraterritorial enforcement of sexual exploitation crimes? To start, it would help if the United Nations established a convention to impose an obligation on signatory nations to adopt a criminal prohibition of sexual exploitation. In her presentation to the UN Human Rights Council, Special Rapporteur Najat Maalla M'jid suggests proposing a set of laws that can be easily adopted by all states.[xxii] Such a broad set of laws would need to include a legal definition of child pornography, criminalize the mere possession of child pornography, criminalize sexual exploitation crimes facilitated by computers, and require all Internet Service Providers to report possible offenders and retain data to use in prosecutions. M'jid also suggests creating a global database of sorts to track typical offender behavior and what laws and enforcement tools actually work. M'jid is certainly on the right track, but her suggestions can go further.

Before the world can get to an end goal of a global set of sexual exploitation laws, we need to understand the hurdles. NGOs and governmental organizations must be educated on the real harm sexual exploitation imposes on victims. The global database is the right place to start but needs to be

much more comprehensive. Such a database would need to include a list of offenders and whether their passports restrict them from international travel, lists of known victims and whether they have a victim rights advocate representing them in civil matters. Keep in mind that this is not a call to identify attorneys representing known victims by name, but rather to understand how far the materials have spread and whether victims have been successful in obtaining restitution and/or civil damages. The database would also include lists of pending cases in local and international courts with the option of keeping prosecutors, defense counsel and the defendant anonymous, vetted training techniques teaching law enforcement officials how to recognize sexual exploitation, and where on the Dark Web to target purveyors of child pornography.

Our current available studies show that sexual exploitation will only lead to a growth in crossover rates with more serious offenses. Extraterritorial enforcement must start with sexual exploitation of children, but enforcement must be based on a more thorough understanding of the problem, a willingness to create a globalized task force to combat it, and the common goal of upholding the core principles of the Convention on the Rights of the Child .

Michelle is a 3rd year student and law clerk for the Utah Attorney General's Office, focusing on the prosecution of internet crimes against children. She is the Secretary/Public Relations Director for the Student Bar Association and a member of the law school's National Trial Advocacy team.

Endnotes

- [i] 18 U.S.C.S. § 2251 (LexisNexis)
- [ii] 18 U.S.C.S. § 2252(a)(4b) (LexisNexis)
- [iii] Amy Adler, *The Perverse Law of Child Pornography*, 101 *Colum. L. Rev.* 209, 211 (2001).
- [iv] *New York v. Ferber*, 549 U.S. 747, 756 (1982).
- [v] Mark Griffiths, *Excessive Internet Use: Implications for Sexual Behavior*, *CYBERPSYCHOLOGY & BEHAVIOR*, vol. 3, 537-552 (2000).
- [vi] <https://www.justice.gov/criminal-ceos/child-pornography>
- [vii] www.ohchr.org/EN/NewsEvents/Pages/ChildsexTourism.aspx
- [viii] *Id.*
- [ix] General Assembly resolution 44/25
- [x] *Id.*
- [xi] <https://www.icmec.org/child-pornography-model-legislation/>
- [xii] <http://www.ohchr.org/EN/NewsEvents/Pages/ChildSexTourism.aspx>
- [xiii] International Centre for Missing and Exploited Children, *Child Pornography: Model Legislation and Global Review*, Eighth Edition, 2016. <http://www.icmec.org/wp-content/uploads/2016/02/Child-Pornography-Model-Law-8th-Ed-Final-linked.pdf>
- [xiv] *Id.*
- [xv] Feber, at 758.
- [xvi] UC Schoettle, M.D., *Child Exploitation: A Study of Child Pornography*, *Journal of the American Academy of Child Psychiatry*, vol. 19, 289-99 (1980).
- [xvii] DP Shouplin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 *Wake Forest L. Rev.* 535 (1981).
- [xviii] Brief for Respondent Amy at 3, *Paroline v. United States*, 572 US ___ (2014) (No. 12-8561).
- [xix] A.W. Eke, M.C. Seto & J. Williams, *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-up Study*, 35 *LAW HUMAN BEHAVIOR* 466-78 (2011).
- [xx] U.S. Dept. Of Justice, Federal Bureau of Investigation, *Crossover Offending: Investigations of Child Pornography Possession Can reveal Contact Sexual Offenses Against Children*, unclassified memorandum, 1-8, (2014).
- [xxi] M.C. Bourke & A.E. Hernandez, *The "Butner Study" Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, *The Journal of Family Violence*, vol. 24, 183-91 (2009).
- [xxii] www.ohchr.org/EN/NewsEvents/Pages/ChildsexTourism.aspx