

THE EFFICACY OF SEVERE CHILD PORNOGRAPHY SENTENCING: EMPIRICAL VALIDITY OR POLITICAL RHETORIC?

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I. INTRODUCTION

Congress's appetite for expanding the scope of child pornography laws and increasing the length of prison sentences for child pornography offenders endures, despite other officials involved in federal sentencing questioning the necessity and proportionality of severe sentences. While members of Congress ascribe various general harms to the existence of child pornography, it appears as though the real impetus behind Congress's harsh stance is an underlying presumption that child pornography offenders are really undetected child molesters, a particularly scorned group.¹ Congress has repeatedly forced increases in the federal sentencing guidelines using unconventional means for child pornography offenses, notwithstanding opposition from the United States Sentencing Commission. The polarity of opinion concerning the risk that child pornography offenders pose to other children is now evident. Despite strong Congressional belief, a growing number of federal judges instead view most offenders who possess or trade child pornography as mostly harmless to others. The following description is illustrative of the perception of many federal judges: "[w]e have had quite a number of people that are very similarly situated to [defendant], successful, hard working, family people that get caught up in this."² Indeed, a recent survey by the Sentencing Commission showed that

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1. *See, e.g.*, 149 CONG. REC. S231, S243 (daily ed. Jan. 13, 2003) (reporting a "significant link between those offenders who possess child pornography and those who sexually assault children"); 137 CONG. REC. S10,322 (daily ed. July 18, 1991) (statement of Sen. Jesse Helms) (testifying that "[i]n 1986, the Senate Subcommittee on Investigations found that child pornography was directly connected to child molestations. The experts testified that users of child pornography are frequently pedophiles."). Senator Helms also asserted that "[t]here have been dozens of studies by respected experts who come to the same conclusion—child pornography is indeed a cause of child molestations," though without naming any study. *Id.*

2. *United States v. Bain*, 586 F.3d 634, 642 (6th Cir. 2009).

around seventy percent of federal judges consider the sentencing guidelines too severe for child pornography possession and receipt cases.³ With their recent Supreme Court-awarded discretion in sentencing, a number of federal judges began to use this discretion to reduce child pornography sentences, in many cases far below sentencing guideline ranges. In part, the reduction in sentences in many cases represents a growing movement among federal judges who dispute Congressional fears that child pornographers are also molesters. Members of Congress have, in turn, sternly criticized the practice of sentencing to lesser terms than Congress intended.⁴ This Article, in part, provides a substantial review of the social science literature to inform as to whether the potential link to child molestation is supported.

The issue is important to the operation of the federal criminal justice system. With the explosion of the Internet, the relative ease with which one can find and distribute child pornography, and the corresponding focus of federal investigators on finding child pornography offenders online, the prison population of child pornographers will inevitably rise.⁵ Though child pornographers do not deserve much sympathy, if they are subjected to longer prison sentences than necessary for the purposes of public safety, public monies and resources expended upon incarceration are wasted. In addition, if sentences are disproportionately severe to the crime committed, notions of fairness and justice are compromised. Admittedly, not all child pornography offenders are alike in terms of the harm they pose, and children can suffer greatly in the production of many images. Yet current sentencing guidelines are often oblivious to the differences. As an example, under the current scheme, a middle-aged male who receives a photograph of a prepubescent girl actually being sodomized by an adult man would be assigned the same base offense level for sentencing as would an 18-year-old who engages in sexting by using a computer to send a same-aged friend a consensually taken, nude photo of a 17-year-old girlfriend.⁶ With no criminal history, the sentencing range for that offense level would exceed five years (specifically 63-78 months) for each of

3. U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 5 (2010), available at http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf. Thirty percent also rated the guidelines too severe for distribution cases. *Id.*

4. See, e.g., *infra* notes 80-86 and accompanying text.

5. See *infra* notes 88, 91, 103, and accompanying text.

6. The calculation is as follows: each would start at a base offense level of 22. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(2) (2009) [hereinafter U.S.S.G.]. For the first offender, two levels would be deducted for no intent to traffic, offset by the addition of two levels because of the enhancement for a prepubescent child, plus four levels for the violence enhancement, totaling twenty-six levels. For the second offender, enhancements would add two levels for using a computer plus two for distribution, also totaling twenty-six. Moreover, if the second offender had forwarded the photo to a friend who was under the age of eighteen, he would fare worse as an additional three levels would be added for the underage distributee under § 2G2.2(b)(3)(C)), with a corresponding range of 87-108 months. *Id.*

them.⁷

The battle among Congress, the United States Sentencing Commission, and the federal judiciary over child pornography sentencing continues. The Commission has taken notice of the judiciary's complaints, publicly confirming in 2010 its intent to review the empirical evidence concerning harms caused by child pornography offenders and to reconsider the child pornography guidelines.⁸ On the other hand, Congress proposed legislation in 2009 that would have further lengthened prison sentences for child pornography offenses beyond current guidelines.⁹ In the meantime, strife exists in the federal judiciary, where many judges are rejecting the severe sentencing guidelines' approach and instead materially reducing final sentences while a substantial number of federal judges continue to adhere to the guidelines-calculated ranges.¹⁰ Significant disparities in sentencing are the result of the battle,¹¹ undermining the foundational goals for sentencing of each of these institutions.

This Article addresses the debate, proceeding in the following format. Part II contains a summary history of Congress's journey in expanding the scope of child pornography laws, and the tussle between Congress and the Sentencing Commission on the length of guideline sentences. It also describes the current framework for federal child pornography sentencing. Part III reviews the frequent and polarizing issues that emerge from a comprehensive review of federal case law regarding sentencing child pornography offenders. Part IV parses the empirical literature to assess the commonly perceived correlation between child pornography and child molestation. A brief conclusion follows in Part V.

II. THE LEGAL JOURNEY TO PUNITIVE SENTENCING FOR CHILD PORNOGRAPHY

The increasingly punitive stance by Congress toward child pornography offenders is primarily the result of a moral panic about the sexual exploitation of children.¹² The moral panic derives from the alluring influence of the

7. This calculation can be made by referencing the Sentencing Table in the 2009 U.S. Sentencing Guidelines Manual.

8. Notice of Proposed Priorities, 75 Fed. Reg. 41,927 (July 19, 2010).

9. Prevention and Deterrence of Crimes Against Children Act of 2009, H.R. 3513, 111th Cong. § 2 (2009).

10. See *infra* Part III.

11. *Id.*

12. H.R. REP. NO. 104-90, at 3 (1995) (portraying child pornography as one of the "most destructive forces attacking today's families"); 141 CONG. REC. H4124 (daily ed. Apr. 4, 1995) ("With reports of child pornography becoming increasingly prevalent, we must act now, and control the infiltration of the obscenity and filth that is destroying the fabric of our society."); Jesse Basbaum, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281, 1292 (2010); Wayne A. Logan, *Sex Offender Law and Policy: Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 60 (2008).

combination of sex and violence, with the media and public officials feeding off the public frenzy triggered by high profile, though rare, cases of child abductors who commit heinous acts of sexual violence against children.¹³ I contend that those who seek harsh sentencing for child pornography are really using a child pornography charge as a proxy for punishing child molestation.¹⁴ Those who support the proxy approach view child pornography as being so highly correlative with molestation that the offenses deserve almost equivalent sentences.¹⁵ Others more specifically conceptualize child pornography as being a causative factor in sexual assault by fueling the viewer's sexual desire for children¹⁶ and serving as a tool to groom children for sexual escapades.¹⁷ The proxy perspective is akin to penalizing certain behavior at a greater severity level than it deserves because the behavior creates a high risk the offender will commit other, more serious crimes. The analogy is to inchoate offenses, such as conspiracy and solicitation, which constitute crimes because of the increased risk that the target offenses will be completed.¹⁸

Traditionally, child pornography was prosecuted by states.¹⁹ The federal role in investigating and prosecuting child pornography offenses accelerated with the proliferation of the Internet and the resulting jurisdictional reach of the

13. 131 CONG. REC. E1088 (daily ed. Mar. 25, 1985) (statement of Rep. Clinger) (noting heightened attention by the media who "have just recognized the dire seriousness and implications of child pornography" with media outlets devoting "generous amounts of time and space to shed light on this gruesome crime"); Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1580016 (providing further evidence to support the moral panic ideology).

14. See Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577961.

15. See, e.g., David P. Shouvlín, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981); ALEXANDRA GELBER, U.S. DEPARTMENT OF JUSTICE, A RESPONSE TO "RELUCTANT REBELLION" 4 (2009), available at <http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf> (arguing viewers are participants in the ongoing sexual exploitation of children).

16. *Stopping Child Pornography: Hearing on S. 2520 Before the S. Judiciary Comm.*, 107th Cong. (2002) (statement of Frederick Schauer, Professor, John F. Kennedy School of Government and Harvard Law School), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=485&wit_id=1229 (contending child pornography "fuel[s] and reinforce[s] the predilections of the abusers").

17. H.R. REP. NO. 104-90, at 4 (1995).

18. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002); Suzanne Ost, *Children at Risk: Legal and Societal Perceptions of the Potential Threat that the Possession of Child Pornography Poses to Society*, 29 J.L. SOC'Y 436, 449 (2002). *Contra* Loren Rigsby, *A Call for Judicial Scrutiny: How Increased Judicial Discretion Has Led to Disparity and Unpredictability in Federal Sentencings for Child Pornography*, 33 SEATTLE U. L. REV. 1319, 1336 (2010) (favoring long-term sentencing guidelines because child pornography is not an inchoate crime but a completed offense that must be deterred to shrink the market).

19. See H.R. REP. NO. 104-90 (1995).

federal government by virtue of the necessary use of interstate commerce in internet-based offending.²⁰ Today, federal criminal justice forces are heavily involved in investigating and prosecuting child pornography crimes, and recent legislation has affirmatively encouraged and substantially increased resources and funding for these efforts in the future.²¹ To better understand the federal government's role in this area and the presumption of pornographers as molesters, a summary of the implementation and progression of both Congress's expansion of child pornography laws and lengthening of sentences may be useful.

A. Federal Child Pornography Laws

Congress has expanded federal anti-pornography laws over time through various, incremental initiatives. Congress's power has not gone unchecked, though, as the Supreme Court has on occasion considered the constitutionality of certain laws on free speech grounds.²² In any event, the names of the statutes are highlighted herein as indicative of the moral panic about sexual harm to children that is at the heart of the expanding scope and severity of the criminalization process. The moniker given to statutes also advances the contention that child pornography laws operate as a proxy for punishing child molesters. An abridged version of the history of federal child pornography laws that follows spans the last four decades.

Federal child pornography law largely began in the 1970s based on growing public concern about the sexual exploitation of children.²³ Concluding that child pornography had become a national problem that harmed children and society, Congress passed the Protection of Children Against Sexual Exploitation Act of 1977.²⁴ Because officials believed child pornography was funded and operated by highly organized and wealthy groups, this legislation targeted the commercial production of visual and print depictions of obscenity involving minors.²⁵ The age for a minor under this initial statute was sixteen.²⁶ At the time, lawmakers apparently assumed that Congress could only outlaw depictions amounting to obscenity because of the Supreme Court's ruling in *Miller v. California*. In *Miller*, the Court differentiated pornography, which

20. 18 U.S.C. §§ 2251-2252C (2006).

21. Protect Our Children Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229 (codified as amended in scattered sections of 18 and 42 U.S.C.).

22. See *infra* notes 27-33, 38-42, 45-50, and accompanying text.

23. Myra MacPherson, *Children: The Limits of Porn*, WASH. POST, Jan. 30, 1977, at C1.

24. Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251-2253 (2006)).

25. S. REP. NO. 95-438, at 5 (1977).

26. Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified at 18 U.S.C. §§ 2251(c) (2006)).

enjoyed First Amendment protection, from obscenity, which, it ruled, did not.²⁷ The definition of the latter remains intact: an item is obscene if, taken as a whole, it appeals to the prurient interest of the average person, is patently offensive, and contains no serious literary, artistic, political, or scientific value.²⁸

Whether the *Miller* standard applied to material with children in sexually explicit scenes was later the subject of *New York v. Ferber*.²⁹ In *Ferber*, the Supreme Court refused to apply the *Miller* obscenity standard to a state's child pornography law, ruling that child pornography did not deserve First Amendment protection, regardless of whether it amounted to obscenity.³⁰ The Supreme Court reasoned that the government has a "compelling" need to safeguard "the physical and psychological well-being of minor[s]" from the harmful effects of sexual exploitation.³¹ In outlining the harm to children, the Court asserted that child pornography "poses an even greater threat to the child victim than does sexual abuse or prostitution" because the material will continue to circulate in the future.³² In addition, the Court accepted the legislative finding in support of the state's law that "[t]he act of selling these materials is guaranteeing that there will be additional abuse of children."³³

Empowered by the catalyst of *Ferber*'s exclusion of child pornography from free speech protection, Congress continued to expand the reach of child pornography laws. The Child Protection Act of 1984 was a direct result whereby Congress deleted the obscenity requirement so that the federal child pornography statute criminalized the production and distribution of depictions of a minor engaged in sexually explicit conduct.³⁴ The law also increased the age of minority for purposes of the child pornography statute from sixteen to eighteen years and removed the commercial element so that child pornography production was illegal even if not made or traded for pecuniary gain. A few years later, the Child Protection and Obscenity Enforcement Act of 1988 specifically prohibited the use of a computer to transport, distribute, or receive visual depictions of minors engaged in sexually explicit conduct.³⁵ Then, as part of the Crime Control Act of 1990, Congress decreed that simple possession of child pornography was a federal offense.³⁶

27. 413 U.S. 15 (1973).

28. *Id.* at 24.

29. *New York v. Ferber*, 458 U.S. 747 (1982).

30. *Id.* at 764.

31. *Id.* at 756-57 (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

32. *Id.* at 760 n.10 (citing Shouvlín, *supra* note 15, at 545).

33. *Id.* at 762.

34. Pub. L. No. 98-202, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. § 2253 (2006)).

35. Pub. L. No. 100-690, 102 Stat. 4485 (1988) (codified as amended at 18 U.S.C. §§ 2251, 2252(a)(1) (2006)).

36. Pub. L. No. 101-647, § 323(b), 104 Stat. 4789, 4818-19 (1990) (codified as

Next, with the Child Pornography Prevention Act of 1996, Congress extended the child pornography laws to include “virtual child pornography,” which involved depictions that looked like real children but were not. The definition included material that did not depict any real person but was either generated by computer software or was a depiction of adults portrayed as children.³⁷ But this new expansion to virtual child pornography soon faced a constitutional hurdle. In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down the virtual child pornography clauses as overbroad in violation of the First Amendment.³⁸ The majority distinguished virtual pornography from child pornography involving actual children.³⁹ In response to the government’s contention that child pornographers would use virtual child pornography to groom children for abuse, the Court noted that the government needed a “significantly stronger, more direct connection” of pedophiles using virtual child pornography to entice children into sexual activity.⁴⁰ The Court explained that Congress could not constitutionally ban speech that might at some indefinite point in the future lead to some other unlawful act.⁴¹ Besides, the Court argued, pedophiles could use all sorts of innocent objects, such as candy and video games, to entice children; yet the mere possibility was insufficient to ban them.⁴²

Lawmakers quickly rallied with a different tactic. In the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003 (the “PROTECT Act”), Congress created the crime of pandering or soliciting any “material in a manner that reflects the belief, or that is intended to cause another to believe” that it contains child pornography.⁴³ Their intent, in part, was to criminalize more material in an effort to shrink the wider market for child pornography.⁴⁴ Notably, the PROTECT Act’s pandering crime was upheld in 2008 by a divided Supreme Court in *United States v. Williams*.⁴⁵ In responding to the argument that the ruling effectively undermined *Ashcroft*’s

amended at 18 U.S.C § 1460 (2006)).

37. Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-29 (1996) (codified as amended at 18 U.S.C § 2256(8)(b) (2006)).

38. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239-40 (2002).

39. *Id.* at 251.

40. *Id.* at 253-54. The opinion also noted that instead of promoting more harm to children, virtual child pornography may have the opposite effect of reducing the need to use live children. *Id.* at 254.

41. *Id.* at 253.

42. *Id.* at 251.

43. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C. § 2252A(a)(3) (2006)). The statute passed with virtually no debate, despite the imposition on free speech. Travis Johnson, *Child Pornography in Canada and the United States: The Myth of Right Answers*, 29 DALHOUSIE L.J. 375, 404 (2006). For a detailed discussion of the history behind the enactment of the PROTECT Act, see generally Skye Phillips, Note, *Protect Downward Departures*, 12 J.L. & POL’Y 947 (2004).

44. 149 CONG. REC. S2573, S2573-74 (daily ed. Feb. 24, 2003).

45. *United States v. Williams*, 553 U.S. 285 (2008).

constitutional position on virtual child pornography, the majority opinion authored by Justice Scalia pointed out that unlike the statute at issue in *Ashcroft*, the new crime did not target the underlying material, but instead “bans the collateral speech that introduces such material into the child-pornography distribution network.”⁴⁶ Thus, the majority accepted that a person is guilty under the act if he solicits online child pornography from an undercover agent who does not actually possess any.⁴⁷ Similarly, a person who advertises virtual child pornography as depicting real children is guilty even if it does not.⁴⁸ On the other hand, the majority noted that free speech was still protected where virtual material depicting child pornography would not be unlawful if it were offered or requested as simulated.⁴⁹ Justice Scalia explained, too, that the First Amendment does not protect offers to engage in illegal transactions.⁵⁰

The ruling likely encouraged Congress to limit more material. The PROTECT Our Children Act of 2008 criminalizes the production or distribution of a pornographic image that was adapted from a picture of an identifiable minor.⁵¹ This means that a person can be convicted for taking an otherwise innocent picture of a juvenile and morphing it to be sexually explicit. Thus, child pornography laws (at least for the acts of production or distribution) now encompass morphed images created without any child actually being sexually abused.

B. Federal Sentencing Guidelines on Child Pornography

As the reach of substantive child pornography laws has expanded, the length of prison sentences for child pornography offenses has steadily escalated over the last two decades. Increasing sentences has been achieved statutorily through mandatory minimum sentences and significant maximum allowable terms. Child pornography production carries a mandatory minimum of fifteen years, with a maximum sentence of thirty years.⁵² Distribution and receipt offenses each carry a mandatory minimum of five years, with a maximum of twenty years.⁵³ For possession of child pornography, there is no mandatory

46. *Id.* at 293.

47. *Id.*

48. *Id.*

49. *Id.* at 303.

50. *Id.* at 297. The dissent pointed out that treating pandering like an attempt crime is inapposite since if the parties had completed the bargain, i.e., transferred the material, no crime would have been committed since, per *Ashcroft*, virtual child pornography not involving a live child is not illegal. *Id.* at 317 (Souter, J., dissenting).

51. Pub. L. No. 110-401, § 304, 122 Stat. 4229, 4243 (2008) (codified as amended at 18 U.S.C. § 2252 (2006)).

52. 18 U.S.C. § 2251(e) (2006).

53. *Id.* §§ 2252(b)(1), 2252A(b)(1).

minimum and the maximum is ten years.⁵⁴

An equally important path toward increasing the average length of sentences has been through rising ranges of recommended sentences, in some cases representing a sevenfold increase in the lower end of the range, calculated using methodologies produced by the U.S. Sentencing Commission, a governing body for federal sentencing established in the mid 1980s. Critics, though, contend that Congress has invaded the U.S. Sentencing Commission's territory by requiring various sentencing enhancements that have increased the recommended guideline ranges for almost all child pornography offenders.⁵⁵ Before delving into this morass further, a brief explanation of federal sentencing processes is warranted.

Under the Sentencing Reform Act of 1984, Congress established the U.S. Sentencing Commission with the mandate to establish sentencing policies and practices that consider the "purposes of sentencing (i.e., just punishment, deterrence, incapacitation, and rehabilitation)," avoid disparities in sentencing, and:

reflect, to the extent practicable, advancement in the knowledge of human behavior as it relates to the criminal justice process; and develop the means of measuring the degree to which sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.⁵⁶

Congress also instructed the Commission to "constantly refine national sentencing standards."⁵⁷ To achieve the objectives of honesty, uniformity, and proportionality in sentencing, the Commission generally utilizes an empirical methodology that examines data from national experience and past sentencing practices.⁵⁸ The results are intended to inform Commission officials in creating and modifying guideline (hereinafter "Sentencing Guidelines" or "Guidelines") ranges to provide the federal judiciary with normative sentencing practices within prescribed bounds.

While Congress established the Sentencing Guidelines as a mandatory system for federal courts, the Supreme Court in 2005 ruled them advisory, thereby giving much more discretion to district courts.⁵⁹ Still, the Guidelines

54. *Id.* § 2252(b)(2). While commentators, appropriately it seems, highlight that receipt and possession offenses are relatively synonymous, Congress has retained this odd division, along with the severity of the five-year mandatory minimum for receipt despite the fact that the relevant sentencing guideline range may be far below that minimum. Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 1 (2010) (arguing that possession does not equate to viewing, and that the older image of the child possessor is challenged now with the use of the Internet as the user could amass more images through spam, not knowing how to correctly delete unwanted files, and hidden files).

55. *See, e.g., infra* notes 80 and 161.

56. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

57. *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

58. U.S.S.G. § 1A1.1 (2007).

59. *United States v. Booker*, 543 U.S. 220, 260-61 (2005). *Making the Guidelines*

remain relevant and important.⁶⁰ The Guidelines currently operate with judicial discretion in a stepwise manner for each individual sentence. The goal is a sentence that is sufficient, but not greater than necessary.⁶¹ In other words, the sentence must be reasonable. First, the district court calculates the Guidelines base offense level, which generally considers the offense(s) of conviction plus any Guidelines enhancements, and then finds the corresponding Guidelines sentencing range.⁶² Second, the court determines if any traditional departures, whether upward or downward, are warranted.⁶³ Next, in determining a final sentence, the district court reviews certain statutory sentencing factors that Congress established as general tenets for the reasonableness of an individual sentence. These include such considerations as the nature of the offense, individual defendant characteristics, deterrence, public safety, the advisory guideline range, and avoiding disparities between like offenders.⁶⁴

Based on a series of incremental Supreme Court decisions, a number of additional rules currently apply to federal sentencing. The sentencing court no longer presumes that a within-Guidelines sentence should apply⁶⁵ or that it is reasonable.⁶⁶ If the court “decides that an outside-Guidelines sentence is warranted, [it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.”⁶⁷

In conducting the reasonableness review, the district court accords deference to the Sentencing Commission when the applicable sections of the Guidelines are “the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.”⁶⁸ But if the Commission departed from its empirical approach in formulating certain Guidelines, a court may conclude that an out-of-Guidelines sentence is reasonable.⁶⁹ Thus, the judge may vary a final sentence if the Guidelines for the particular crime “do not exemplify the Commission’s exercise of its characteristic institutional role,” even if the defendant’s conduct

advisory was a court-created remedy as it found that the Sentencing Guidelines system violated the Sixth Amendment. *Id.* at 245.

60. *Gall v. United States*, 552 U.S. 38, 46, 49 (2007).

61. 18 U.S.C. § 3553(a) (2006).

62. *Gall*, 552 U.S. at 49. The range is also substantively based on the defendant’s criminal history score. *Id.* at 71.

63. *United States v. Cunningham*, 680 F. Supp. 844, 846 (N.D. Ohio 2010). A departure technically differs from a variance. *Irizarry v. United States*, 553 U.S. 708, 714 (2008). A departure is permitted if the judge determines there is an aggravating or mitigating factor that was not considered by the Sentencing Commission pursuant to § 3553(b). A variance is a sentence outside the guideline range that complies with the sentencing factors considered in § 3553(a). *See supra* note 64 and accompanying text.

64. 18 U.S.C. § 3553(a) (2006).

65. *Rita v. United States*, 551 U.S. 338, 351 (2008).

66. *Nelson v. United States*, 555 U.S. 350, 352 (2009).

67. *Gall*, 552 U.S. at 52.

68. *Id.* at 46.

69. *Kimbrough v. United States*, 552 U.S. 85, 109-10 (2007).

lies within the proverbial heartland of cases.⁷⁰ When the Guidelines are the result of statutory directives, they may also not represent a fair approximation of a reasonable sentence.⁷¹ Furthermore, a court may vary a sentence from the Guidelines based on a policy disagreement with the Guidelines approach⁷² or with Congress.⁷³

If a sentence is appealed, the appellate court determines whether the district court's sentence was unreasonable.⁷⁴ The appellate standard for unreasonableness is a deferential abuse-of-discretion one.⁷⁵ The appellate court cannot presume that an outside-Guidelines sentence is unreasonable.⁷⁶ However, the appellate court can presume a within-Guidelines range sentence is reasonable because it must mean that the Commission and the district court independently came to the conclusion that the particular sentence is consistent with the specified statutory factors and is reasonable.⁷⁷

The foregoing summary explains the legal ability of federal judges who object to the reasonableness of a Guidelines-based sentencing range to issue out-of-Guidelines sentences. As discussed further in Part III, a common legal rationale for lesser sentences is that the Guidelines ranges for child pornography offenses have not resulted from the Commission's use of an empirical approach. Rather, the consistent increases in base offense levels and enhancements have largely accrued from Congressional mandate.⁷⁸ As a result, many judges issuing lower-than-Guidelines sentences explain that the Guidelines ranges for child pornography offenses deserve less deference than usual. Still, it is important to highlight that not all federal judges concur, and many strenuously object to sentence reductions.⁷⁹

To be fair, any divergence from its institutional role in providing empirically-sound guidelines would not be entirely the fault of the Commission. The agency has made several attempts to reduce the Guidelines sentencing ranges, but has been rebuked by Congress for doing so and ordered to increase sentencing ranges.⁸⁰ For example, in 1990 Congress demanded that

70. *Id.* at 109.

71. *Id.*

72. *Rita v. United States*, 551 U.S. 338, 351 (2008).

73. *Kimbrough*, 552 U.S. at 109. A sentencing court must still comply with mandatory minimum statutes.

74. *United States v. Booker*, 543 U.S. 220, 261 (2005).

75. *Gall v. United States*, 552 U.S. 38, 52 (2007).

76. *Id.*

77. *Rita*, 551 U.S. at 347.

78. Ian N. Friedman & Kristina W. Supler, *Child Pornography Sentencing: The Road Here and the Road Ahead*, 21 FED. SENT'G REP. 83, 83 (2008).

79. See, e.g., *infra* notes 112, 146-149, 172-177, and accompanying text.

80. For a history of Congressional efforts pushing sentencing ranges higher for child pornography, see generally *United States v. Howard*, No. 8:08CR387, 2010 U.S. Dist. LEXIS 17740, at *7-*28 (D. Neb. Mar. 1, 2010); U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009) [hereinafter HISTORY], available at

the Commission implement “more substantial penalties” for sex offenses involving children if the Commission determined existing guidelines were inadequate.⁸¹ Instead, upon reviewing sentencing statistics and finding a high rate of downward reductions for non-distribution cases, the Commission created lower base ranges for possession and receipt crimes.⁸² Senator Jesse Helms quickly objected, publicly denouncing the Commission, which had “for some unbeknown reason, decided to reduce the sentence for these smut peddlers so low that most of the convicted smut peddlers and pedophiles will receive, at most, probation.”⁸³ Subsequently, Congress ignored the Commission’s proffered reductions and, alternatively, ordered the agency to increase base levels and implement specified enhancements thereto.⁸⁴ On another occasion, Congress, albeit for the only time in the history of the Commission, as part of the PROTECT Act of 2003 directly modified the Guidelines uniquely for child pornography offenses by increasing base offense levels and adding more enhancement provisions.⁸⁵

Regarding the abnormal meddling by Congress, a Commission-produced document in 2009 recognized that “Congress has been particularly active over the last decade creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography offenses.”⁸⁶ In particular, the base level enhancements have operated to increase sentencing ranges for many, and in some cases, almost all, child pornography offenders.⁸⁷ Enhancements include when the offense involves a computer,⁸⁸ the material includes a prepubescent minor or a minor younger than twelve years,⁸⁹ the material portrays sadistic or masochistic conduct or other depictions of violence,⁹⁰ and a graduated set of enhancements based on the number of images involved.⁹¹

To illustrate the extent to which the Guidelines for child pornography offenses have transformed over the years, Federal Public Defender Troy

http://www.ussc.gov/general/20091030_History_Child_Pornography_Guidelines.pdf; TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES (2009), available at http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

81. Pub. L. No. 101-647, 104 Stat. 4789, 4818 (1990).

82. 137 CONG. REC. H6736 (daily ed. Sept. 24, 1991).

83. 137 CONG. REC. S10356, S10363 (daily ed. July 18, 1991).

84. *Id.* For more insight into the volleys between Congress and the Commission on child pornography sentencing, see generally Stabenow, *supra* note 80; Friedman & Supler, *supra* note 78; Phillips, *supra* note 43; HISTORY, *supra* note 80.

85. HISTORY, *supra* note 80, at 38.

86. *Id.* at 1.

87. An enhancement is not an upward or downward departure in exact Guidelines terminology, but is part of the calculation of the base offense level.

88. U.S.S.G. § 2G2.2(b)(6) (2009).

89. *Id.* § 2G2.2(b)(2).

90. *Id.* § 2G2.2(b)(4).

91. *Id.* § 2G2.2(b)(7).

Stabenow theorized a hypothetical offender. The hypothetical sentencee's offense of conviction is possession of child pornography. He shares certain common enhancement characteristics of observed cases, has no criminal history and no child molestation allegations, and has accepted responsibility for his crimes. The resulting Guidelines range rose from no punishment if sentenced on April 30, 1987 (as possession was not then a federal offense), to a range of six to twelve months on November 1, 1991, twenty-one to twenty-seven months on November 1, 1996, and finally, the current range of forty-one to fifty-one months as of November 1, 2004.

The overall summary statistics from the Federal Justice Statistics Resource Center also show the dramatic increases in the likelihood of the defendants' receiving a prison sentence, the mean length of sentences, and the number of defendants being sentenced. While 77% of child pornography offenders received a prison sentence in 1996, 97% did in 2006.⁹² For offenders convicted of possession, receipt, or distribution of child pornography (i.e., excluding production cases), the mean sentence has risen in a relatively steady fashion from 20.59 months in 1997 to 91.82 months in 2008.⁹³ This represents almost a 450% increase in twelve years. As a basis for comparison to other offenses, the 91.82 months mean sentence for child pornography greatly exceeds the mean sentences in 2008 of 31.21 months for manslaughter⁹⁴ and 30.80 months for drug importation.⁹⁵ The number of child pornography offenders (excluding production) being sentenced in the federal system has also considerably and consistently increased from 238 in 1997⁹⁶ to 1606 in 2009.⁹⁷

On the other hand, statistics also confirm the substantial impact of the advisory nature of the Guidelines and the general judicial feeling that the Guidelines are unreasonable. In fiscal year 2009, Sentencing Commission statistics show that of the 1606 offenders sentenced for child pornography offenses (excluding production), 860 received below-Guidelines sentences.⁹⁸ Of the 860, 586 were based on a reasonableness conclusion, meaning that the

92. MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS 2006, at 5 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>.

93. *Federal Justice Statistics Resource Center*, BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/fjsrc/tsec.cfm> (last visited Feb. 16, 2011) (maintaining an online calculator to obtain these results for 18 U.S.C. §§ 2252-2252A (2006)). These average calculations include assigning a zero sentence length for sentences of probation or fine only. Before 1997, the mean sentence for child pornography offenses (excluding production) had been decreasing: 39.67 months (1994), 32.15 months (1995), and 28.14 months (1996). *Id.*

94. FEDERAL JUSTICE STATISTICS RESOURCE CENTER, <http://fjsrc.urban.org/tsec.cfm> (last visited Feb. 16, 2011) (using 18 U.S.C. § 1112 (2006)).

95. *Id.* (using 21 U.S.C. § 952 (2006)).

96. *Id.*

97. U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.28 (2010).

98. *Id.*

judges determined that the Guideline ranges were excessive.⁹⁹ In sum, 54% of non-production child pornography offenders received below-Guidelines range sentences in 2009.¹⁰⁰ These numbers further emphasize the large increases in Guidelines ranges as they represent a four-fold increase in the mean sentences from 1997. Thus, despite the majority of cases now receiving lesser sentences, the average sentence is far higher.¹⁰¹ Still, some offenders received higher-than-Guidelines sentences. There were twenty-nine above-Guidelines departures, nineteen of which were based on the reasonableness determination that the Guidelines were not punitive enough.¹⁰²

The battle among Congress, the Sentencing Commission, and the judiciary over child pornography sentencing endures, with more recent developments that will continue to deepen the dissonance. Congress has passed three new statutes in 2008 expanding child sexual exploitation laws,¹⁰³ and proposed legislation in 2009 would further enhance prison sentences for child pornography offenses.¹⁰⁴ The Commission, on the other hand, in what may be an attempt to return to its normal institutional role, announced in 2010 its intent to reconsider child pornography sentences by reviewing reasons given for variances from guidelines and studies regarding child pornographers and recidivism.¹⁰⁵ The Commission stated its goal is to issue a new report with potential new recommendations for Congress. Toward these ends, the Commission issued a summary report outlining the history of the child pornography guidelines, as influenced by Congress, and has encouraged discussion with criminal justice officials.¹⁰⁶ No final report appears imminent and there have been no public announcements about any new empirical research by Commission personnel. Nonetheless, new and potentially significant developments in the area of child pornography sentencing may be on the horizon. As for the judiciary, the role of federal judges in sentencing, and their educated opinions, which also reflect divided perspectives regarding

99. *Id.*

100. *Id.*

101. The mean sentence likely would have been lower if mandatory minimums were not applied. Many judges sentencing to the mandatory minimum implied they would have preferred lesser sentences. *See, e.g.*, *United States v. Szymanski*, No. 3:08CR417, 2009 U.S. Dist. LEXIS 37156, at *14 (N.D. Ohio Apr. 30, 2009); *United States v. Gellatly*, No. 8:08CR50, 2009 U.S. Dist. LEXIS 2693, at *35 (D. Neb. Jan. 5, 2009); *United States v. Ontiveros*, No. 07-CR-333, 2008 U.S. Dist. LEXIS 58774, at *8 (E.D. Wis. July 24, 2008).

102. U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.28 (2010).

103. PROTECT Act of 2008, Pub. L. No. 110-401, 122 Stat. 4229; Keeping the Internet Devoid of Sexual Predators Act of 2008, Pub. L. No. 110-400, 122 Stat. 4224; Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008).

104. Prevention and Deterrence of Crimes Against Children Act, H.R. 3513, 111th Cong. § 2 (2009).

105. Notice of Proposed Priorities, 75 Fed. Reg. 41,927 (July 19, 2010).

106. *See generally* HISTORY, *supra* note 80.

the reasonableness of lengthy sentences, are explored next in Part III.

III. JUDICIAL PERSPECTIVES ON CHILD PORN SENTENCING

The comprehensive analysis of federal sentencing opinions involving child pornography offenders during the last decade that follows in this Part reveals a strong trend toward finding the Sentencing Guidelines excessive for most child pornography offenders. As outlined below, the rebuke of the Guidelines and of Congress for its interference has turned dogmatic. With the Supreme Court's incremental decisions giving sentencing courts more discretion, downward departures from Guidelines ranges in many cases were considerable not only in number,¹⁰⁷ but also in magnitude. A few courts gave probationary sentences, despite Guidelines ranges involving multi-year prison terms.¹⁰⁸ Defendants in many other cases received sentences that were more than fifty percent below the bottom of the Guidelines ranges,¹⁰⁹ with many defendants receiving sentences with even greater percentage reductions.¹¹⁰ Because of the stringency of the Guidelines ranges, though, the large percentage reductions still resulted in many sentences of substantial prison terms.¹¹¹ Despite this trend, however, the conclusion that the Guidelines provide unreasonably high sentence

107. See *supra* notes 99-100 and accompanying text.

108. Compare *United States v. Autery*, 555 F.3d 864, 867-68 (9th Cir. 2009) (explaining probationary sentence in a possession case, despite Guidelines range of 41-51 months and defendant arguing for a 41-month sentence because defendant was different than other child pornography defendants), and *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008) (affirming probationary sentence in face of 46 to 57-month range for possession), with *United States v. Pugh*, 515 F.3d 1179, 1182-83 (11th Cir. 2008) (reversing probation sentence in possession case with 97 to 120-month range).

109. See, e.g., *United States v. Smith*, 275 F. App'x 184, 184 (4th Cir. 2008) (per curiam) (affirming 24-month sentence with range of 78-97 months for possession); *United States v. Halsema*, 108 F. App'x 103, 104 (11th Cir. 2006) (affirming a 24-month sentence where range was 57-71 months); *United States v. Sudyka*, No. 8:07CR383, 2008 U.S. Dist. LEXIS 42569, at *29 (D. Neb. Apr. 14, 2008) (sentencing to 24 months with range of 188-235 months for possession).

110. See, e.g., *United States v. Stall*, 581 F.3d 276, 277-78 (6th Cir. 2009) (affirming 1-day sentence despite range of 57-71 months for possession); *United States v. Huckins*, 529 F.3d 1312, 1314 (10th Cir. 2008) (affirming sentence of 18 months with range of 78-97 months); *United States v. Manke*, No. 09-CR-172, 2010 U.S. Dist. LEXIS 3757, at *5, *23 (E.D. Wis. Jan. 19, 2010) (sentencing defendant to 1 day despite range of 41-51 months); *United States v. Stern*, 590 F. Supp. 2d 945, 947-48 (N.D. Ohio 2008) (imposing sentence of 12 months and 1 day despite range of 46-57 months in possession case). *Contra* *United States v. Christman*, 607 F.3d 1110, 1123 (6th Cir. 2010) (reversing 5-day sentence where range was 57-71 months in possession case and district judge originally sentenced defendant to 57 months and upon resentencing sentenced to 5 days).

111. See, e.g., *United States v. Weller*, 330 F. App'x 506, 507 (6th Cir. 2009) (affirming 120-month sentence with range of 324-405 months for possession and distribution); *United States v. Beach*, 275 F. App'x 529, 532 (6th Cir. 2008) (per curiam) (affirming 96-month sentence despite range of 210-240 months); *United States v. Grossman*, 513 F.3d 592, 596 (6th Cir. 2008) (per curiam) (affirming sentence of 66 months despite range of 135-168 months).

recommendations is not universal. A strong minority of opinions has perpetuated the Guidelines' harsh approach.¹¹² Overall, the child pornography Guidelines are clearly unhelpful to many judges.¹¹³ This Part describes the often opposing judicial perspectives on a few important issues that emerged from an analysis of the body of sentencing opinions issued in child pornography cases.

A. Broad Perspectives on the Severity of Child Porn Sentencing

A few judges have addressed the bigger picture and their comments in questioning the progression of expanding child pornography offenses and increasing sentences, reviewed earlier, support my contentions that harsh sentencing for child pornography offenses reflects a moral panic and is fundamentally based on a presumption that anyone involved in child pornography, even a possessor or distributor (but not a producer), is an undetected child molester. The following quotation draws upon the critique that child pornography offense sentencing is a proxy for punishing child molestation:

Possessors of child pornography are modern-day untouchables. We cannot fathom how they can be aroused by images of prepubescent children being brutalized. And, because we cannot imagine that we personally know anyone so perverted, we are not bothered by the idea that these men are cast out to serve long periods in prison. Their prurient interests are so foreign that our citizens want them permanently removed from society. Many fear that those who view these images will also personally harm a child. And, wanting to punish *someone* for the crimes that these horrible images embody, society seeks harsh sentences for anyone who participates in this market. Rarely able to catch the monsters that create the images, society reflexively nominates the consumers of this toxic material as proxies for the depraved producers and publishers. The resulting punishment under the Guidelines may be more a reflection of our visceral reaction to these images than a considered judgment

112. See, e.g., *United States v. Reed*, No. 09-4677, 2010 U.S. App. LEXIS 13615, at *1-*2 (3d Cir. July 2, 2010) (affirming 57-month sentence with range of 57-71 on one count of possession); *United States v. Guilliot*, No. 09-30433, 2010 U.S. App. LEXIS 14122, at *1, *3 (5th Cir. June 22, 2010) (affirming 151-month sentence for receipt with 121-151 month range); *United States v. Thomas*, 380 F. App'x 911 (11th Cir. 2010) (per curiam) (affirming 210-month sentence for receipt and distribution); *United States v. Tanner*, No. 09-5177, 2010 U.S. App. LEXIS 12085, at *1 (6th Cir. June 11, 2010) (affirming 210-month sentence for distribution, receipt, and possession with 210-262 month range); *United States v. Nikonova*, 480 F.3d 371, 374 (5th Cir. 2007) (affirming 31-month sentence with range of 27-33 months in possession case involving a female defendant described as a successful student who was primarily motivated by academic interest); *United States v. Perez*, 484 F.3d 735, 738 (5th Cir. 2007) (affirming 57-month sentence for possession); *United States v. Rolfsema*, 468 F.3d 75, 78 (2d Cir. 2006) (affirming 57-month sentence for possession with range of 57-71 months); *United States v. Branson*, 463 F.3d 1110, 1110-11 (10th Cir. 2006) (affirming 51-month sentence for possession with range of 51-63 months).

113. See *infra* notes 156-160 and accompanying text.

of the appropriate sentence for the individual.¹¹⁴

Similarly, a different judge refused the government's request to sentence the defendant in a possession case by assuming he had also committed child molestation, a crime for which the defendant had not been charged, despite the societal fear of pornography offenders.¹¹⁵ The court explained that it was not the role of a judge to "act as a hooded executioner for an outraged populace."¹¹⁶

Another appellate judge, writing alone in a dissent to a 240-month sentence for possession, argued that the federal criminal justice system had "lost its bearing" because of the "social revulsion" against the "misfits" downloading child pornography.¹¹⁷ The dissenting judge concluded that the harsh sentencing policy is "perhaps somewhat more rational than the thousands of witchcraft trials and burnings conducted in Europe and here from the Thirteenth to the Eighteenth Centuries, but it borders on the same thing."¹¹⁸ The severity in child pornography sentencing was also described in various opinions as being irrational,¹¹⁹ eccentric,¹²⁰ and as merely reflecting an angry Congress.¹²¹

B. Variances for Individual Characteristics

In a plethora of cases, sentencing judges believed that the applicable Guidelines ranges were unreasonably excessive when considering the defendants' individual characteristics. Judges commonly described defendants in ways that conceptualized them as ordinary, even upstanding men (there were few female defendants), whose only flaw appeared to be an interest in child pornography.¹²² One judge made this general observation: "From my

114. *United States v. Cruikshank*, 667 F. Supp. 2d 697, 703 (S.D.W. Va. 2009).

115. *United States v. Raby*, No. 2:05-CR-00003, 2009 U.S. Dist. LEXIS 121836, at *22, *26 (S.D.W. Va. Dec. 30, 2009).

116. *Id.* at *26.

117. *United States v. Paull*, 551 F.3d 516, 533 (6th Cir. 2009) (Merritt, J., dissenting), *cert. denied*, 130 S. Ct. 187; *see also* *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1112 (N.D. Iowa 2009) (rejecting the Guidelines because "mere revulsion for child pornography offenses is not a reliable indicator of the need to protect the public from defendants who commit such offenses").

118. *Paull*, 551 F.3d at 533.

119. *United States v. Dorvee*, 604 F.3d 84, 97 (2d Cir. 2010).

120. *United States v. Tutty*, No. 09-2705-CR, 2010 U.S. App. LEXIS 14574, at *12 (2d Cir. July 16, 2010).

121. *United States v. Burns*, No. 07CR556, 2009 U.S. Dist. LEXIS 100642, at *47 (N.D. Ill. Oct. 27, 2009).

122. *United States v. Smith*, 275 F. App'x 184, 186 (4th Cir. 2008) (per curiam) (describing defendant as having led "an exemplary life" with "noteworthy activities" and "strong family ties"); *United States v. Raby*, No. 2:05-CR-00003, 2009 U.S. Dist. LEXIS 121836, at *10 (S.D.W. Va. Dec. 30, 2009) (calling defendant a "productive member of society"); *United States v. Phinney*, 599 F. Supp. 2d 1037, 1046 (E.D. Wis. 2009) (noting that other than the instant offense of possession, the defendant had "behaved in an entirely

experience, most of these men, like [the defendant], have no prior criminal history. They usually have healthy family lives and productive careers.”¹²³ Along the same lines, another judge stated that “[a]side from this offense, [the defendant] has led a law abiding life, and with his wife, who has stood by his side throughout, he has raised a good family and been a mainstay in his community.”¹²⁴ The defendants’ professional careers were often highlighted, including Air Force Captain,¹²⁵ physician,¹²⁶ trust specialist,¹²⁷ and teacher.¹²⁸

In the case law, there were other regular mentions of particular characteristics that judges viewed as reducing defendants’ culpability and their risk of actually molesting children. Having no prior criminal history was predominant across the cases.¹²⁹ In cases in which defendants received sentencing reductions, it was common for the judges to express that they were impressed that the defendants received the expressed support of their families,¹³⁰ maintained religious ties,¹³¹ were remorseful,¹³² and had been successful participants in sex offender treatment programs.¹³³ In justifying

pro-social fashion”); *United States v. Johnson*, 588 F. Supp. 2d 997, 999 (S.D. Iowa 2008) (describing the physician defendant as “appear[ing] to have been a productive member of society and to have maintained a stable household” who “has been a loving husband to his wife and father to his son”); *United States v. Stern*, 590 F. Supp. 2d 945, 955-56 (N.D. Ohio 2008) (describing defendant as “a law-abiding and productive member of society”). Still, one court noted the contradiction. *See United States v. Goff*, 501 F.3d 250, 251 (3d Cir. 2007) (overturning a below-Guidelines sentence and noting the district judge’s description of the defendant as a “respectable, middle-aged man leading a decent, law abiding life” but with a “terrible divergence between appearance and reality, because he was also a frequent customer of a child pornography internet site”).

123. *United States v. Cruikshank*, 667 F. Supp. 2d 697, 701 (S.D.W. Va. 2009). The judge added that they are generally “pathetic men.” *Id.* at 702.

124. *United States v. Grober*, 595 F. Supp. 2d 382, 412 (D.N.J. 2008).

125. *United States v. Baird*, 580 F. Supp. 2d 889, 893 (D. Neb. 2008).

126. *Johnson*, 588 F. Supp. 2d at 999.

127. *United States v. Manke*, No. 09-CR-172, 2010 U.S. Dist. LEXIS 3757, at *8, (E.D. Wis. Jan. 19, 2010).

128. *See, e.g., United States v. Gellatly*, No. 8:08CR50, 2009 U.S. Dist. LEXIS 2693, at *30 (D. Neb. Jan. 5, 2009).

129. *United States v. Shipley*, 560 F. Supp. 2d 739, 743 (S.D. Iowa 2008); *United States v. Szymanski*, No. 3:08CR417, 2009 U.S. Dist. LEXIS 37156, at *7 (N.D. Ohio Apr. 30, 2009).

130. *See, e.g., United States v. Ontiveros*, No. 07-CR-333, 2008 U.S. Dist. LEXIS 58774, at *10 (E.D. Wis. July 24, 2008); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1110 (N.D. Iowa 2009); *United States v. Cruikshank*, 667 F. Supp. 2d 697, 699 (S.D.W. Va. 2009); *Manke*, 2010 U.S. Dist. LEXIS 3757, at *8.

131. *See, e.g., United States v. Grober*, 595 F. Supp. 2d 382, 407 (D.N.J. 2008); *Cruikshank*, 667 F. Supp. 2d at 699; *United States v. Raby*, No. 2:05-CR-00003, 2009 U.S. Dist. LEXIS 121836, at *10 (S.D. W.Va. Dec. 30, 2009).

132. *See, e.g., United States v. Beach*, 275 F. App’x 529, 532 (6th Cir. 2008) (per curiam); *United States v. Huckins*, 529 F.3d 1312, 1316 (10th Cir. 2008); *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145, at *9 (D. Neb. Sept. 8, 2008); *Szymanski*, 2009 U.S. Dist. LEXIS 37156, at *8.

133. *See, e.g., United States v. Smith*, 275 F. App’x 184, 186 (4th Cir. 2008) (per

lesser sentences, judges often referred to the defendants' interest in child pornography as having origins more innocent than sexual obsession with actually molesting children. There existed a frequent refrain in the sentencing opinions toward blaming the defendants' pornography obsession on depression¹³⁴ or compulsive behavior fostered by the ease and addictive quality of internet searching.¹³⁵ Several opinions noted that the defendants' initial viewing of adult pornography online evolved into seeking child pornography to increase the deviant quality of, and therefore the pleasure derived from, the activity.¹³⁶ One more innocent explanation conveyed that the defendants' interest in child pornography may not have represented deviant sexual impulses as much as a sort of fascination related to the defendants' own sexual abuse as children.¹³⁷

C. Collateral Consequences

When downward varying, judges also appeared concerned defendants would suffer other ills beyond the sentence imposed, such as informal stigmatic harms and vulnerability to civil suit. Notably, several courts justified downward variances in part because of the punishment the defendants would necessarily endure due to the shameful stigma of the sex offender label¹³⁸ and the hardships imposed by sex offender registration requirements that would necessarily result from the convictions.¹³⁹ Similarly, an opinion referred to the burden on normal

curiam); *United States v. Stall*, 581 F.3d 276, 280-81 (6th Cir. 2009); *United States v. Hanson*, 561 F. Supp. 2d 1004, 1012 (E.D. Wis. 2008); *Szymanski*, 2009 U.S. Dist. LEXIS 37156, at *7.

134. *See, e.g.*, *United States v. Dorvee*, 604 F.3d 84, 88 (2d Cir. 2010); *Stall*, 581 F.3d at 279; *Huckins*, 529 F.3d at 1316; *United States v. Phinney*, 599 F. Supp. 2d 1037, 1041 (E.D. Wis. 2009); *United States v. Johnson*, 588 F. Supp. 2d 997, 1000 (S.D. Iowa 2008); *United States v. Stern*, 590 F. Supp. 2d 945, 954 n.8 (N.D. Ohio 2008); *Ontiveros*, 2008 U.S. Dist. LEXIS 58774, at *11.

135. *See, e.g.*, *United States v. Howard*, No. 8:08CR387, 2010 U.S. Dist. LEXIS 17740, at *36-*37 (D. Neb. Mar. 1, 2010); *United States v. Burns*, No. 07CR556, 2009 U.S. Dist. LEXIS 100642, at *48 (N.D. Ill. Oct. 27, 2009); *United States v. Goldberg*, No. 05CR0922, 2008 U.S. Dist. LEXIS 35723, at *21-*22 (N.D. Ill. Apr. 30, 2008) (resentencing).

136. *Stall*, 581 F.3d at 279; *United States v. Diaz*, No. 09-CR-302, 2010 U.S. Dist. LEXIS 65979, at *6 (E.D. Wis. June 30, 2010); *United States v. Manke*, No. 09-CR-172, 2010 U.S. Dist. LEXIS 3757, at *11 (E.D. Wis. Jan. 19, 2010); *Grober*, 595 F. Supp. 2d at 404.

137. *United States v. Janosko*, 355 F. App'x 892, 894 (6th Cir. 2009); *United States v. Prisel*, 316 F. App'x 377, 382 (6th Cir. 2008); *Grober*, 595 F. Supp. 2d at 410; *Hanson*, 561 F. Supp. 2d at 1007.

138. *United States v. Autery*, 555 F.3d 864, 875 (9th Cir. 2009); *United States v. Baird*, 580 F. Supp. 2d 889, 894 (D. Neb. 2008); *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145, at *9 (D. Neb. Sept. 8, 2008); *United States v. Shipley*, 560 F. Supp. 2d 739, 745 (S.D. Iowa 2008).

139. *See, e.g.*, *Baird*, 580 F. Supp. 2d at 894; *Grober*, 595 F. Supp. 2d at 404; *Johnson*, 588 F. Supp. 2d at 1005; *Ontiveros*, 2008 U.S. Dist. LEXIS 58774, at *15.

life after release from prison through residency restriction laws and the legal and practical limitations on employment opportunities.¹⁴⁰ These comments are surprising because they directly conflict with the judicial characterization of sex offender registration and residency restriction laws as not punitive in nature and therefore considered merely a collateral part of the civil law.¹⁴¹ The consequences arising from societal reaction and civil laws are arguably irrelevant, then, in sentencing decisions for criminal punishment.

D. Moral Culpability and Proportionality

Many courts also questioned the fairness of the Guidelines in child pornography cases by invoking an ideology of moral culpability, which these courts viewed as a critical foundation for proportionality in sentencing. A number of courts complained that the Guidelines failed to sufficiently differentiate the least from the most culpable of child pornography offenders.¹⁴² A repeated reference position for the continuum of culpability idea portrayed possessors as the least culpable, followed by distributors, producers, and then child sexual contact offenders as the most culpable.¹⁴³ Many judges placed their defendants in this continuum and sentenced accordingly,¹⁴⁴ though sentences for offenders adjudged somewhere in the middle of the continuum were often given sentences far below Guidelines ranges.¹⁴⁵ Consistent with the proportionality theme, within-Guidelines and upward variances were often in cases of defendants with significant criminal histories,¹⁴⁶ prior incidents of

140. *United States v. Raby*, No. 2:05CR00003, 2009 U.S. Dist. LEXIS 121836, at *26-*27 (S.D.W. Va. Dec. 30, 2009).

141. *Smith v. Doe*, 538 U.S. 84, 105-06 (2003); *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005); *People v. LeRoy*, 828 N.E.2d 769, 778-82 (Ill. App. Ct. 2005).

142. *United States v. Gellatly*, No. 8:08CR50, 2009 U.S. Dist. LEXIS 2693, at *28 (D. Neb. Jan. 5, 2009); *Grinbergs*, 2008 WL 4191145, at *9; *see also Grober*, 595 F. Supp. 2d at 404 (rejecting the argument that “there is no need to distinguish between abusers and producers on the one hand, and consumers on the other” and concluding “the Court cannot make [the defendant] a surrogate for the monsters who prey on child victims through actual contact”); *United States v. Howard*, No. 8:08CR387, 2010 U.S. Dist. LEXIS 17740, at *32 (D. Neb. Mar. 1, 2010) (criticizing the Guidelines as being “appropriate for a sexual predator,” but not for the receipt and distributor defendant in the instant case).

143. *Baird*, 580 F. Supp. 2d at 893; *Grinbergs*, 2008 WL 4191145, at *9; *United States v. Sudyka*, No. 8:07CR383, 2008 U.S. Dist. LEXIS 42569, at *22 (D. Neb. Apr. 14, 2008); *see also Grober*, 595 F. Supp. 2d at 394.

144. *See supra* notes 108-112.

145. *United States v. Beach*, 275 F. App'x 529, 532 (6th Cir. 2008); *United States v. McElheney*, 630 F. Supp. 2d 886, 887 (E.D. Tenn. 2009); *United States v. Shipley*, 560 F. Supp. 2d 739, 745-46 (S.D. Iowa 2008).

146. *United States v. Rudow*, No. 09-3367, 2010 U.S. App. LEXIS 7743, at *1-*2 (3d Cir. Apr. 13, 2010) (giving mid-range sentence of 326 months in rare case in this data with a high criminal history score); *United States v. Sprague*, No. 08-5814, 2010 U.S. App. LEXIS 6169, at *23-*25 (6th Cir. Mar. 24, 2010) (involving a defendant with prior sexual offenses).

hands-on offending with children,¹⁴⁷ and those involving the more culpable acts including production.¹⁴⁸ The sternest judgments were often reserved for production offenders whose victims were their own children.¹⁴⁹

Yet the Guidelines as an expected normative referent did not always serve the continuum of culpability perspective. Several judges lamented the irony of the Guidelines that often resulted in harsher sentences for child pornography offenses (including possession and receipt) than for raping a child.¹⁵⁰ It was also mentioned that possession and receipt offenses could earn lengthier prison terms than nonsexual violent assaults. As an example, one court posited a specific comparison: a defendant convicted of possessing on his computer two nonviolent videos of seventeen-year-olds engaging in consensual sex would have a Guidelines range of forty-six to fifty-seven months, the same range as a person with some criminal history who was convicted of aggravated assault with a firearm that resulted in bodily injury.¹⁵¹ The implication of this example of equivalent sentencing ranges for disproportionate degrees of societal harm reflects the moral panic ideology underlying modern sentencing for child pornography offenses.

147. *United States v. Spiwak*, No. 09-4289, 2010 U.S. App. LEXIS 9396, at *8 (4th Cir. May 7, 2010) (affirming upward departed sentence of 188 months despite range of 121-151 months); *Sprague*, 2010 U.S. App. LEXIS 6169, at *23-*25 (upward variance to 360 months despite range of 121-151 months in receipt case); *United States v. Paull*, 551 F.3d 516, 527-29 (6th Cir. 2009) (affirming sentence of 210 months for possession).

148. *United States v. Segura*, No. 09-10645, 2010 U.S. App. LEXIS 11110, at *4-*5 (5th Cir. June 1, 2010) (affirming 360-month sentence for production); *United States v. Comeaux*, No. 09-30032, 2010 U.S. App. LEXIS 6000, at *1, *5 (5th Cir. Mar. 22, 2010) (affirming a 240-month sentence that was 30 months above the top of the Guidelines range); *United States v. Phillips*, 345 F. App'x 772, 772-73 (3d Cir. 2009), *cert. denied*, 2010 U.S. LEXIS 782 (Jan. 25, 2010) (affirming statutory maximum sentence of 240 months for a one-time offense of distribution).

149. *United States v. Fiorella*, 602 F. Supp. 2d 1057, 1075-76 (N.D. Iowa 2009), *aff'd*, *United States v. Shuler*, 2010 U.S. App. LEXIS 5140 (8th Cir. Mar. 11, 2010) (affirming a 360-month, top of the Guideline range sentence); *United States v. Huffstatler*, 571 F.3d 620, 622 (7th Cir. 2009) (affirming 450-month sentence despite range of 300-55 months). *But see supra* note 112.

150. *United States v. Cruikshank*, 667 F. Supp. 2d 697, 702 (S.D.W. Va. 2009); *United States v. Dorvee*, 604 F.3d 84, 84, 87 (2d Cir. 2010). A hypothesized example of this would involve a defendant convicted of a non-forcible statutory rape of a twelve-year-old whose base offense level would be 18, *see* U.S.S.G. § 2A3.2 (2009), whereby the defendant who receives via computer a single image of a sexually suggestive seventeen-year-old would be assigned a higher offense level of 24, *see id.* § 2G2.2. As another example, a defendant who forcibly rapes a twelve-year-old would have a base offense level of 42, *see id.* § 2A3.1, the same as a defendant with an online collection of over six hundred images of child pornography that included material depicting prepubescent children and violence, who at one time sent one of the images to a minor for the purpose of enticing that minor for sexual purposes, *see id.* § 2G2.2.

151. *Dorvee*, 604 F.3d at 97; *see also* *United States v. Noxon*, No. 07-40152-01-RDR, 2008 U.S. Dist. LEXIS 87477, at *6 (D. Kan. Oct. 28, 2008) (finding illogical the statutory maximum for child pornography distribution of 240 months was far higher than the statutory maximum of 120 months for assaulting a person with a gun causing permanent injury).

In terms of the societal view of fair punishment, an empirical study shows that the public appears to similarly differentiate the culpability of someone who rapes a child from one who accesses child pornography. In a recent random national sample, researchers found that while 97.1% of respondents thought that a child rapist deserved incarceration, 68.0% thought so for those who access child pornography.¹⁵² Of those that believed child pornography possessors deserved no jail time, 15.0% chose community supervision, 10.5% picked probation, and 6.5% believed that a fine was a sufficient penalty.¹⁵³

Nonetheless, a segment of the federal judiciary averred the Guidelines offered reasonable sentences in child pornography cases. Contrary to the numerous cases with reduced sentences for proportionality purposes, many judges relied on in-Guidelines sentences in cases not involving production or contact offending, resulting in long-term sentences.¹⁵⁴ In addition, not all agreed with the foregoing assessment of the moral continuum. A couple of courts professed that pornography perpetuated greater harm than sexual abuse or prostitution.¹⁵⁵ An appellate panel even commented that a man having sex with a boy under fourteen “might be worse than sticking somebody with a knife or shooting them with a gun.”¹⁵⁶

E. Policy Disagreement

Numerous federal judges quarreled specifically with the policy underling the Guidelines governing distribution, receipt, and possession offenses. They generally determined the relevant Guidelines had not been empirically validated by the Sentencing Commission, often citing impeding Congressional mandates as the reason.¹⁵⁷ Indeed, several opinions expressly criticized Congress for interfering with the Commission’s main role of providing institutional guidance for normative sentencing.¹⁵⁸ One court surmised that the

152. Daniel P. Mears et al., *Sex Crimes, Children, and Pornography: Public Views and Public Policy*, 54 CRIME & DELINQ. 532, 547 (2008).

153. *Id.*

154. *See supra* note 112.

155. *United States v. Pugh*, 515 F.3d 1179, 1196 (11th Cir. 2008) (quoting *New York v. Ferber*, 458 U.S. 747, 758-59 (1982)); *United States v. Cunningham*, 680 F. Supp. 844, 863 (N.D. Ohio 2010) (quoting *Ferber*, 458 U.S. at 758-59).

156. *Dorvee*, 604 F.3d at 94 (finding such statement by the district court to be ironic since child pornography possessors are treated by the Guidelines harsher than direct sexual conduct with minors).

157. *See, e.g.*, *United States v. Diaz*, No. 09-CR-302, 2010 U.S. Dist. LEXIS 65979, at *8 (E.D. Wis. June 30, 2010); *United States v. Howard*, No. 8:08CR387, 2010 U.S. Dist. LEXIS 17740, at *31 (D. Neb. Mar. 1, 2010); *United States v. Raby*, No. 2:05-CR-00003, 2009 U.S. Dist. LEXIS 121836, at *18 (S.D.W. Va. Dec. 30, 2009); *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145, at *10 (D. Neb. Sept. 8, 2008).

158. *See, e.g.*, *United States v. Manke*, No. 09-CR-172, 2010 U.S. Dist. LEXIS 3757, at *14 (E.D. Wis. Jan. 19, 2010) (acknowledging “Congress consistently intervened and at times frustrated the Commission’s attempt to create a logical approach to these cases”);

only possible explanation for the unusual Congressional intrusion was the “general revulsion that is associated with child-exploitation-related offenses.”¹⁵⁹ As a result, many judges determined that the Guidelines deserved little judicial deference.¹⁶⁰ Numerous judges explicitly rejected the Guidelines on policy grounds.¹⁶¹ A district judge’s comment is salient in this respect: “The Court’s scrutiny of the guideline has led it to conclude that the guideline does not guide.”¹⁶²

Though still rejecting the child pornography Guidelines on policy grounds, two courts took less confrontational stances toward Congress. One district court judge, while criticizing Congressional interference, distinguished the Congressional concern as being focused on smut peddlers and pedophiles rather than passive pornography viewers like the defendant.¹⁶³ Likewise, a second court, issuing a lower-than-Guidelines sentence, distinguished the defendant’s individual possession case by recognizing that Congress was instead “concerned about commercial pornography dealers or those who actually abused children.”¹⁶⁴

Many courts took aim at sentencing enhancements.¹⁶⁵ One court described the enhancements as “duplicative and draconian.”¹⁶⁶ The court referred to

United States v. Beiermann, 599 F. Supp. 2d 1087, 1104 (N.D. Iowa 2009) (criticizing the prosecution for arguing that “the Commission’s institutional role is to do what Congress tells it to do”); United States v. Johnson, 588 F. Supp. 2d 997, 1004 (S.D. Iowa 2008) (criticizing Congress for “tinkering” with the Guidelines).

159. *Johnson*, 588 F. Supp. 2d at 1003; United States v. Shipley, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008).

160. *See, e.g.*, United States v. Phinney, 599 F. Supp. 2d 1037, 1043 (E.D. Wis. 2010); *Grinbergs*, 2008 WL 4191145, at *10; United States v. Stults, No. 8:07CR199, 2008 U.S. Dist. LEXIS 106344, at *31 (D. Neb. Sept. 12, 2008), *aff’d*, 2009 U.S. App. LEXIS 18130 (8th Cir. Aug. 14, 2009); *see also* United States v. Hanson, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008) (calling statutory enhancements “arbitrary increases by Congress slipped into other bills”).

161. *See, e.g.*, *Dorvee*, 604 F.3d at 97; *Beiermann*, 599 F. Supp. 2d at 1100; United States v. Jacob, 631 F. Supp. 2d 1099, 1108 (N.D. Iowa 2009).

162. United States v. Grober, 595 F. Supp. 2d 382, 391, 412 (D.N.J. 2008) (utilizing Stabenow’s conclusions, in part, because the prosecution failed to directly refute them, instead having chosen to discredit his character by calling Stabenow a deconstructionist who as a federal public defender had an agenda). In declining to defer to the Guidelines, the paper written by Federal Public Defender Stabenow, *supra* note 80, criticizing the child pornography guidelines was often influential. *See* United States v. McElheney, 630 F. Supp. 2d 886, 892 (E.D. Tenn. 2009); *Hanson*, 561 F. Supp. 2d at 1009; *Raby*, 2009 U.S. Dist. LEXIS 121836, at *18; *Johnson*, 588 F. Supp. 2d at 1004; United States v. Ontiveros, No. 07-CR-333, 2008 U.S. Dist. LEXIS 58774, at *20 (E.D. Wis. July 24, 2008).

163. *Phinney*, 599 F. Supp. 2d at 1042 n.3.

164. United States v. Diaz, No. 09-CR-302, 2010 U.S. Dist. LEXIS 65979, at *11-*12 (E.D. Wis. June 30, 2010).

165. United States v. Howard, No. 8:08CR387, 2010 U.S. Dist. LEXIS 17740, at *34 (D. Neb. Sept. 8, 2008); United States v. Manke, No. 09-CR-172, 2010 U.S. Dist. LEXIS 3757, at *17-*19 (E.D. Wis. Jan 19, 2010); *Phinney*, 599 F. Supp. 2d at 1042.

166. United States v. Burns, No. 07-CR-556, 2009 U.S. Dist. LEXIS 100642, at *40

substantial sentencing increases through the combination of enhancements for use of a computer, violent content of the images, involvement of prepubescent or under-age-twelve children, and number of images as being necessarily intertwined since the Internet leads to the easy, and sometimes unintended, collection of massive collections of images including those with violence and prepubescent children.¹⁶⁷ More complained that the enhancements failed to distinguish more culpable offenders as they tended to apply in nearly all child pornography cases.¹⁶⁸ This observation is borne out by Commission records. Statistics show that of non-production child pornography cases sentenced in 2009, at least one enhancement applied in every case and several specific enhancements applied in a substantial majority of cases: 97% for use of a computer, 97% for number of images, 95% for a child under twelve years, and 73% for a violent theme.¹⁶⁹ Even the Department of Justice appears concerned that certain enhancements may not be appropriate. In its 2010 annual letter to the Sentencing Commission, the Department discussed its concern about sentencing disparity for child pornography offenses because of a dichotomous strategy of federal judges either adhering to the Guidelines or varying from them.¹⁷⁰ The Department also called on the Commission to reconfigure the Guidelines, impliedly to lower ranges, since “changes in the use of technology and in the way these crimes are regularly carried out today suggest the time is right for evaluating the current Guidelines and considering whether reforms are needed.”¹⁷¹

Nonetheless, an extreme difference of opinion in the federal judiciary existed regarding a non-deferential stance. A minority of judges emphatically disagreed with the idea that the Guidelines suffered empirical flaws. In one case, the judge contended that prior opinions denigrating the Guidelines for their lack of empirical guidance on child pornography offenses “were wrongly decided” and chastised the courts for failing to consider the seriousness of the offenses.¹⁷² In an additional case, the judge contended that “[f]ar from failing to

(N.D. Ill. Oct. 27, 2009).

167. *Id.* at *24.

168. *Howard*, 2010 U.S. Dist. LEXIS 17740, at *34; *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1105 (N.D. Iowa 2009); *United States v. Cruikshank*, 667 F. Supp. 2d 697, 702 (S.D.W. Va. 2009); *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145, at *10 (D. Neb. Sept. 8, 2008).

169. U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS FISCAL YEAR 2009, at 36-37 (2010), available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2009/09_glinexline.pdf.

170. Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, Dep’t of Justice, to William K. Sessions III, U.S. Sentencing Comm’n 2 (June 28, 2010), available at <http://www.scribd.com/doc/37248211/June-28-2010-DOJ-Letter-to-Sentencing-Commission>.

171. *Id.* at 6.

172. *United States v. Fiorella*, 602 F. Supp. 2d 1057, 1074-75 (N.D. Iowa 2009), *aff’d*, *United States v. Shuler*, 2010 U.S. App. LEXIS 5140 (8th Cir. Mar. 11, 2010).

rely on empirical data and its own expertise, the Commission has conducted formal studies whenever possible and conducted extensive analyses to fulfill its statutory obligations.”¹⁷³ It should be noted, though, that contrary to the latter court’s contention, the Guidelines are clearly not the result of the Commission’s informed decisions. The Commission’s recent historical perspective on child pornography sentencing dramatically exhibits Congressional interventions in the Commission’s normal process and their strategic influence on the resulting Guidelines.¹⁷⁴

In other cases involving lengthy sentences consistent with the severe Guidelines approach, judges acknowledged the arguments that the Guidelines for child pornography may not have been empirically founded. But these courts also pointed out that while sentencing judges could now depart from Guidelines ranges for policy disagreements, they were not required to do so, as per Supreme Court precedent.¹⁷⁵

Overall, the polarity in opinion on the legitimacy of the Guidelines for reasonable sentences leads to large disparities in sentencing. In a recent case, the defendant, who appeared to be similarly situated to the many employed, family-supported defendants receiving large downward variances,¹⁷⁶ was unlucky in this regard. The Seventh Circuit recently affirmed his 90-month sentence for a single count of possession, despite there being no evidence of contact offenses, no criminal history, and the court describing the defendant as a small-business owner, church trustee, and the primary caregiver of five kids (one of whom was autistic) whose wife was dying of cancer.¹⁷⁷

F. The Role of Empirical Evidence

The final issue commonly addressed in these decisions concerns the harms that Congress outlined to champion its severe sentencing stance for child pornographers. The supposed correlation between viewing child pornography and child molestation was occasionally discussed, but with differing conclusions. A few courts assumed that child pornographers were dangerous and thereby deserved lengthy sentences.¹⁷⁸ Other courts, though, disagreed with

173. *United States v. Cunningham*, 680 F. Supp. 2d 844, 851 (N.D. Ohio 2010).

174. HISTORY, *supra* note 80, at 38.

175. *United States v. Coopman*, 602 F.3d 814, 818 (7th Cir. 2010); *United States v. Evanouskas*, No. 09-14719, 2010 U.S. App. LEXIS 14377, at *8 n.1 (11th Cir. July 12, 2010); *United States v. McMickens*, No. 09-3273, 2010 U.S. App. LEXIS 7517, at *5 (3d Cir. Apr. 12, 2010); *United States v. Huffstatler*, 571 F.3d 620, 624 (7th Cir. 2009); *United States v. Mikowski*, 332 F. App’x 250, 256 (6th Cir. 2009).

176. *See supra* Part III.B.

177. *United States v. Pape*, 601 F.3d 743, 745 (7th Cir. 2010).

178. *Coopman*, 602 F.3d at 818; *United States v. Reed*, No. 09-4677, 2010 U.S. App. LEXIS 13615, at *4 (3d Cir. July 2, 2010); *United States v. Cunningham*, 680 F. Supp. 2d 844, 855 (N.D. Ohio 2010); *cf.* *United States v. Tanner*, No. 09-5177, 2010 U.S. App. LEXIS 12085, at *9-*10 (6th Cir. June 11, 2010) (accepting the district judge’s conclusion

the position that viewers were more likely to abuse a child.¹⁷⁹ Some of these seemed to accept expert testimony that there was no empirically shown correlation.¹⁸⁰ For example, one court quoted a psychologist as testifying that “[t]he best data there are indicates that it’s a very low recidivism rate for individuals whose only offense is child pornography, possession, or distribution,” despite the general lack of reliable scientific studies on the subject.”¹⁸¹

A different court drew upon the philosophy of human will:

Of course, the fact that a person was stimulated by digital depictions of child pornography does not mean that he has or will in the future seek to assault a child. [The defendant], like all human beings, has free will, and neither a psychologist, nor a judge, can predict what a person will choose to do in the future. A court should exercise caution to avoid imposing a sentence for a crime some fear a defendant could commit in the future, instead of for the crime he actually committed and for which he is before the court.¹⁸²

Notably, a couple of judges commented that it was not necessarily deviant for adults to enjoy pictures of pubescent girls. One court referred to psychological research showing it to be “*normal* for adult heterosexual men and women to find pubescent minors of the opposite gender sexually attractive.”¹⁸³ A different court blamed, in part, social forces, arguing that the Internet made it easier for someone to create a collection and that “as the popular culture has become more and more saturated with a debased concept of human sexuality, this natural aversion in many people [concerning child pornography] seems to have grown weaker.”¹⁸⁴

Any connection between pedophilia and contact sex offending was merely

that the defendant posed a risk of molestation, and refuting a psychologist’s report otherwise because defendant’s online profile indicated an interest in young girls).

179. *United States v. Cruikshank*, 667 F. Supp. 2d 697, 700 (S.D.W.Va. 2009); *United States v. Phinney*, 599 F. Supp. 2d 1037, 1045 n.10 (E.D. Wis. 2009) (noting that while this correlation “is always lurking in the background in these cases,” no assumptions about future offending should be made without a reliable basis); *United States v. Raby*, No. 2:05-CR-00003, 2009 U.S. Dist. LEXIS 121836, at *22, *25 (S.D.W. Va. Dec. 30, 2009) (refusing to allow prosecutor to presume that a receiver of child pornography who had been a middle school teacher had actually molested children); *United States v. Grober*, 595 F. Supp. 2d 382, 409 (D.N.J. 2008).

180. *United States v. Stall*, 581 F.3d 276, 279 (6th Cir. 2009) (noting psychologist testimony that internet sex offenders had significantly lower rates of all types of recidivism than child molesters); *United States v. Szymanski*, No. 3:08CR417, 2009 U.S. Dist. LEXIS 37156, at *3 (N.D. Ohio Apr. 30, 2009) (sexual disorder clinician testifying that his patients generally have a voyeuristic interest in child pornography but are not at a heightened risk of contact offenses against children).

181. *United States v. Johnson*, 588 F. Supp. 2d 997, 1000 (S.D. Iowa 2008).

182. *United States v. Ontiveros*, No. 07-CR-333, 2008 U.S. Dist. LEXIS 58774, at *13 (E.D. Wis. July 24, 2008).

183. *United States v. Burns*, No. 07-CR-556, 2009 U.S. Dist. LEXIS 100642, at *30 (N.D. Ill. Oct. 27, 2009) (also labeling pubescent girls as “women”).

184. *Ontiveros*, 2008 U.S. Dist. LEXIS 58774, at *17.

implied. Most often the reference was to indicate the defendant was not a pedophile in a list of reasons why the defendant was at low risk of contact offending and/or child pornography recidivism.¹⁸⁵ The inclusion in the risk-relevant list suggested, without directly addressing, some connection between pedophilia and child molestation. Two other courts, though, gave significant sentences, citing the pedophilia diagnosis as one of the reasons the defendants needed to be incapacitated longer.¹⁸⁶ None of the courts referenced any social science research about any correlation between pedophilia and molestation.

The argument that harsher sentencing for child pornography offenders was needed to reduce the demand and production of child pornography was noted in a few cases.¹⁸⁷ A couple of courts accepted Congress's assertion of the market reduction theory without further analysis.¹⁸⁸ Conversely, another official was highly skeptical of the market theory. A judge opined that "I wish it were that simple" and pointed to the general failure of the harsher sentencing of drug offenders in the drug war to reduce the market for illegal drugs.¹⁸⁹ Several other opinions assumed the validity of the theory for theoretical purposes but disregarded it as a reason to issue a long prison sentence.¹⁹⁰ These courts expressed doubt the defendant's individual viewing had any impact on the overall market. A potential explanation for the insignificance of the market reduction hypothesis is that it is theoretical and, particularly with the Internet playing a significant role, practically difficult to track or empirically analyze.

The continued harm to the victim by repeated viewing was rarely explored

185. See, e.g., *United States v. Autery*, 555 F.3d 864, 874 (9th Cir. 2009); *United States v. Goff*, 501 F.3d 250, 253 (3d Cir. 2007) (reflecting district judge's opinion yet reversing because district judge did not address all of the § 3553(a) factors); *Burns*, 2009 U.S. Dist. LEXIS 100642, at *30; *United States v. Baird*, 580 F. Supp. 2d 889, 894 (D. Neb. 2008).

186. *United States v. Rodgers*, No. 09-2264, 2010 U.S. App. LEXIS 9662, at *4, *10 (3d Cir. May 11, 2010); *United States v. Sprague*, No. 08-5814, 2010 U.S. App. LEXIS 6169, at *24 (6th Cir. Mar. 24, 2010); compare *United States v. Manke*, No. 09-CR-172, 2010 U.S. Dist. LEXIS 3757, at *11 (E.D. Wis. Jan. 19, 2010) (varying downward despite diagnosis of pedophilia because of an expert opining that the defendant was a low risk of contact offending because his viewing child pornography was the socially isolated man's substitute for sexual pleasure that he could not achieve through interpersonal contact), with *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1094 (N.D. Iowa 2009) (defense psychologist diagnosed defendant with pedophilia but also testified he was unlikely to engage in predatory sexual crimes).

187. *United States v. Sudyka*, No. 8:07CR383, 2008 U.S. Dist. LEXIS 42569, at *22 (D. Neb. Apr. 14, 2008).

188. *United States v. Pugh*, 515 F.3d 1179, 1196 (11th Cir. 2008); *Goff*, 501 F.3d at 260.

189. *Beiermann*, 599 F. Supp. 2d at 1103.

190. *Manke*, 2010 U.S. Dist. LEXIS 3757, at *19; *United States v. Raby*, No. 2:05-CR-00003, 2009 U.S. Dist. LEXIS 121836, at *20 (S.D.W.Va. Dec. 30, 2009); *United States v. Goldberg*, No. 05CR0922, 2008 U.S. Dist. LEXIS 35723, at *21-*22 (N.D. Ill. Apr. 30, 2008).

in the case law.¹⁹¹ However, an outlier opinion deserves note. One particularly vociferous judge, while arguing for hefty prison sentences for child pornography generally, stood the argument on its head. In his opinion, the judge strongly advised that the child pornography materials be more openly displayed and viewed in criminal cases. He explained:

Child pornography is a vile, heinous crime. Mention the term to your average American and he responds with immediate disgust and a sense of unease. However, once it enters the legal system, child pornography undergoes sterilization. The sterilization goes far beyond properly removing emotion from sentencing decisions. Images are described in the most clinical sense. Victims all too often remain nameless. The only emotions on display are those of defendants, sorry that their actions were discovered by law enforcement.¹⁹²

Seeking to desterilize the process, the same judge personally viewed the defendant's collection of child pornography and strongly urged other sentencing judges to do likewise.¹⁹³

Empirical evidence, therefore, played a relatively insignificant role in judicial decisions in sentencing considering societal harms posed by those involved with child pornography.

G. The Search for Clarity

The sentencing opinion data reviewed above reflects the strong discord in the federal judiciary regarding child pornography sentencing. They also signify that extreme disagreements among Congress, the Sentencing Commission, and the federal judiciary exist unabated. The result, though, is both confusion and disparities in sentencing practices. A couple of opinions highlight the frustration that judges feel from the lack of reasonable guidance. A judge in a child pornography case complained: “[w]e readily concede that in this post-Booker era lower courts may occasionally feel a bit like Hansel and Gretel, looking for the now-missing breadcrumbs that would lead us back to clarity in sentencing.”¹⁹⁴ Some have lamented their discomfort with the large statistic on downward variation and the extreme inconsistency across cases in child

191. *But see Goff*, 501 F.3d at 259 (referencing Congressional statements about the continued victimization of children due to the permanent record of the abuse). This harm will arguably be inapplicable in cases involving either morphed images or pandering of images that don't exist as they don't require that any child actually be sexually abused.

192. *United States v. Cunningham*, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010).

193. *Id.* He admitted the surprised reaction of the FBI investigator who asserted that no other judge had ever requested to personally view the materials. Undeterred, the judge described in the opinion the physical attributes of the prepubescent children in detail. *Contra United States v. Diaz*, No. 09-CR-302, 2010 U.S. Dist. LEXIS 65979, at *14 (E.D. Wis. June 30, 2010) (declining *Cunningham's* suggestion, arguing that sentencing judges ought not to base a sentence on visceral reactions that viewing the material might render, and noting the revictimization that doing so might entail).

194. *United States v. Autery*, 555 F.3d 864, 878 (9th Cir. 2009) (probation despite the Guidelines range of 41-51 months).

pornography sentencing. For instance, a judge commented:

In the absence of coherent and defensible Guidelines, district courts are left without a meaningful baseline from which they can apply sentencing principles. The resulting vacuum has created a sentencing procedure that sometimes can appear to reflect the policy views of a given court rather than the application of a coherent set of principles to an individual situation. Individual criminal sentences are not the proper forum for an expansive dialogue about the principles of criminal justice. Such conversation, though vital, should not take place here—lives are altered each and every time a district court issues a sentence: this is not a theoretical exercise. Yet, this Court is mindful of the appropriate scope of its authority—it must take the law as it finds it.¹⁹⁵

Similarly, in a 2010 opinion another judge, in issuing a ten plus year in-Guidelines sentence, acknowledged the problem: “[w]ith a growing number of district judges finding that the Guidelines in this area are entitled to no deference, sentencing disparities are bound to grow exponentially.”¹⁹⁶ It appears clear from this analysis of the body of judicial opinions that federal judges want greater rationality and consistency in the child pornography sentencing arena.

IV. EMPIRICAL EVIDENCE ON THE NEXUS BETWEEN CHILD PORNOGRAPHY AND CHILD MOLESTATION

This Part reviews and analyzes empirical research about the harm of pornography in general and then provides a more focused assessment of the empirical basis for the asserted connection between child pornography and sexual offending against children.¹⁹⁷ The intent is to help provide a basis for determining which laymen’s perspective on the harms posed by child pornography offenders has a more informed view of the empirical data: Congressional assertions of a connection between child pornography and child molestation or the apparent majority position within the federal judiciary that most child pornography offenders pose little risk.

195. *United States v. Stern*, 590 F. Supp. 2d 945, 961 (N.D. Ohio 2008); *accord* *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1115 (N.D. Iowa 2009); *United States v. Young*, No. 1:09-CR-252, 2010 U.S. Dist. LEXIS 10086, at *3 (W.D. Mich. Feb. 5, 2010) (contending that the Guidelines have resulted in “complexity, confusion and inconsistencies”).

196. *Cunningham*, 680 F. Supp. 2d at 862.

197. While an additional evil discussed by antipornographers concerns the continuing harm to the children in the pornographic images because of the potential for repeated viewing, there appear to be no empirical studies to date on this topic. Thus, the continuing harm argument remains a theoretical one and this Article does not address it.

A. Federal Inquiries into Pornography and Its Effects

Congress has initiated numerous attempts to ban pornography. In pursuit of this objective, the federal government on two occasions established commissions to study the assumed harms of pornography on individuals and society. The expressed goal each time was to garner support for legally limiting pornography. While the resulting reports are generally about pornography, they still resonate in the debates about criminalization and severe sentencing for child pornography.

Congress established the Presidential Commission on Obscenity and Pornography in 1967 with the mission of investigating the causal relationship between pornography and antisocial behavior.¹⁹⁸ In pursuit of this, the Presidential Commission considered the sparse empirical literature already available and funded dozens of additional studies. Contrary to an anti-pornography stance, the Presidential Commission stated in its final report issued in 1970:

In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crimes or sex delinquency.¹⁹⁹

On the other hand, the report noted there was some empirical support for the idea that pornography may actually have the benefit of reducing contact offenses by providing a cathartic outlet.²⁰⁰ As a result of these findings, the 1970 Commission recommended that pornography laws be rescinded. In response, the Senate rebuked the Commission and its work and formally voted against the report in a 60-5 vote (35 abstentions).²⁰¹ Similarly, President Nixon accused group members of being “morally bankrupt” and formally rejected the 1970 report because it did not support a policy decision to ban pornographic materials.²⁰²

In another attempt to garner evidence of the assumed harms that pornography precipitates, President Ronald Reagan established the Attorney General’s Commission on Pornography in 1985.²⁰³ The committee was tasked with studying the impact of pornography on society and to make corresponding recommendations for law enforcement efforts that could limit the production

198. Jules Witcover, *Civil War over Smut*, 18 NATION 550, 550 (1970).

199. COMM’N ON OBSCENITY AND PORNOGRAPHY, REPORT 223 (1970).

200. *Id.* at 147.

201. *Senate Votes, 60 to 5, to Reject and Censure Obscenity Report*, N.Y. TIMES, Oct. 14, 1970, at 30 (reporting Congressman denouncing the commissioners as “slanted and biased”).

202. *Nixon Repudiates Obscenity Report as Morally Void*, N.Y. TIMES, Oct. 25, 1970, at 1.

203. U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY’S FINAL REPORT (1986) [hereinafter MEESE REPORT].

and distribution of pornography. The committee was reportedly stacked with anti-pornography advocates.²⁰⁴ The resulting 1986 report expressly criticized the prior 1970 committee's conclusions for having been premature, suffering methodological flaws, and failing to specifically examine violent pornography. In expounding upon the multiple harms pornography causes, the Attorney General's committee admitted that it had not limited itself to the empirical effects of pornography, though the report does contain a social science literature review. The group found that that it was equally proper to have considered the non-empirical moral consequences of pornography as well.²⁰⁵

The report explained:

Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm. And when we think about harm in this way, there are acts that must be condemned not because the evils of the world will thereby be eliminated, but because conscience demands it.²⁰⁶

As for child pornography, the report contains no references to research on the effects on children or society. Instead, the committee members collectively averred their personal opinions:

None of us doubt that child pornography is extraordinarily harmful both to the children involved and to society, that dealing with child pornography in all of its forms ought to be treated as a governmental priority of the greatest urgency, and that an aggressive law enforcement effort is an essential part of this urgent governmental priority.²⁰⁷

The committee fulfilled anti-pornography advocates' wishes in terms of its concluding stance that pornography causes observable and unobservable harm to individuals directly involved, as well as to greater societal values. The group's final ninety-two recommendations for change consistently supported greater restrictions on pornographic material and stronger enforcement efforts.²⁰⁸ The 1986 report continues to resonate today. In pushing legislation

204. Christopher J. Ferguson & Richard D. Hartley, *The Pleasure Is Momentary . . . the Expense Damnable? The Influence of Pornography on Rape and Sexual Assault*, 14 *AGGRESSION & VIOLENT BEHAV.* 323, 324 (2009). On a side note, one of the commissioners, Bruce Ritter, a Franciscan priest, was later forced to resign from his executive positions with a charitable shelter he ran after four boys from the shelter claimed they had sexual relations with the priest. M.A. Farber, *Founder of Covenant House Steps Aside in Church Inquiry*, N.Y. TIMES, Feb. 7, 1990, at A1. But in his personal statement as part of the final report's forward, Reverend Ritter paradoxically opined that "[T]eenagers, and to a great extent even younger children, must learn to protect themselves—both from exploitation by others and from the consequences of their own ignorance and immaturity." MEESE REPORT, *supra* note 203, at 107. Ritter thereby promoted universal sex education in schools even for youngsters.

205. MEESE REPORT, *supra* note 203, at 303.

206. *Id.*

207. *Id.* at 417-18.

208. Daniel Linz, Edward Donnerstein & Steven Penrod, *The Findings and Recommendations of the Attorney General's Commission on Pornography, Do the Psychological "Facts" Fit the Political Fury?*, 42 *AM. PSYCHOLOGIST* 946, 946 (1987).

containing restrictions on pornography over the last quarter century, anti-pornography advocates continue to tout the report and its conclusions.²⁰⁹

However, the 1986 report's conclusions, and more particularly the social science cited therein about the evils of pornography, has been the subject of persistent attack. Even two of the researchers whose work the committee commonly cited in their report to support the conclusions, Neil Malamuth and Edward Donnerstein, objected. For instance, in a co-authored piece, Donnerstein concluded that "[i]t seems to us that the legal recommendations made by the commission for strengthening obscenity laws do not follow from the data."²¹⁰ In another work, Malamuth argued that "[t]he commission selectively attended to the results of research that obtained effects while largely disregarding those studies producing null effects."²¹¹ Malamuth also complained about the commission's substitution of personal judgment for empirical evidence:

[L]acking solid scientific proof, the commission argued, on the basis of their 'own insights and experience with these types of pornography,' that substantial exposure to materials of this type 'bears some causal relationship to the level of sexual violence, sexual coercion, or unwanted sexual aggression in the population so exposed.'²¹²

Regarding Congress's penchant for selectively using statistics to support anti-pornography campaigns, Malamuth and other researchers have surmised:

Why has social science evidence been applied to policy decision making in such a seemingly haphazard way? We submit that it is because policy makers have sought first to advance a political or moral position and then have tried to support these positions with the necessary scientific evidence. When the evidence has been consistent they have emphasized it; when it has proven contrary to their case they have usually chosen to ignore it or to denigrate its value.²¹³

As the 1986 committee was influenced in large part by subjective moral judgments about pornography's harm and was in direct conflict with the conclusions of the 1970 committee, another look at the past and more recent empirical evidence is justified.

209. See, e.g., 144 CONG. REC. H4491, H4497 (daily ed. June 1, 1998); see also S. CON. RES. 77, 108th Cong. (2003).

210. Linz, Donnerstein & Penrod, *supra* note 208, at 952.

211. Daniel Linz, Neil M. Malamuth & Katherine Beckett, *Civil Liberties and Research on the Effects of Pornography*, in *PSYCHOLOGY AND SOCIAL POLICY* 149, 154 (Peter Suedfeld & Peter E. Tetlock eds., 1992).

212. *Id.* at 154 (citing MEESE REPORT, *supra* note 203, at 333-34).

213. *Id.*; see also Jeffrey Layne Blevins & Fernando Anton, *Muted Voices in the Legislative Process: The Role of Scholarship in US Congressional Efforts to Protect Children from Internet Pornography*, 10 *NEW MEDIA & SOC'Y* 115, 133 (2008) (finding that Congress rarely looks to social scientists to inform them in their decision-making about the dangers online pornography pose to children and that such empirical evidence would only be embraced if it supported the ideas and values of the dominant power).

B. Aggregate Statistics

Anti-pornography advocates often argue that pornography will lead to overall increases in sexual assault and anti-female sentiment. But, studies with aggregate statistics refute a correlation. Pornography consumption had an inverse relationship with the rate of rape in several western European countries and the United States.²¹⁴ Another study confirmed the U.S. result by also finding an inverse relationship between pornography availability and rape rates from 1988 to 2005.²¹⁵ There is also evidence from a different study that higher circulation rates of pornography in states correlated with greater gender equality.²¹⁶

C. Individual Correlates

As for individual-level differences, the relevant empirical literature includes studies on pornography and sexual aggression in general, discussed first, as well as on more focused research involving child pornography and molestation.

1. Pornography and Sexual Aggression

Empirical evidence of a correlation between pornography and sexual assault is equivocal. Some research studies using undergraduate students as sample subjects have found statistically significant effects of violent pornography on aggressive behavior by using various proxies for the aggression variable.²¹⁷ However, studies relatively consistently indicate that

214. Berl Kutchinsky, *Pornography and Rape: Theory and Practice? Evidence from Crime Data in Four Countries Where Pornography Is Easily Available*, 14 INT'L J.L. & PSYCHIATRY 47, 62 (1991).

215. Ferguson & Hartley, *supra* note 204, at 326; *see also* William A. Fisher & Azy Barak, *Internet Pornography: A Social Psychological Perspective on Internet Sexuality*, 38 J. SEX RES. 312, 316 (2001) (finding an inverse relationship between the amount of sexually explicit material on the Internet and rape rates in the U.S. between 1995 and 1999).

216. Larry Baron, *Pornography and Gender Equality: An Empirical Analysis*, 27 J. SEX RES. 363, 376 (1990) (studying soft pornography); *see also* Milton Diamond, *Pornography, Public Acceptance and Sex Related Crime: A Review*, 32 INT'L J.L. & PSYCHIATRY 304, 306, 312 (2009) (reviewing studies and concluding that the 1986 Commission was wrong about the empirical evidence as there is no link between pornography and the occurrence of rape).

217. *See, e.g.*, Edward Donnerstein & Leonard Berkowitz, *Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women*, 41 J. PERSONALITY & SOC. PSYCHOL. 710, 720 (1981) (measuring aggression through the proxy of the participant's willingness to administer electric shocks to another after watching erotic films); Neil M. Malamuth & James V.P. Check, *Penile Tumescence and Perceptual Responses as a Function of Victim's Perceived Reactions*, 10 J. APPLIED SOC. PSYCHOL. 528, 544 (1980) (finding a correlation between arousal to audio stories of rape involving a distressed victim and likelihood of rape); Vanessa Vega & Neil M. Malamuth, *Predicting Sexual Aggression:*

any observed aggressive behavior occurs not because the violent images contained a sexual theme. Rather, it is the violence that is relevant. For example, a study showed a correlation between sexually aggressive behavior and sexually violent pornography, but not with nonviolent pornography.²¹⁸ Thus, experts believe that whatever correlation exists is related to the violence in the image, whether or not a sexual component also exists.²¹⁹

Even assuming a correlation between violent pornography and aggression, experts warn that there are many reasons why one cannot take any correlation merely at face value, or at least not without the following critical contextual knowledge. Unquestionably, correlation is not causation.²²⁰ Further, rarely does one variable singularly determine a result. Experts studying pornography and violence, whether their studies show some statistically significant correlation or not, rather consistently admit that they believe any risk of aggression following the observance of violent pornography is mediated and moderated by many other variables. These include preexisting aggressive tendencies;²²¹ being at high risk of sexual aggression;²²² preexisting personality characteristics, such as

The Role of Pornography in the Context of General and Specific Risk Factors, 33 AGGRESSIVE BEHAV. 104, 109 (2007) (defining pornography use based on self-reported viewing of magazines such as *Hustler* and *Playboy*, while sexual aggression was measured by a survey asking about previous behaviors involving rape, attempted rape, and sexual harassment). For a detailed critique of the first two studies, see generally Douglas E. Mould, *A Critical Analysis of Recent Research on Violent Erotica*, 24 J. SEX RES. 326 (1988).

218. Dano Demaré et al., *Sexually Violent Pornography, Anti-Women Attitudes, and Sexual Aggression: A Structural Equation Model*, 27 J. RES. PERSONALITY 285, 296 (1993).

219. Edward I. Donnerstein, *Erotica and Human Aggression*, in 2 AGGRESSION: THEORETICAL AND EMPIRICAL RESEARCH 144-45, 151 (Russell G. Green & Edward I. Donnerstein, eds., 1983); Robert Bauserman, *Sexual Aggression and Pornography: A Review of Correlational Research*, 18 BASIC & APPLIED SOC. PSYCHOL. 405, 424 (1996); Paul Pollard, *Pornography and Sexual Aggression*, 14 CURRENT PSYCHOL. 200, 200 (1995).

220. *But see* Danielle R. Dallas, *Starting with the Scales Tilted: The Supreme Court's Assessment of Congressional Findings and Scientific Evidence in Ashcroft v. Free Speech Coalition*, 44 WILLAMETTE L. REV. 33, 49 (2007) (conceding in arguing the harms of virtual child pornography that correlation is not causation but that it "does not mean that it may not be some evidence of causality").

221. Neil M. Malamuth et al., *Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand them?*, 11 ANN. REV. SEX RES. 26, 85 (2000). The correlation depends on the relative risk of the viewer to sexual aggressiveness. Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAV. 341, 347 (2008) (studying child molesters). High-risk men were much more likely to engage in sexual aggression but with the addition of frequent pornography use. Vega & Malamuth, *supra* note 217, at 114. In the end, researchers have cautioned that the correlation for the high-risk group may be circular in that already sexually aggressive men are more likely to be drawn to pornography that reinforces their already hostile feelings to sexuality. Malamuth et al., *supra*, at 26.

222. Michael C. Seto et al., *The Role of Pornography in the Etiology of Sexual Aggression*, 6 AGGRESSION & VIOLENT BEHAV. 35, 46 (2001); *see also* Gert Martin Hald & Neil M. Malamuth, *Self-Perceived Effects of Pornography Consumption*, 37 ARCHIVES SEXUAL BEHAV. 614, 621 (2008) (finding significant positive self-reported consequences of

antisocial personality or hostile masculinity;²²³ and alcohol and/or drug use.²²⁴ Nevertheless, a host of research studies have found no correlation between pornography and rape in general,²²⁵ adherence to rape myths,²²⁶ or negative attitudes toward women.²²⁷ As a result, experts who have extensively studied the impact of pornography on sexual aggression generally conclude that while several laboratory studies have shown a short-term and small impact on aggression, there is little empirical support for any long-term impact, even in laboratory studies.²²⁸

2. Child Pornography and Child Molestation

Social science studies considering the correlation between viewing child pornography and contact sexual offenses against children are not consistent, though there is much evidence that only a subset of offenders who use child

viewing hardcore pornography and few negative effects); Vega & Malamuth, *supra* note 217, at 114.

223. Drew A. Kingston et al., *The Importance of Individual Differences in Pornography Use: Theoretical Perspectives and Implications for Treating Sexual Offenders*, 46 J. SEX RES. 216, 221 (2009) (conducting literature review).

224. Kelly Cue Davis et al., *Men's Likelihood of Sexual Aggression: The Influence of Alcohol, Sexual Arousal, and Violent Pornography*, 32 AGGRESSIVE BEHAV. 581, 586 (2006).

225. Bauserman, *supra* note 219, at 422; Corey R. Isaacs & William A. Fisher, *A Computer-Based Educational Intervention to Address Potential Negative Effects of Internet Pornography*, 59 COMM. STUD. 1, 13 (2008).

226. William A. Fisher & Guy Grener, *Violent Pornography, Antiwoman Thoughts, and Antiwoman Acts: In Search of Reliable Effects*, 31 J. SEX RES. 23, 32 (1994); Luis T. Garcia, *Exposure to Pornography and Attitudes About Women and Rape: A Correlational Study*, 22 J. SEX RES. 378, 382 (1986).

227. Kimberly A. Davies, *Voluntary Exposure to Pornography and Men's Attitudes Toward Feminism and Rape*, 34 J. SEX RES. 131, 136 (1997); Vernon R. Padgett et al., *Pornography, Erotica, and Attitudes Toward Women: The Effects of Repeated Exposure*, 26 J. SEX RES. 479, 489 (1989). *But see* Gert Martin Hald, Neil M. Malamuth & Carlin Yuen, *Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies*, 36 AGGRESSIVE BEHAV. 14, 18 (2010) (finding "a significant overall relationship between pornography consumption and attitudes supporting violence against women in nonexperimental studies.").

228. Ferguson & Hartley, *supra* note 204, at 326; *see also* Philippe Bensimon, *The Role of Pornography in Sexual Offending*, 14 SEXUAL ADDICTION & COMPULSIVITY 95, 99 (2007) (surmising that the results of studies showing a link between pornography and sexual violence is equivocal at best); Diamond, *supra* note 216, at 311 (reviewing the literature and finding no empirical basis for a cause and effect between pornography and harms to women and noting antipornography laws serve political interests in Western countries while countries with strict bans are not known for protecting women from sexual harm); Neil M. Malamuth & Joseph Ceneti, *Repeated Exposure to Violent and Nonviolent Pornography: Likelihood of Raping Ratings and Laboratory Aggression Against Women*, 12 AGGRESSIVE BEHAV. 129, 129 (1986) (noting that even if prior research shows that exposure to pornography increases male aggression in laboratory experiments in the short term, such effect appears to quickly extinguish).

pornography also sexually offend against children. To support this, researchers conducting comprehensive reviews of empirical literature often conclude there is little evidence of any direct impact of viewing child pornography on the commission of contact sexual offenses.²²⁹ Indeed, the rates of contact offending by child pornographers are relatively low. Research also shows that recidivism for child molesters is also low, though higher than it is for child pornography-only offenders. A study of over 200 individuals suspected of viewing child pornography online found only 0.8% of the sample was investigated for child sexual abuse in a six year follow-up period.²³⁰ Similarly, none of the seventy-three internet child pornography offenders in a London study committed a new contact sex offense, while 2% of the 117 members of the child molester group did in an eight month follow-up.²³¹ In a sample of registered sex offenders in Canada, offenders with only child pornography offenses in their criminal history were least likely to recidivate with a contact sexual offense (1.3%) at an average two and a half year follow-up than those child pornographers with a prior criminal *nonsexual* offense (2.0%).²³² The child pornography offenders with a prior history of contact sexual offenses were most likely to sexually reoffend (9.2%).²³³

In general, the literature supports the view that while child molesters may possess child pornography, those that possess child pornography are generally not likely to engage in contact offenses against children. Instead, child molesters are merely a small subset of child pornographers. Or, another way to look at it is that child molesters and child pornography offenders are two groups with occasional overlap in membership.²³⁴ There are strong reasons to differentiate the groups. Research shows that contact sex offenders with child victims vary in significant and risk-relevant ways from child pornography

229. See, e.g., Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 BMC PSYCHIATRY 43, 43 (2009); Dean D. Knudsen, *Child Sexual Abuse and Pornography: Is There a Relationship?*, 3 J. FAM. VIOLENCE 253, 262 (1988) (concluding any nexus is indirect but that "most violence toward women and children is undertaken without" pornography to stimulate desire); Neil M. Malamuth & Mark Huppín, *Drawing the Line on Virtual Child Pornography, Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 820 (2007); Ost, *supra* note 18, at 450; Michael C. Seto, *Assessing the Risk Posed by Child Pornography Offenders* (Apr. 6, 2009) (paper presented at the G8 Global Symposium), available at http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf.

230. Endrass et al., *supra* note 229, at 43.

231. L. Webb et al., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 SEXUAL ABUSE 449, 459 (2007).

232. Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE 201, 207 (2005).

233. *Id.* Indeed, as a result of the importance of a prior history of child molestation distinguishing dangerous offenders, pornography researchers have argued that the government ought to ban virtual child pornography only for convicted child molesters. Malamuth & Huppín, *supra* note 229, at 826-27.

234. Endrass et al., *supra* note 229.

offenders. In a study comparing a group of convicted internet child pornography offenders with convicted child molesters, researchers found that child molesters were significantly more likely (six times) to have committed prior sexual offenses against children prior to the offense of conviction.²³⁵ Notably, the child molester group had no prior child pornography convictions.²³⁶ The same study showed differences from child pornography offenders where the child molester group held more assaultive attitudes, experienced higher levels of psychopathy, were far more likely to recidivate, and were more likely to otherwise engage in sexually risky behavior.²³⁷ Other researchers also comparing groups found that child molesters tested at greater levels of over-assertiveness and cognitive distortions as to whether children enjoy sexual contact and are not harmed by it.²³⁸ The latter researchers concluded that these variations could explain why child pornography offenders do not progress to being contact offenders.²³⁹

Another argument offered for the dangerousness of child pornographers is that they use the images to groom juveniles as victims.²⁴⁰ While this is true for some child pornographers who are intent on contact offending, it is also the case that child molesters using sexually explicit materials for grooming are more likely to use adult pornography than graphic images depicting children.²⁴¹

3. Child Pornography and Sexual Fantasies

Contrary to what may appear logical, the correlation between pedophilia and sexual contact offenses against children is not very strong. In fact, child molesters are less likely than child pornographers to either be pedophiliac²⁴² or to fantasize sexually about children. In one study, child pornography offenders were about three times more likely to test as having pedophilia (using phallometric testing) than child molesters even when the pornography offenders had no past contact offending.²⁴³ Overall, thirty-nine percent of the

235. Webb et al., *supra* note 231, at 456.

236. *Id.* at 457.

237. *Id.* at 457-58.

238. Ian Alexander Elliott et al., *Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders*, 21 *SEXUAL ABUSE* 76, 87 (2009).

239. *Id.* at 87.

240. Ost, *supra* note 18, at 448.

241. Ron Langevin & Suzanne Curnoe, *The Use of Pornography During the Commission of Sexual Offenses*, 48 *INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 572, 581-83 (2004).

242. The clinical definition of pedophilia requires “[o]ver a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally thirteen years or younger).” *AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 572 (4th ed. 2000).

243. Michael C. Seto et al., *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 *J. ABNORMAL PSYCHOL.* 610, 612 (2006).

child pornographers and sixty-five percent of contact child molesters did not test positive for a diagnosis of pedophilia.²⁴⁴ This result suggests that many who commit sexual offenses involving children are not abnormally attracted to prepubescence. Similarly, another study shows that child molesters were actually less likely than child pornography offenders to foster sexual fantasies involving children.²⁴⁵ A likely explanation for child molesters being less likely to be sexually oriented toward children is that they are often opportunistic offenders. A national study analyzing a five-year period in the 1990s found that seventy-six percent of assaultive sex offenses committed against child victims (less than eighteen years) were committed by family members or acquaintances.²⁴⁶ The same study showed that almost half of sexual contact offenses against children under six years were perpetrated by family members.²⁴⁷ It is posited that contact offenders may target juveniles as sexual victims rather than adults because children are more vulnerable and accessible. The fact that the youngest victims are far more likely to be sexually assaulted by family members and family friends is consistent with this opportunity theory.²⁴⁸

Even for those child pornography offenders who experience deviant sexual fantasies, the existence of fantasies does not automatically render them at high risk of contact offending. Indeed, entertaining deviant sexual fantasies towards children may not uniquely differentiate child pornographers from the public. Deviant sexual fantasies are quite common even in non-offender populations, and pedophilic interests are not unusual. A study of undergraduate students found twenty-one percent reported sexual attraction to small children, with nine percent having sexual fantasies involving children.²⁴⁹ In a community sample of non-offender men, twenty-five percent either self-reported pedophilic interest or exhibited penile arousal to pedophilic stimuli.²⁵⁰ There is also reason to believe that pedophilic attraction does not lead to behavior acting out the

244. *Id.*

245. Kerry Sheldon & Dennis Howitt, *Sexual Fantasy in Pedophile Offenders: Can Any Model Explain Satisfactorily New Findings from a Study of Internet and Contact Sexual Offenders?*, 13 *LEGAL & CRIMINOLOGICAL PSYCHOL.* 137, 151 (2008); see also W.L. Marshall, *The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Nonoffenders*, 25 *J. SEX RES.* 267, 279 (1988) (finding that compared to rapists and nonoffenders, child molesters did not disproportionately seek out child pornography compared to the other groups).

246. HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, *SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS* 10 (2000).

247. *Id.*

248. Marshall, *supra* note 245, at 276.

249. John Briere & Marsha Runtz, *University Males' Sexual Interest in Children: Predicting Potential Indices of "Pedophilia" in a Nonforensic Sample*, 13 *CHILD ABUSE & NEGLECT* 65, 68 (1989).

250. Gordon C. Nagayama Hall et al., *Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men*, 26 *BEHAV. THERAPY* 681, 688 (1995).

image observed. A study of male undergraduates found that ninety-five percent of them had at least one deviant sexual fantasy.²⁵¹ Of this undergraduate sample, thirteen percent reported having experienced a sexual fantasy indicative of pedophilia.²⁵² But, while the study found statistically significant correlations between deviant sexual fantasy overall and behaviors acting out on those fantasies, there was no significant correlation between a pedophilic fantasy and behavior.²⁵³

Child pornography offenders should not be assumed to be molesters for other reasons as well. Pornographers are heterogeneous in their motivations for viewing pornography.²⁵⁴ The three main uses of child pornography materials are arousal, imitation, and catharsis. There is evidence to support each.²⁵⁵ But while imitators are the ones who may engage in contact offending, those who report a cathartic effect contend that it keeps them from acting out with live children.²⁵⁶ The evidence that child pornographers generally do not imitate the images by contact offending against children may also be explained by the presence of protective factors that are known to reduce violent offending. Child pornography offenders tend to be better educated, of higher intelligence, and more likely to be gainfully employed than other types of offenders.²⁵⁷

Interestingly, it has been noted that pornography laws could have the opposite effect from deterrence. Perpetuating more laws criminalizing pornography may lead to more offending as offenders also point to the fact that the images are unlawful create a higher level of satisfaction.²⁵⁸ Nevertheless,

251. Kevin M. Williams et al., *Inferring Sexually Deviant Behavior from Corresponding Fantasies: The Role of Personality and Pornography Consumption*, 36 CRIM. JUST. & BEHAV. 198, 205 (2009) (covering frotteurism, voyeurism, exhibitionism, transvestism, pedophilia, bondage, sadism, object fetishism, and sexual assault).

252. *Id.*

253. *Id.*

254. See generally David Middleton et al., *An Investigation in to the Applicability of the Ward and Siegert Pathways Model of Child Sexual Abuse with Internet Offenders*, 12 PSYCHOL., CRIME & L. 589, 598, 600 (2006) (finding internet child pornographers were homogenous, differing from contact offenders in risk significant ways).

255. Daniel Lee Carter et al., *Use of Pornography in the Criminal and Developmental Histories of Sexual Offenders*, 2 J. INTERPERSONAL VIOLENCE 196, 207 (1987); Dean D. Knudsen, *Child Sexual Abuse and Pornography: Is There a Relationship?*, 3 J. FAM. VIOLENCE 253, 258 (1988).

256. Carter et al., *supra* note 255, at 207 (noting also that individuals prone to acting upon their fantasies likely will do so regardless of pornography exposure); Milton Diamond et al., *Pornography and Sex Crimes in the Czech Republic*, ARCHIVES SEXUAL BEHAV. (2010) (finding rates of child sexual abuse declined with legalization of child pornography in several countries), available at <http://www.springerlink.com/content/v046j3g178147772/fulltext.html>.

257. Endrass et al., *supra* note 229.

258. Ethel Quayle & Max Taylor, *Child Pornography and the Internet: Perpetuating a Cycle of Abuse*, 23 DEVIANT BEHAV. 331, 340 (2002); see also Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 249 (2001) (quoting Freud in suggesting that making it forbidden only increases the sexual temptation of man).

even if there is a correlation, there is no empirical support that eliminating all child pornography will reduce contact sexual offenses in general, or even contact offenses against children in particular.²⁵⁹

V. CONCLUSION

Emotions run high concerning issues involving the sexual exploitation of children. Moral panic has led Congress to pursue an ever-expanding federal regime of broadening the scope of child pornography laws and substantially increasing the length of sentences. The U.S. Sentencing Commission has endeavored to engage in its institutional role of providing empirically-sound normative sentence ranges, but has faced Congressional overrides uniquely applied to child pornography offenses. As a result, child pornography sentencing guidelines beget lengthy sentences. Yet, with the Guidelines being advisory, a revolt by a large contingent of the federal judiciary has caused further dispute and confusion. The extreme difference in opinion in the federal judiciary is largely due to a polarity of opinion in the reasonableness of the Guidelines for most child pornography offenders. While many judges find the Guidelines excessive and thereby vary sentences downward, sometimes by substantial percentages, numerous other judges comply with the stringent Guidelines ranges. The case law review illustrated the consequences: significant disparities in sentencing and confusion.

The debate surrounding proportionality in sentencing highlights a key theme that the perceived risk that child pornography offenders will commit contact sex offences. Congress assumes high risk while many federal judges assess most child pornography offenders who are not producers as posing little risk to society. Based on an assessment of the empirical evidence, the Congressional stance is best characterized as political rhetoric. Overall, empirical research fails to establish a correlation, much less a causative link, between viewing child pornography and contact offenses against children. The empirical evidence, instead, indicates that child pornography offenders and child molesters differ substantively in risk-relevant ways. Indeed, studies show that child pornographers are generally not contact offenders. An analogy seems logical. "It's like saying that if you look at pictures of homicides, you'll kill someone."²⁶⁰ Nonetheless, while it is certainly laudable to deter sexual violence against children and to impose severe penalties for child molesters, the criminalization with lengthy sentences for child pornographers who are not contact offenders is a poor proxy for this goal. This conclusion is of particular import with new child pornography offenses encompassing morphed images

259. See Malamuth & Huppel, *supra* note 229, at 826-27 (finding from a literature review a correlation between child pornography viewing and child sexual abuse by prior contact offenders but not for child pornography-only offenders).

260. Carol Sowers, *Child Porn Law Under Attack: Judges, Defense Attorneys Fight Harsh Sentences*, ARIZ. REPUBLIC, May 19, 2003, at A1.

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and pandering child pornography materials that do not actually exist, which call for substantial sentences for acts where no child was ever sexually abused.

The future of child pornography sentencing in the federal system is uncertain as the three major institutions in the debate are moving in various directions. As it stands, Congress continues to expand child pornography laws and increase sentences, the Sentencing Commission is restudying the issue with potential Guidelines changes, and the federal judiciary remains fragmented in sentencing policies. As the debate rages, though, sentencing goals of proportionality to the offense committed, reasonableness considering the offense and the offender, reducing disproportional sentencing between likely offenders, and overall logic suffers at the expense of justice and public coffers. A rational perspective on the risks that child pornography offenders pose is needed.

