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**MAKING THE PUNISHMENT FIT THE (COMPUTER) CRIME:
REBOOTING NOTIONS OF POSSESSION FOR THE FEDERAL
SENTENCING OF CHILD PORNOGRAPHY OFFENSES**

By Jelani Jefferson Exum*

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INTRODUCTION

[1] Sexual exploitation of children is a real and disturbing problem. However, when it comes to the sentencing of child pornography possessors, the U.S. federal system has a problem, as well. This Article adds to the current, heated discussion on what is happening in the sentencing of federal child pornography possession offenses, why nobody is satisfied, and how much the Federal Sentencing Guidelines are to blame. At the heart of this Article are the forgotten players in the discussion—computers and the Internet—and their role in changing the realities of child pornography possession. This Article argues that computers and the Internet are important factors in understanding both the victimization of the children portrayed in the illegal images and the formulation of appropriate punishment for those who view and possess such images. Discussion on the topic thus far has failed to pay proper attention to the effect computer behavior and the Internet have on the

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manner in which offenders possess child pornography and to the type and extent of punishment that is appropriate, given the characteristics of that possession. While some district judges are thinking about these issues when they impose sentences, they have little guidance from experts in the fields of punishment and sexual crimes because sentencing guidance provided to judges has largely been restricted to the Federal Sentencing Guidelines. In promulgating Guidelines for child pornography possession offenses, the United States Sentencing Commission has largely treated the possession offenses as traditional possession crimes, and has been increasingly influenced by Congress' response to political pressure to severely punish such offenders without regard to the stated purposes of punishment. Now that the Guidelines are no longer mandatory, many judges are forgoing the Guidelines' advice when it comes to sentencing the possessors of child pornography and forging out on their own. These judges often receive criticism for being too lenient. While there may be some truth to that assessment, what is even more apparent is that: judges are ill-equipped to respond to the punishment needs of this group of offenders; critics of lenient sentences often discount the faults in the Guidelines; and the computer and Internet, the root of controversy, have been largely overlooked in the sentencing discussion. A system reboot is in order.

[2] Part I of this Article will introduce the genuine problem of the sexual exploitation of children that this country faces. It will explain the specific federal crime of child pornography possession and the typical methods taken to commit the crime. Part II will focus on the sentencing of child pornography possessors, explaining the current Federal Sentencing Guidelines approach, the rebellion of some district judges against the Guidelines' advisory sentencing ranges for these crimes, and the criticism levied at those judges. Together, Parts I and II expose the system failure that requires a rebooting of the sentencing approach. In Part III, the Article will suggest a new manner of thinking about child pornography possession as a computer crime that is very different from ordinary possession crimes. This new approach seeks to understand computers and the Internet to develop a system of punishment that will at least move toward achieving the congressionally identified goals of punishment. Ultimately, it is neither the purpose of this Article to suggest an appropriate range of sentences for child pornography possession; nor is it necessarily the goal to have the Guidelines ranges for child pornography possessors reduced. Rather, this

Article emphasizes the necessity of finding a method of giving meaningful guidance to district judges so that they are able to more appropriately punish child pornography possessors. This is impossible to do without making the punishment fit the specific realities of computer and Internet crimes.

I. THE REAL HARMS OF CHILD PORNOGRAPHY POSSESSION

[3] The possession of child pornography is an offense that sheds light on the horrific market that exists in the sexual exploitation of children. Each image is a reminder of the abuse, molestation, and sexual victimization of a child. Although the main purpose of this Article is to discuss the offense of child pornography possession in particular, it is necessary to delve into the creation and distribution of child pornography to understand the stories behind its possession.

[4] The Child Pornography Prevention Act defines child pornography as “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,” containing sexually explicit conduct involving a minor.¹ This can range from images of exposed genitalia to more explicit sexual abuse of children under the age of eighteen, such as bondage or penetration by adults or objects.² These

¹ 18 U.S.C. § 2256(8) (2006). In *Ashcroft v. Free Speech Coalition*, the Supreme Court held that the ban on virtual child pornography in the CPPA was unconstitutional. 535 U.S. 234, 244–45 (2002). The Court described virtual child pornography as images “that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology.” *Id.* at 234. However, since *Ashcroft*, Congress has enacted the Prosecutorial Remedies & Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act). Pub. L. No. 108-21, 117 Stat 650 (codified as amended in scattered sections of 18 U.S.C.). This Act prohibits pornographic materials that are “indistinguishable from” child pornography. 18 U.S.C. § 2256(8)(B). This Article, however, is primarily concerned with images that do depict real children when that can be proven.

² Nat’l Ctr. for Missing & Exploited Children, What is Child Pornography?, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1504 (last visited Mar. 10, 2010); see also Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 PACE L. REV. 847, 852–53 (2008) (discussing damage caused by child pornography).

images depict a variety of age ranges of children, including pubescent minors, pre-pubescent minors, and even infants or toddlers.³ According to the National Center for Missing & Exploited Children, in more than half of child pornography cases, the victimization of the children appearing in these images resulted from acts by people they know, such as “parents, other relatives, neighborhood/family friends, babysitters, and coaches.”⁴ The still image or video captures the abuse.⁵

[5] Originally, distribution of child pornography took place through real, physical images in print media; however, computers and Internet now play a predominate role in the distribution of such images.⁶ It is inexpensive to produce and memorialize child pornography on videotape, film, CD-ROM, or DVD, to name a few formats.⁷ The pornographic information can be loaded onto the creator’s computer and then distributed via the Internet in a variety of manners, including Internet chat rooms, instant messages, e-mail, and websites.⁸ While the popularity of fee based websites has decreased among child pornography sharers, use of programs that create peer-to-peer networks is increasing.⁹ These networks simplify

³ Nat’l Ctr. for Missing & Exploited Children, *supra* note 2 (“Of the child pornography victims identified by law enforcement, 42% appear to be pubescent, 52% appear to be prepubescent, and 6% appear to be infants or toddlers.”).

⁴ *Id.*

⁵ *See id.*

⁶ *See* Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1028 (2001) (“Whereas a piece of child pornography once might have only reached a few thousand people who bought a magazine, with the internet it can reach millions very quickly.”).

⁷ Nat’l Ctr. for Missing & Exploited Children, *supra* note 2.

⁸ *Id.*

⁹ *Id.*; *see* Lee Hollander, *Tactics for Defending Computer Pornography Charges*, in STRATEGIES FOR DEFENDING INTERNET PORNOGRAPHY CASES: LEADING LAWYERS ON ANALYZING ELECTRONIC DOCUMENTS, UTILIZING EXPERT WITNESSES, AND EXPLAINING TECHNOLOGICAL EVIDENCE 57, 60–61 (Aspatore ed., 2008).

file sharing between several individual computer users.¹⁰ Thus, the illegal market uses the Internet both to grow and to frustrate law enforcement efforts.

[6] While the sexual exploitation of children occurs worldwide, it is not necessary to look beyond the United States to gain an understanding of the vastness of the problem. Estimates reveal that over 200,000 children in America were at risk of commercial sexual exploitation in 2001, including becoming victims of child pornography, juvenile prostitution, and sexual trafficking.¹¹ When the focus shifts to the Internet, the situation becomes even more disturbing. A congressionally funded study conducted in 2000, found that one in five youths between the ages ten and seventeen that regularly use the Internet have received unwanted sexual solicitation over the Internet.¹² Further, it has been widely reported that eighty-nine percent of sexual solicitations of youth occur in Internet chat rooms.¹³ The Child Exploitation and Obscenity Section of the U.S. Department of Justice (CEOS) is dedicated “to protect the welfare of America’s children and

¹⁰ For an explanation of peer-to-peer file sharing networks, see Hollander, *supra* note 9; Bradley Mitchell, *Introduction to Peer to Peer (P2P) Networks and Software Systems*, <http://compnetworking.about.com/od/p2ppeertopeer/a/p2pintroduction.htm> (last visited March 10, 2010).

¹¹ U.S. Dep’t of Just., Child Exploitation and Obscenity Section (CEOS), Child Prostitution: Domestic Sex Trafficking of Minors, <http://www.justice.gov/criminal/ceos/prostitution.html> (last visited Mar. 10, 2010); RICHARD J. ESTES & NEIL ALAN WEINER, U OF PA., COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO, 2, available at http://www.sp2.upenn.edu/~restes/CSEC_Files/Complete_CSEC_020220.pdf.

¹² THE CRIMES AGAINST CHILDREN RES. CTR., ONLINE VICTIMIZATION: A REPORT ON THE NATION’S YOUTH, http://www.missingkids.com/en_US/publications/NC62.pdf.

¹³ See Att’y Gen. of Va., *Child Internet Safety: Tips for Parents*, available at http://www.oag.state.va.us/KEY_ISSUES/PREDATORS/Internet_Tips_for_Parents.html (last visited Mar. 10, 2010) (citing PEW Study reported in Journal of the American Medical Association); see also Donna Rice Hughes, *Sexual Predators Online*, available at <http://www.protectkids.com/dangers/onlinepred.htm> (last visited Mar. 10, 2010); GuardChild.Com, Internet Statistics, <http://www.guardchild.com/statistics.php> (last visited Mar. 10, 2010).

communities by enforcing federal criminal statutes relating to the exploitation of children and obscenity.”¹⁴ CEOS worries that the Internet has made certain crimes against children, especially child pornography crimes, easier to commit but harder to prevent.¹⁵

[7] Certainly, when the focus shifts from other sexual exploitation crimes against children to the child pornography market in particular, the impact of the Internet is overwhelming. This huge, illegal industry is prolific on the Internet, with at least 100,000 websites containing child pornography.¹⁶ Data reveals that the websites exist to feed a very real market for child pornography. For instance, the file-sharing network Gnutella has reported receiving 116,000 requests for child pornography.¹⁷ Further, the child pornography industry’s annual revenue is estimated to be approximately three billion dollars.¹⁸ It is an undeniable fact that the development, distribution, and possession of child pornography are real, far-reaching problems. Therefore, it is quite easy to justify the time and

¹⁴ U.S. Dep’t of Just., Child Exploitation and Obscenity Section (CEOS), <http://www.justice.gov/criminal/ceos/index.html> (last visited Mar. 10, 2010).

¹⁵ See U.S. Dep’t of Just., Child Exploitation and Obscenity Section, *Child Pornography*, <http://www.justice.gov/criminal/ceos/childporn.html> (last visited Mar. 10, 2010) (explaining that computers and the Internet has made the production and distribution of child pornography easier); see also U.S. Dep’t of Just., Child Exploitation and Obscenity Section, *CEOS Mission*, <http://www.justice.gov/criminal/ceos/index.html> (last visited Mar. 10, 2010) (“CEOS is focused on waging an aggressive battle to protect children from individuals who use computers or the United States mails to sexually abuse and exploit them.”).

¹⁶ Posting of Cy.Talk Blog, *Pornography Industry is Larger than the Revenues of the Top Technology*, <http://blog.cytalk.com/2010/01/web-porn-revenue/> (Jan. 1, 2010).

¹⁷ *Id.*

¹⁸ Press Release, Internet Filter Review, TopTenReviews Releases Porn Industry Statistics (Feb. 6, 2004), available at <http://www.toptenreviews.com/2-6-04.html>.

resources allocated to protecting children from sexual exploitation, including child pornography possession.¹⁹

II. THE SENTENCING OF CHILD PORNOGRAPHY POSSESSORS

[8] Just as the manner in which child pornography crimes are committed varies, the punishments imposed for the variety of crimes in this category differ greatly. The production of child pornography carries a mandatory minimum sentence of fifteen years, with a maximum of thirty years imprisonment.²⁰ The distribution and receipt of child pornography is punishable by a mandatory minimum of five years imprisonment but can be punished up to twenty years.²¹ Simple possession of child pornography carries a maximum of ten years imprisonment.²² All of these punishments, however, can be aggravated for repeat offenders.²³ For instance, the minimum sentence for the possession of child pornography by someone with a previous conviction of certain other sex offenses increases to ten years and carries a maximum of twenty years imprisonment.²⁴ In the federal system, the common thread between all of these punishments is a steady increase in punishment,²⁵ often without much explanation and even less study.

¹⁹ Numerous agencies, initiatives, and programs have been created to combat sex offenses against children, especially pornography offenses, such as: the Nat'l Ctr. for Missing and Exploited Children (www.missingkids.com); the Internet Crimes Against Children Task Force (www.icactraining.org); and the Innocent Images Project (www.fbi.gov/publications/innocent.htm).

²⁰ 18 U.S.C. § 2251(e) (2006).

²¹ 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1).

²² 18 U.S.C. § 2252A(b)(2).

²³ 18 U.S.C. §§ 2251(e), 2252(b)(1), 2252A(b)(1), 2252A(b)(2).

²⁴ 18 U.S.C. § 2252A(b)(2).

²⁵ For example, 18 U.S.C. § 2252(b)(1) was amended in 2003 to increase the maximum punishment for distributing or receiving child pornography from fifteen years to twenty

A. The Upward Trend of Child Pornography Punishment²⁶

[9] The Sentencing Commission explains that “numerous legislative changes (particularly statutorily prescribed mandatory minimum sentences) and amendments to the sex offense guidelines (*e.g.*, increased base offense levels) have resulted in substantial sentence increases for [sex] offenders.”²⁷ Before the enactment of the Federal Sentencing Guidelines in 1987, there was no statute criminalizing the simple possession of child pornography.²⁸ Within three years, Congress made the possession of child pornography a federal crime.²⁹ The Sentencing Commission subsequently created a new Guidelines section, § 2G2.4, which assigned a base offense level of ten for simple possession.³⁰ Under this section, an offender would receive a two-level enhancement for possessing images of a prepubescent or minor under twelve years old.³¹

years for first time offenders. PROTECT Act of 2003, Pub. L. No. 108-21, § 103(B)(i), 117 Stat 650 (2003).

²⁶ This Article often refers to “simple possession”. 18 U.S.C. § 2252A(a)(2)(A) also criminalizes the receipt of child pornography. It is unclear how one can receive without ever possessing, though it is possible for the producer of the child pornography to possess it without receiving it. However, simple possession refers to the possession of child pornography without the intent to distribute it. Therefore, in cases other than the producer of the pornography, the distinction between simple possession and receipt is unclear. *See United States v. Olander*, 572 F.3d 764, 769 (9th Cir. 2009). This Article focuses on simple possession in an effort to simplify the language used to describe the offense of having child pornography in one’s possession without any manifested intent to distribute it, in violation of 18 U.S.C. 2252A(a)(5).

²⁷ UNITED STATES SENT’G COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 116 (2006), available at http://www.ussc.gov/booker_report/booker_report.pdf.

²⁸ U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (2009).

²⁹ *See* Crime Control Act of 1990, Pub.L. No. 101-647, §§ 323(a)–(b), 104 Stat. 4789, 4818–19.

³⁰ Sentencing Guidelines for United States Courts, 56 Fed. Reg. 1846, 1863 (Jan. 17, 1991).

³¹ *Id.*

Although these changes took effect on November 1, 1991,³² by November 27, there was already a significant change to the Guidelines governing the punishment of child pornography offenses, including the sentence calculation for possession.³³ As a result of a Senate Bill introduced while most senators were in committee meetings, the base offense level for simple possession of child pornography increased to thirteen, and added a new, two-level enhancement for the possession of ten or more items.³⁴ House Resolution 1240 led to another set of increases in these penalties that took effect in 1996.³⁵ The new base offense level for possession of child pornography was fifteen, and another two-level enhancement—this time for possession as a result of computer use—was added to the list of existing enhancements.³⁶

[10] The computer enhancements seemingly took on a mind of their own—one divorced from the stated legislative purpose of “help[ing] our law enforcement efforts in this area keep pace with changing technology by increasing the penalties for the use of computers in connection with the distribution of child pornography.”³⁷ In reality, the computer enhancements are out of touch with the actual effects of “changing technology” when it comes to the criminal world of child pornography.³⁸ Because the steady increase in the Guidelines for child pornography possession had a lot to do with enhancements given for possessing child pornography on computers, it is important to understand how the

³² *Id.*; U.S. SENTENCING GUIDELINES MANUAL, app. C amend. 372 (2009).

³³ U.S. SENTENCING GUIDELINES MANUAL, app. C amend. 436.

³⁴ *See* 137 CONG. REC. S10322 (daily ed. July 18, 1991) (statement of Sen. Helms).

³⁵ *See* Sex Crimes Against Children Prevention Act of 1995, Pub. L. 104-71, 109 Stat. 774.

³⁶ Sentencing Guidelines for United States Courts, 61 Fed. Reg. 20,306 (May 6, 1996).

³⁷ *See* 141 CONG. REC. S5519 (daily ed. Apr. 6, 1995) (statement of Sen. Hatch).

³⁸ The change in the methods of possessing child pornography that are due to advancements in technology will be discussed in Part III.

computer enhancements have greatly affected and complicated today's Sentencing Guidelines for child pornography possession.

[11] The first complication took place in 2000, when the Commission was directed to clarify the term "item" in the child pornography Guidelines to include a computer file.³⁹ Consequently, the two-level increase that child pornography possessors could incur for ten or more items would apply to computer files, in addition to the two-level increase for computer usage. By 2003, simple possession, still carrying a base offense level of fifteen, carried a possibility of five enhancements for specific characteristics of a defendant.⁴⁰ In addition to the enhancements already mentioned, there was also a four-level enhancement if material portrayed sadistic or masochistic conduct, or other violence, as well as several enhancements related to the number of images possessed.⁴¹ Images were differentiated from items, with an item being capable of holding several images.⁴² Thus, a computer file counting as one item that could potentially hold several images depicting child pornography. According to the new § 2G2.4: 10 to 150 images warranted a two-level enhancement; 150 to 300 images led to a three-level enhancement; 300 to 600 images resulted in a four-level enhancement; and more than 600 images would increase a base offense level by five levels.⁴³ Though a clarification regarding the potential for item/image double counting was made in 2004,⁴⁴ it did not simplify the calculation or lessen the punishment for child pornography possessors.

[12] To comply with the new, higher mandatory minimums and statutory maximums set forth by the PROTECT Act of 2003, the

³⁹ See U.S. SENTENCING GUIDELINES MANUAL, app. C amend. 592 (2009).

⁴⁰ See *id.* at amend. 649.

⁴¹ *Id.*

⁴² *Id.* at amend. 592.

⁴³ *Id.* at amend. 649.

⁴⁴ *Id.* at amend. 664.

Sentencing Commission made major changes to the child pornography guidelines in 2004.⁴⁵ The Act removed the two-level enhancement for ten or more items, but increased the base offense level for simple child pornography possession to eighteen.⁴⁶ The relevant portions of U.S. Sentencing Guideline § 2G2.2—the new and current guidelines for child pornography possession—are as follows:

Base Offense Level: 18

Enhancements for Specific Offense Characteristics:

1) If the material involved a prepubescent minor or a minor who had not attained the age of 12 years, increase by 2 levels;

2) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels;

3) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels;

4) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels;

⁴⁵ See 18 U.S.C. § 2251(e) (2006); *see also* U.S. SENTENCING GUIDELINES MANUAL, app. C amend. 664 (2009).

⁴⁶ U.S. SENTENCING GUIDELINES MANUAL, app. C amend. 664.

5) If the offense involved:

a) at least 10 images, but fewer than 150, increase by 2 levels;

b) at least 150 images, but fewer than 300, increase by 3 levels;

c) at least 300 images, but fewer than 600, increase by 4 levels; and

d) 600 or more images, increase by 5 levels.⁴⁷

[13] In his article, “Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines,” Troy Stabenow uses “two hypothetical, but statistically typical defendants” to clearly demonstrate how the current Guidelines for child pornography possession operate, and how those Guidelines have changed over time.⁴⁸ In Stabenow’s hypothetical, both defendants are convicted of possessing child pornography and sentenced pursuant to § 2G2.2.⁴⁹ Stabenow gives the second hypothetical defendant the following specific offense characteristics and indicates the percentage of real-life child pornography possession offenders who share those characteristics:

1) Possessed a picture depicting a child under the age of 12 (93.5%);

2) Used a computer to obtain the image (93.1%); and

⁴⁷ *Id.* § 2G2.2.

⁴⁸ See TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES 1–2, 27 (2009), available at http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

⁴⁹ *Id.* at 27–28.

3) Had one disk containing two movie files and 10 pictures, equating to 160 pictures (38% had at least 150 pictures, 63.1% had greater than 10 images).⁵⁰

[14] The second hypothetical defendant “pleads guilty in a timely fashion and receives the maximum standard reduction for acceptance of responsibility,” even though he “has no criminal history and has never abused or exploited a child.”⁵¹ The Guidelines ranges that would apply to Stabenow’s second defendant at the key stages of the child pornography guidelines’ development are:

- 1) April 30, 1987: No punishment - not illegal.
- 2) November 1, 1991: 6-12 months.
- 3) November 27, 1991: 12-18 months.
- 4) November 1, 1996: 21-27 months.
- 5) April 30, 2003: 30-37 months.
- 6) November 1, 2004: 41-51 months.⁵²

In sum, the Commission directed courts to impose a sentence of, at most, one year of imprisonment for child pornography possession in 1991, and that directive increased to over four years in prison thirteen years later.⁵³

[15] To add to Stabenow’s example, consider how each applicable enhancement moves the hypothetical defendant from one sentencing range to another under today’s Guidelines. With a base offense level of eighteen and a criminal history category of I, the defendant would have a

⁵⁰ *Id.* at 28.

⁵¹ *Id.*

⁵² *Id.* at 28–29.

⁵³ *See id.* at 29.

Guidelines range of twenty-seven to thirty-three months of imprisonment.⁵⁴ The two-level enhancement for possessing an image depicting a child under twelve-years-old increases the Guidelines range to thirty-three to forty-one months of imprisonment.⁵⁵ Additionally, the two-level enhancement for the use of a computer takes the applicable range up to forty-one to fifty-one months of imprisonment.⁵⁶ Finally, the three-level increase for having 150 to 300 images raises the Guidelines range to fifty-seven to seventy-one months of imprisonment.⁵⁷

[16] This progression shows that a few enhancements that apply in most child pornography possession cases take the possible Guidelines sentence from just over two years to nearly six years. If there were developments made over the years suggesting that such an increase was necessary to affect the goals of punishment, then this progression might not be disturbing. But there is no information from the Sentencing Commission indicating that the steady increase was warranted by the purposes of sentencing that have been identified by Congress: punishment, deterrence, incapacitation, and rehabilitation.⁵⁸ In fact, at many points within this

⁵⁴ See U.S. SENTENCING GUIDELINES MANUAL ch.5, pt. A (2009).

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See 18 U.S.C. § 3553(a)(2) (2006) Specifically, the section states that the sentencing court shall consider

the need for the sentence imposed: (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner

Id. Congress has directed the Sentencing Commission to establish sentencing practices that meet these purposes. See 28 U.S.C. § 991(b)(1)(A) (2006).

upward progression of the child pornography guidelines, the Sentencing Commission criticized the direction Congress was taking, especially when it came to the computer enhancements.⁵⁹ The Commission stressed, “[n]ot all computer use is equal,” and suggested Congress “develop a more finely-tuned system of apportioning punishment in cases involving the use of computers.”⁶⁰ Recently, a growing number of district judges are demonstrating their disagreement with the increased, unreasoned sentences by apportioning punishment without deference to the Sentencing Commission.

B. The Judicial Response

[17] District judges are speaking out about their belief that the Guidelines treat child pornography crimes, especially possession, unreasonably harsh. A series of regional, public hearings held by the Sentencing Commission between 2009 and 2010 provided the perfect stage for judges to air such grievances.⁶¹ In her remarks at the U.S. Sentencing Commission public hearing in November 2009, Western District of Oklahoma Judge Robin J. Cauthron stated:

The Guideline sentences for child pornography cases are often too harsh where the defendant’s crime is solely possession unaccompanied by an indication of “acting out” behavior on the part of [the] defendant. It is too often the case[,] that a defendant appears to be a social misfit looking at dirty pictures in the privacy of his own

⁵⁹ See U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN 30 (1996), available at http://www.ussc.gov/r_congress/scac.pdf. In the 1996 Report to Congress, after the introduction of computer enhancements, the Sentencing Commission questioned why Congress made the increase without any legislative record to explain the reasoning. See *id.* at 30 n.23.

⁶⁰ *Id.* at 29–30.

⁶¹ See generally Public Hearing Testimony & Transcript: 2009–2010 Regional public Hearings, available at <http://www.ussc.gov/hearings.htm>.

home without any real prospect of touching or otherwise acting out as to any person.⁶²

Judge Cauthron recognized child pornography as “foul,” but still questioned the sensibility of the computer enhancements;⁶³ stating: “As widespread as computer use is now, enhancing for use of a computer is a little like penalizing speeding but then adding an extra penalty if a car is involved.”⁶⁴

[18] During that same public hearing, Eastern District of Louisiana Judge Jay C. Zainey took issue with the statutory minimums applicable to child pornography cases.⁶⁵ Judge Zainey referred to the effects of those minimums as “too harsh in certain circumstances,” especially when it comes to first offenders.⁶⁶ Though Judge Zainey analyzed the congressionally mandated statutory minimums and not the Guidelines themselves,⁶⁷ the continual increases of the applicable Guidelines for child pornography offenses were promulgated to comply with congressionally imposed statutory minimums and other directives.⁶⁸

⁶² *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 5 (Nov. 2009) (statement of Robin J. Cauthron, Judge, W.D. Okla.), available at <http://www.ussc.gov/AGENDAS/20091119/Cauthron.pdf>.

⁶³ *Id.* at 5–6.

⁶⁴ *Id.* at 6.

⁶⁵ *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 1–3 (Nov. 2009) (statement of Jay C. Zainey, Judge, E.D. La.), available at <http://www.ussc.gov/AGENDAS/20091119/Zainey.pdf>.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 1–3.

⁶⁸ See *supra* Part II.A.

[19] Just four months earlier, at another hearing in this series of regional public hearings, Western District of New York Judge Richard J. Arcara gave a statement questioning the purpose of the many enhancements that could be applied to child pornography cases, especially in the cases of possession.⁶⁹ Specifically, Judge Arcara asked: “Is the person who downloads hundreds of images indiscriminately more dangerous than one who downloads 50 or 60 specific kinds of images?”⁷⁰ By noting that “numerous enhancements apply to every child pornography offender,” Judge Arcara questioned whether the Guidelines “assist the Court in identifying factors that distinguish a defendant who is a threat to the community and likely to reoffend from one who is not.”⁷¹ Throughout this hearing and the other regional public hearings, other judges also mentioned that the Commission ought to reexamine the sentences for child pornography offenses.⁷² Western District of Pennsylvania Judge Donetta

⁶⁹ *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 8–9 (July 2009) (statement of Richard J. Arcara, Judge, W.D.N.Y.), available at http://www.ussc.gov/AGENDAS/20090709/Arcara_Testimony.pdf.

⁷⁰ *Id.* at 8–9.

⁷¹ *Id.* at 9.

⁷² *See, e.g., Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 5 (Nov. 2009) (statement of Edith H. Jones, Chief Judge, 5th Cir.), available at <http://www.ussc.gov/AGENDAS/20091119/Jones.pdf> (noting that the Guidelines are unevenly applied in the case of child pornography offenses); *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 1 (Oct. 2009) (statement of Robert W. Pratt, Chief Dist. Judge, S.D. Iowa), available at http://www.ussc.gov/AGENDAS/20091020/Pratt_Testimony.pdf (“Sentences are routinely more harsh and punitive than they need to be, especially in run-of-the-mill . . . pornography cases.”); *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 4–5 (July 2009) (statement of Nancy Gertner, Dist. Judge, Mass. Dist. Ct.), available at http://www.ussc.gov/AGENDAS/20090709/Gertner_Testimony.pdf (noting that departures in pornography cases indicate problems with the Guidelines); *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 11 (July 2009) (statement of Jon O. Newman, Cir. Judge, 2d Cir.), available at http://www.ussc.gov/AGENDAS/20090709/Newman_testimony.pdf (criticizing the enhancements for child pornography offenses);

W. Ambrose nicely summarized this position by stating that in many child pornography cases, “strict application of the Sentencing Guidelines would create an injustice.”⁷³

[20] Now that sentencing judges are not bound to sentence within the Guidelines range, the sentiments of district judges are played out in several child pornography sentencing decisions. For example, in *United States v. Booker*,⁷⁴ the Supreme Court rendered the Guidelines advisory and directed circuit courts to review sentences for “unreasonableness.”⁷⁵ In *Booker* and several follow-up cases, the Court explained that, in fashioning a reasonable sentence, a district judge must properly calculate the applicable Guidelines range and then tailor a sentence that satisfies the sentencing factors set forth in 18 U.S.C. § 3553(a).⁷⁶ In doing so, the

Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n, at 3 (May 2009) (statement of Susan Oki Mollway, Dist. Judge, Dist. Of Haw.), available at http://www.ussc.gov/AGENDAS/20090527/Mollway_testimony.pdf (stating her concern about the “disproportionately high” child pornography sentences); *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 2 (Feb. 2009) (statement of Gregory A. Presnell, Dist. Judge, Dist. Of Fla.), available at http://www.ussc.gov/AGENDAS/20090210/Presnell_statement.pdf (explaining that courts afford less deference to the child pornography Guidelines because they are “inherently illogical” and “not based on any empirical data [*sic*] or institutional analysis”).

⁷³ *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg'l Hearing Before the U.S. Sent'g Comm'n*, at 6 (July 2009) (statement of J. Donetta W. Ambrose, Chidf Judge, W.D. Pa.), available at http://www.ussc.gov/AGENDAS/20090709/Ambrose_testimony.pdf.

⁷⁴ 543 U.S. 220, 244 (2005).

⁷⁵ *Id.* at 261.

⁷⁶ See 18 U.S.C. § 3553(a) (2006); *Booker*, 543 U.S. at 259–60; see also *Gall v. United States*, 552 U.S. 38, 49–50 (2007). The § 3553(a) sentencing factors include: (1) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines; (2) any pertinent policy statement issued by the Sentencing Commission; (3) the need to avoid unwarranted sentencing disparities; (4) the need to provide restitution to victims; (5) the requirement to impose sentences that reflect the seriousness of the offense,

sentencing court must consider the applicable Guidelines range, but the sentencing court may chose to sentence the defendant outside of that range, when a Guidelines sentence would not satisfy the § 3553(a) sentencing factors.⁷⁷ The Court clarified in *Kimbrough v. United States*⁷⁸ that a district court is also free to sentence a defendant outside of the applicable Guidelines range based on the district court's determination that the policy underlying that range makes the range out of line with the sentencing factors.⁷⁹ Several district judges have been exercising this discretion in sentencing child pornography offenders.

[21] Approximately twenty-seven percent of offenders sentenced under § 2G2.2 in 2007 received a sentence below the applicable Guidelines range.⁸⁰ A year later, this number was up to approximately thirty-six percent sentenced below the Guidelines range.⁸¹ Of course, several critics have taken issue with what these below-Guidelines sentences imply: that the Guidelines often lead to unreasonably long sentences for child pornography offenders. These critiques are levied even in the cases of possession without any evidence of physical child abuse by the possessor.

[22] Some critics argue that the case against the child pornography possession guidelines fails to appreciate “the true nature of the crime and

promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. 18 U.S.C. § 3553(a).

⁷⁷ See *Gall*, 522 U.S. at 49–50.

⁷⁸ 522 U.S. 85, 111 (2007).

⁷⁹ See *id.* at 108–11.

⁸⁰ U.S. SENT'G COMM'N, TABLE 28: SENTENCES RELATIVE TO THE GUIDELINE RANGE BY EACH PRIMARY SENTENCING GUIDELINE FISCAL YEAR 2007, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2007), available at <http://www.ussc.gov/annrpt/2007/Table28.pdf> (showing that the twenty-seven percent calculation was determined by adding together those sentences that were labeled “Downward Departure” as well as those labeled “Below Range” on the Table 28).

⁸¹ *Id.*

the harm caused” by the offender.⁸² At the heart of such arguments is the claim that child pornography possession itself hurts the children in the images and that the possession of child pornography is often a precursor to or evidence of past abuse of children by that particular offender.⁸³ For instance, Alexander Gelber, Assistant Deputy Chief in the CEOS, takes the position that viewing child pornography exploits the children in the images and “reinforce[s] the concept that a sexual attraction to children is normal and acceptable.”⁸⁴ According to this view, possession of child pornography is punishable because it “contribute[s] to the market demands for more product, which means more child abuse.”⁸⁵ Further, Gelber noted a study in which convicted child pornography possessors reported “a high incidence of previously undisclosed contact offenses against children.”⁸⁶

[23] Testimony given by Ernie Allen, President of the National Center for Missing & Exploited Children, echoed Gelber’s sentiment.⁸⁷ Speaking before the Sentencing Commission, Allen stated: “Viewing [child pornography] is often the first step in the eventual sexual victimization of

⁸² ALEXANDER GELBER, U.S. DEP’T OF JUST., RESPONSE TO “A RELUCTANT REBELLION” 16 (2009), <http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf>.

⁸³ See Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 PACE L. REV. 847, 852–54 (2008) (explaining that children are harmed by the circulation of images of their exploitation and claiming that “the linkage between possession and molestation may be even greater than previously thought”).

⁸⁴ GELBER, *supra* note 80, at 5.

⁸⁵ *Id.*

⁸⁶ *Id.* at 6 (citing Michael L. Bourke & Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 187 (2009) (“85% [of the inmates studied] admitted they had at least one hands-on sexual offense, a 59% increase in the number of subjects with known hands-on offenses.”)).

⁸⁷ Ernie Allen, President & CEO, Nat’l Ctr. for Missing & Exploited Children (October 20, 2009) (Written Testimony to the U.S. Sent’g Comm’n), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4144 (last visited Mar. 10, 2010).

an actual child.”⁸⁸ Though Allen did not suggest that this is true for all child pornography possessors, he cited to studies which “suggest that some population of offenders will transition from viewing child pornography images, to needing to view more extreme images, to offending actual children.”⁸⁹ Allen further stated that even just viewing the images without having had illegal contact with a particular minor “undeniably revictimizes the child who initially was violated.”⁹⁰ The rationale for this position is that:

[O]nce an image is placed on the Internet, it can never be removed and becomes a permanent record of the abuse inflicted upon that child. Each and every time such an image is viewed, traded, printed, or downloaded, the child in that image is re-victimized.⁹¹

Therefore, the argument is that the harm of child pornography possession occurs with each viewing of an image, even for offenders who are not engaging in illegal physical contact with any children. These critics suggest that district judges who disagree with the child pornography Guidelines are ignoring these harms and dangers of child pornography possession.

[24] Independent of the validity of the arguments made about the ills of child pornography possession, it is difficult to argue that district courts are ignoring the seriousness of this offense, even those courts that are sentencing child pornography possessors to below-Guidelines ranges. A glance at reasons given by district courts for imposing those below-

⁸⁸ *Id.* at V.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at VI.

Guidelines sentences discredits such a view. The oft-cited case, *United States v. Baird*,⁹² illustrates this point.

[25] In *Baird*, the defendant pleaded guilty to possession of child pornography and was sentenced pursuant to § 2G2.2, starting with a base offense level of eighteen.⁹³ Due to several enhancements, including one for the use of a computer, as well as a downward adjustment for acceptance of responsibility, the defendant's total offense level was twenty-three.⁹⁴ The defendant did not have a criminal history, and the resulting advisory Guidelines range was forty-six to fifty-seven months imprisonment.⁹⁵ The district court decided to impose a sentence of two years, which was twenty-two months below the applicable Guidelines range.⁹⁶ In imposing this below-Guidelines sentence, the court acknowledged that "possession of child pornography is a serious offense."⁹⁷ The court agreed with the views of those who support the increased length of child pornography Guidelines when it noted that "[t]he primary victims of the crime of possession of pornography are the exploited children."⁹⁸ While recognizing those harms of child pornography possession, the court still felt that a Guidelines sentence would be unreasonably long. The *Baird* court rightly concluded that the

⁹²According to Westlaw, *United States v. Baird* has been cited positively in case opinions twenty times. It has also appeared in 93 appellate court documents, trial motions, memoranda, and affidavits (last visited Mar. 10, 2010).

⁹³ *United States v. Baird*, 580 F. Supp. 2d 889, 889 (D. Neb. 2008).

⁹⁴ *Id.* at 892–93.

⁹⁵ *Id.* at 893.

⁹⁶ *Id.* at 895.

⁹⁷ *Id.* at 893.

⁹⁸ *Id.*

harm to the victim is not the sole sentencing consideration in determining the seriousness of the offense.⁹⁹ Though most of the reasons given by the court for imposing a sentence below the applicable Guidelines range were specific to the offender before it,¹⁰⁰ the court also made a general statement about child pornography possession:

Possession of pornography is the least serious of the crimes on the continuum of conduct – from possession to distribution to production to predatory abuse – that exploits children. A possessor of child pornography is considerably less culpable than a producer or distributor of the exploitative materials and is [*sic*] a marginal player in the overall child exploitation scheme.¹⁰¹

Further, the *Baird* court described the current child pornography Guidelines as a “response to statutory directives” rather than the result of the “Commission’s unique institutional strengths.”¹⁰² The court found the applicable Guidelines range to be “a less reliable appraisal of a fair sentence.”¹⁰³ This critique of the Guidelines had nothing to do with the court misunderstanding the nature of child pornography possession or a failure to believe that the offense was harmful. Instead, the court took issue with the increases to the child pornography Guidelines ranges being based on a political rather than a studied response.¹⁰⁴ Consequently, the *Baird* court chose a two-year sentence to “more closely approximate the sentencing range that was in effect before the Sentencing Commission, in

⁹⁹ *Id.*

¹⁰⁰ The court discusses that the defendant’s conduct happened a number of years ago, did not continue, and that mental health professionals had determined that he was at low risk to reoffend and was not a pedophile. *Id.* at 893–94.

¹⁰¹ *Id.* at 893.

¹⁰² *Id.* at 894–95.

¹⁰³ *Id.* at 894.

¹⁰⁴ *Id.* at 894–95.

response to a Congressional directive [that] collapsed the guideline dealing with possession . . . into the guideline dealing with trafficking of pornography . . . in 2003.”¹⁰⁵ Thus, the court’s decision to impose a below-Guidelines sentence reflects its recognition of a distinction between child pornography possessors, distributors, and producers, which the court felt was absent from the Guidelines increases.¹⁰⁶ The reasoning in *Baird*—finding the increase in child pornography possession Guidelines to be a political, rather than an empirical response—is replicated in many cases in which district courts sentence a child pornography possessor below the applicable Guidelines range.¹⁰⁷

¹⁰⁵ *Id.* at 895.

¹⁰⁶ *Id.* (explaining that combining the Guidelines for child pornography offenses and “the application of significant quantity-driven enhancements for the number of images, has served to muddy the qualitative distinctions between ‘mere possession’ and ‘distribution of child pornography.’”).

¹⁰⁷ *See, e.g.*, *United States v. Grober*, 595 F. Supp. 2d 382, 392 (D.N.J. 2008) (citing to the method of developing the current child pornography Guidelines as a reason for them deserving less deference); *United States v. Phinney*, 599 F. Supp. 2d 1037, 1043 (E.D. Wis. 2009) (“Not only is this guideline *not* based on Commission study or expertise, it is directly contrary to the Commission’s original, studied approach, and to several of its subsequent recommendations and reports. Accordingly, I concluded that the range under the 2008 guideline was worthy of little respect or deference.”); *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008) (discussing the flawed progression of the Guidelines for child pornography offenses); *United States v. Manke*, No. 09-CR-172, 2010 WL 307937, at *4 (E.D. Wis. Jan. 19, 2010) (describing the child pornography possession Guidelines as “a guideline which I and other judges across the country have recognized is seriously flawed and accordingly entitled to little respect.”); *United States v. Cruikshank*, No. 2:09-cr-00102, 2009 WL 3673096, at *4–5 (S.D. W.Va. Nov. 6, 2009) (describing child exploitation offenses as pandemic yet determining that the child pornography Guidelines were not due the same degree of deference as the Guidelines for certain other offenses); *United States v. Goldberg*, No. 05CR0922, 2008 WL 4542957, at *6 (N.D. Ill. Apr. 30, 2008) (“Furthermore, there is reason to be skeptical concerning whether the current guidelines for the specific offense with which Goldberg is charged reflect, as originally intended, an empirical analysis by the U.S. Sentencing Commission of judicial sentencing practices.”); *United States v. Sudyka*, No. 8:07CR383, 2008 WL 1766765, at *7–8 (D.Neb. Apr. 14, 2008) (finding that child pornography possession is a serious crime and that criminalizing it is necessary to destroying the market for it, yet giving a below-Guidelines sentence based in part on an assessment that the Guidelines range for this offense was not reliable).

[26] Of course, judicial divergence from the child pornography possession Guidelines is not necessarily a reason for the Sentencing Commission to completely revamp those Guidelines. Certainly, not all district judges have indicated a willingness to depart from those Guidelines based upon policy disagreements with the increases to the base offense level and the numerous enhancements.¹⁰⁸ Though nearly one-third of the child pornography possession sentences are below the applicable Guidelines range, two-thirds are not.¹⁰⁹ However, the type of criticism directed towards the child pornography Guidelines signals the sort of disagreement that could lead to increased deviation from the Sentencing Commission's recommendations. Courts deviate from the Guidelines, not because they find them inapplicable to a particular defendant's situation, but because they find them unreliable and unstudied. Thus, those Guidelines become increasingly less relevant as a sentencing tool. Additionally, as judges continue to speak out about their belief that the child pornography possession Guidelines are due little deference, that sentiment will likely be adopted by more of the bench. The danger is that as district judges impose non-Guidelines sentences for policy rather than individualized sentencing reasons, a guidance void will be left.

[27] This potential outcome is one that both the Sentencing Commission and Congress should care about, and that should prompt a closer look at the root of the problem with those Guidelines. As more district judges indicate distrust of the child pornography sentencing Guidelines, those judges will have to depend upon their own assessment of what would be a categorically reasonable sentencing range for most child pornography possessors. While trial judges may be in the best position to tailor individualized sentences for a particular defendant within a set of similar offenders,¹¹⁰ it does not mean that they are in the best position to

¹⁰⁸ See, e.g., *United States v. Cunningham*, No. 1:09CR154, 2010 WL 308822 (N.D. Ohio Jan. 26, 2010) (finding no merit in the criticisms of the child pornography Guidelines).

¹⁰⁹ *Id.* at 7.

¹¹⁰ See *Rita v. United States*, 551 U.S. 338, 357–58 (2007) (“The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court.”); *Koon v. United States*, 518 U.S. 81, 98 (1996) (“District courts have an institutional advantage over appellate courts in

determine sentencing policy.¹¹¹ As the imposers of sentences, district judges know that it is their duty to impose reasonable sentences, even if that means breaking away from the Guidelines and attempting to set sentencing policy on their own.¹¹² This break would not be problematic if district judges were systematically selecting similar sentences for child pornography possessors and appellate judges were providing predictable guidance on the reasonableness of sentences for child pornography possessors. But this does not appear to be the case. Instead, the sentencing of child pornography possessors has become quite unpredictable for both district and appellate courts. At least some of this inconsistency is due to a lack of uniform understanding of the role of computers and the Internet in child pornography possession.

[28] There does not seem to be any determinable pattern in the appellate decisions upholding and reversing child pornography possession sentences. In *United States v. Pugh*, the Eleventh Circuit reversed a sentence of five years probation for a defendant convicted of child pornography possession who had no criminal history.¹¹³ The applicable Guidelines range mandated 97 to 120 months of imprisonment, but the

making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do.”).

¹¹¹ See *Rita*, 551 U.S. at 349. (“The Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time in an effort to fulfill this statutory mandate.”); *Kimrough v. United States*, 522 U.S. 85, 108–9 (2007) (“Congress established the Commission to formulate and constantly refine national sentencing standards . . . carrying out its charge, the Commission fills an important institutional role: It has the capacity courts lack to ‘base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.’”) (citing *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

¹¹² See *Rita*, 551 U.S. at 351 (explaining that a presumption of reasonableness for Guidelines range sentences can only be an appellate presumption and district courts must still decide whether a sentence that fall within that range reflects the § 3553(a) sentencing factors).

¹¹³ See generally *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008).

Eleventh Circuit concluded that, though the district court correctly calculated the Guidelines range, “it did not give any real weight to the Guidelines range in imposing the sentence.”¹¹⁴ Ultimately, the Eleventh Circuit held that “a sentence of probation, without a single day in jail or any period of supervised release is an unreasonable one.”¹¹⁵ The Eleventh Circuit opinion in *Pugh* reveals that differing views of the effect of computer usage on the offense and the offender’s culpability is at least part of the disagreement between the district and appellate courts’ decisions. On the one hand, the district court described the defendant’s possession of child pornography as “‘passive’ and ‘incidental’ to his actual goal of developing online relationships”¹¹⁶ The Eleventh Circuit, on the other hand, described the defendant’s illegal computer activity as “neither isolated, unintentional nor lawful.”¹¹⁷ It may seem understandable that the Eleventh Circuit would find a sentence of only probation to be unreasonable for a defendant who “repeatedly downloaded the child pornography images and videos at least 70 times over a period of several years;”¹¹⁸ especially given the extreme explicit nature of those images.¹¹⁹ This position, however, does not reveal any consistent understanding across circuits of appropriate sentences for those who possess child pornography on computers. Surveying other circuits dealing with similar below-Guidelines sentences shows this inconsistency.

¹¹⁴ *Id.* at 1182, 1200.

¹¹⁵ *Id.* at 1204. The period of probation did include certain terms, including that Pugh: “(1) continue his mental health treatment; (2) not possess a computer with internet access; (3) consent to periodic, unannounced examinations of any computer equipment he possessed; (4) submit to searches based on reasonable suspicion; and (5) register with the state sex-offender registry.” *Id.* at 1187.

¹¹⁶ *Id.* at 1187.

¹¹⁷ *Id.* at 1193.

¹¹⁸ *Id.*

¹¹⁹ *See id.* at 1182.

[29] In some circuits, probation with no term of imprisonment for a child pornography possessor has been upheld even though the defendants' circumstances are not much different than the defendant in *Pugh*.¹²⁰ For instance, in *United States v. Autery*,¹²¹ the Ninth Circuit upheld a sentence of five years of probation for a child pornography possessor, notwithstanding the defendant's plea deal agreeing to a Guidelines range of forty-one to fifty-one months of imprisonment.¹²² The defendant in *Autery* was accused of having over 150 images of child pornography on his computer, and yet the district court still agreed to a sentence with no incarceration.¹²³ Like the *Pugh* case, the defendant in *Autery* had no criminal history and was not accused of having inappropriate contact with children.¹²⁴ Again, computer usage played an important role in how the courts viewed the offense. The district court found it important that the defendant was not using his computer to "order" a specific type of customized child pornography, and the appellate court found this consideration appropriate.¹²⁵ Not only did both the district and circuit courts recognize the harms created by participating in the child

¹²⁰ See, e.g., *United States v. Rowan*, 530 F.3d 379 (5th Cir. 2008) (court upholds a five-year probationary sentence with no imprisonment); *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009).

¹²¹ *Autery*, 555 F.3d at 875.

¹²² *Id.* The conditions of the defendant's probation were: (i) registration as a sex offender; (ii) prohibition from viewing any pornography whatsoever; (iii) barred from being within 100 feet of places where minors congregate unless approved by his probation officer; (iv) prohibited from travel outside the State of Oregon without prior approval; (v) participation in mental health evaluation and counseling, including psychotherapy, and taking any prescription drugs as directed; (vi) prohibited from possessing any firearm; (vii) barred from using any computer except for work, or, without approval, any other electronic media-such as a personal digital assistant or cellular phone-with Internet capability; and (viii) prohibited from having "direct or indirect" contact with anyone under the age of eighteen, except his own children. *Id.*

¹²³ *Id.* at 867.

¹²⁴ See *Pugh*, 515 F.3d at 1187; see also *Autery*, 555 F.3d at 867, 874.

¹²⁵ *Autery*, 555 F.3d at 873-75.

pornography market, but both accepted probation as a reasonable sentence for the computer possessor.¹²⁶

[30] Similar inconsistencies can be found in cases in which child pornography possessors receive sentences involving incarceration. The Sixth Circuit upheld a sentence of one-day incarceration and a ten-year period of supervised release in *United States v. Stall*.¹²⁷ The defendant in *Stall* had no criminal history and possessed eighteen images of child pornography on his computer; however, he admitted to having downloaded child pornography over several years and viewing many more than eighteen images.¹²⁸ Ultimately, the Guidelines called for a sentence of fifty-seven to seventy-one months incarceration.¹²⁹ In imposing a below-Guidelines sentence, the district court gave deference to the testimony of a psychologist who explained that “internet sex offenders were significantly less likely to fail in the community than child molesters in terms of all types of recidivism.”¹³⁰ Though the Sixth Circuit commented that it would not have imposed the same sentence, it found that the district court had not abused its discretion in imposing the sentence.¹³¹ In contrast, the Eighth Circuit reversed a longer sentence for a defendant with a lower applicable Guidelines range.¹³²

¹²⁶ *Id.* at 873–78.

¹²⁷ 581 F.3d 276, 277–78 (6th Cir. 2009). Stall pleaded guilty to receipt of child pornography which carries the same base offense level as child pornography possession under § 2G2.2. *Id.* at 278.

¹²⁸ *Id.* at 277–78.

¹²⁹ *Id.* at 278.

¹³⁰ *Id.* at 279.

¹³¹ *Id.* at 286.

¹³² *See generally* United States v. Grinbergs, 470 F.3d 758 (8th Cir. 2006).

[31] In the Eighth Circuit case *United States v. Grinbergs*, the Guidelines range was forty-six to fifty-seven months, and the district court imposed a sentence of twelve months and one day of incarceration following the defendant's plea of guilty to child pornography possession.¹³³ Just as in *Stall*, the nature of the defendant's Internet and computer usage was an important factor in the district court's decision to impose a below-Guidelines sentence.¹³⁴ At the sentencing hearing, the defendant presented testimony of a mental health and addiction specialist who opined that "Grinbergs was not a typical child sex offender or a predator but instead had fallen victim to the Internet, which provided him with an easy outlet for his desire for attention."¹³⁵ The Eighth Circuit found that this testimony did not make the defendant different from the typical offender punished under the same statute.¹³⁶ The Eighth Circuit subsequently held that the below-Guidelines sentence was unreasonable.¹³⁷ On appeal, the Supreme Court directed this sentence to be reviewed in light of its newly-issued decision in *Gall v. United States*, which held that district courts were not required to point to "extraordinary" circumstances to justify a sentence outside the Guidelines range.¹³⁸ On remand, the district court again imposed the same below-Guidelines sentence.¹³⁹ The district court explained that Grinbergs was not

¹³³ *Id.* at 759.

¹³⁴ *Id.* at 759–60.

¹³⁵ *Id.* at 760.

¹³⁶ *Id.* at 761.

¹³⁷ *Id.*

¹³⁸ *Grinbergs v. United States*, 552 U.S. 1088 (2008) (relying on the proposition in *Gall*, 552 U.S. at 47).

¹³⁹ *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145, at *11 (D. Neb. Sept. 8, 2008).

the typical child pornography offender.¹⁴⁰ However, the district court's discussions about the Guidelines reveal that it also disagreed with the child pornography possession Guidelines in general.¹⁴¹ The district court shared many of the same criticisms of the child pornography possession guidelines that this Article has previously discussed. For instance, after explaining the harms of child pornography possession, the district court stated: "A possessor of child pornography is considerably less culpable than one who produces or distributes the exploitative materials and is a marginal player in the overall child exploitation scheme."¹⁴² The district court also stated that "in view of the fact that the child pornography Guidelines are statutorily-driven, as opposed to empirically grounded, the court finds that the Guideline ranges of imprisonment are not a reliable appraisal of a fair sentence in this case."¹⁴³ Further, the district court noted that "the Internet has become the typical means of obtaining child pornography" and determined that the defendant was a small player whose computer conduct did not fall within the type of large-scale harm that the computer enhancements were meant to punish.¹⁴⁴

[32] All of these cases demonstrate the inconsistent guidance available to district courts that are critical of the existing Sentencing Guidelines on what constitutes a reasonable sentence for child pornography possession. At times circuit courts uphold very short sentences, while at other times, they do not. Moreover, while it is not necessarily problematic for circuit courts to disagree about the reasonableness of sentences, the disagreements demonstrate the void that is left when courts at either level, are unclear as to the meaningfulness of the Sentencing Guidelines for certain offenses. It is evident from these cases that some district courts are finding that even "typical" child pornography possessors—first time

¹⁴⁰ *Id.* at *2.

¹⁴¹ *Id.* at *9–11.

¹⁴² *Id.* at *9.

¹⁴³ *Id.* at *10.

¹⁴⁴ *Id.*

offenders with no history of physically abusing children—should be sentenced below the applicable Guidelines range. Therefore, there is a need for a more consistent understanding of child pornography possession and appropriate sentences for such offenders.

III. REBOOTING NOTIONS OF POSSESSION

[33] At the heart of the criticisms of the child pornography Guidelines is the view that the increases to the base offense level and the several enhancements do not correlate to the actual harm created by the typical offender. The Sentencing Commission has included child pornography possession in § 2G2.2, the Guidelines provision that also covers production and distribution of child pornography.¹⁴⁵ There is little disagreement about the seriousness of child pornography possession and the profound harm to children that each image embodies. Despite the damage that possession of child pornography creates, courts are recognizing possession as the lowest culpability offense on the spectrum of child pornography offenses. Therefore, concerned district courts and other critics of the child pornography possession Guidelines are really just asking for the Guidelines to reflect the reality of the offense and the offender.

A. The Realities of Child Pornography Possession

[34] Today's child pornography possession offender looks very different from the offender of the 1990s, when child pornography was first criminalized. The Commission reported in 1995 that "a significant portion of child pornography offenders have a criminal history that involves sexual abuse or exploitation of children."¹⁴⁶ By 2006, however, 79.9% of child pornography defendants had no criminal history at all, including no

¹⁴⁵ U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2010) applies the same base offense level to various types of child-pornography possession: 18 U.S.C. §§ 1466A(b), 2225(a)(4), and 2255A(a)(5), as well as to distribution and production of child pornography: 18 U.S.C. § 2252A(a)(7).

¹⁴⁶ U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES, i (1996), available at http://www.ussc.gov/r_congress/scac.pdf.

prior sexual abuse or exploitation offenses.¹⁴⁷ A year later, in 2007, courts found only 5% of child pornography defendants to be involved in the production of child pornography.¹⁴⁸ Today's typical child pornography possessor is a first time offender for whom there is no evidence of child pornography production.¹⁴⁹ This person is quite different from the offender who would have been sentenced under the more lenient, earlier Guidelines. This fact makes the steady increase in the Guidelines ranges for child pornography possession very curious.

[35] The child pornography possessor looks different today because the manner of possessing child pornography has changed dramatically. The U.S. Department of Justice explains that post mail was the primary means of distributing child pornography in the 1980s.¹⁵⁰ By 2006, however, 97% of child pornography defendants committed the offense using a computer.¹⁵¹ When it comes to child pornography possession, computers and the Internet certainly make it easier to carry out the offense, and also make it easier to amass more sentencing enhancements without necessarily being a more harmful offender. For these reasons, two evidentiary issues must be addressed to better understand the realities of child pornography today.

[36] First, there is a question of proof that the enhancements should even apply. Though many offenders admit to viewing and storing child pornography on their computers, it is often unclear just how many images

¹⁴⁷ See Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, BUREAU OF JUST. STAT. BULL., December 2007, at 5, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>.

¹⁴⁸ See STABENOW, *supra* note 48, at 13 (citing U.S. SENT'G COMM'N, TABLE 17: OFFENDERS SENTENCED FOR EACH CHAPTER TWO GUIDELINE FISCAL YEAR 2007, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2007), available at <http://www.ussc.gov/ANNRPT/2007/Table17.pdf>).

¹⁴⁹ *Id.*

¹⁵⁰ See Motivans & Kyckelhahn, *supra* note 147, at 2.

¹⁵¹ See *id.* at 6.

the court should attribute to a particular offender. For example, law-enforcement officials sometimes recover portions of deleted files or pieces of overwritten files, but it may not be absolutely evident whether or not the defendant deleted those files or whether they were present before the defendant received the computer.¹⁵²

[37] Second, there is the issue of hidden files. When a person downloads an image or enters a site, that person's computer might also unknowingly receive a type of hidden file called a thumbnails database.¹⁵³ Further, when a person views a seemingly legal adult pornography website, the website can automatically bombard the computer with cookies and pop-ups that may include child pornography.¹⁵⁴ Though this all may sound like an issue of proof for conviction, because most defendants will plead guilty, the issue of hidden files usually does not become relevant until sentencing, where the burden of proof is only a preponderance of the evidence.¹⁵⁵

¹⁵² See, e.g., Hollander, *supra* note 9, at 58 (describing a case where the state's technician recovered pieces of images from the defendant's computer).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at *4; see Kathleen M. Sweeny, *Internet Pornography Laws, Precedents, and Defense*, in STRATEGIES FOR DEFENDING INTERNET PORNOGRAPHY CASES: LEADING LAWYERS ON ANALYZING ELECTRONIC DOCUMENTS, UTILIZING EXPERT WITNESSES, AND EXPLAINING TECHNOLOGICAL EVIDENCE 27, 31 (Aspatore ed., 2008) (stating that “[i]nternet child pornography cases also involve a greater likelihood of mistake of error, since images are frequently downloaded from Web sites in bundles, or information is automatically downloaded to a computer with software from newsgroups or other unscreened public areas, and therefore the potential that a defendant was not aware of the files being on his or her computer are substantial.”).

¹⁵⁵ In *McMillan v. Pennsylvania*, the Supreme Court held that due process was satisfied when facts used during sentencing were found by a preponderance of the evidence. 477 U.S. 79, 91 (1986). Circuit courts, both pre- and post-*United States v. Booker*, have held that this standard also applies to sentencing facts and enhancements for Guidelines purposes. 543 U.S. 220 (2005); see *United States v. Wright*, 873 F.2d 437, 441 (1st Cir. 1989); *United States v. Cruz-Zuniga*, 571 F.3d 721, 727 (8th Cir. 2009); *United States v. Ubiera*, 486 F.3d 71, 77 (2d Cir. 2007); *United States v. Grier*, 475 F.3d 556, 568 (3d Cir. 2007); *United States v. Bragg*, 148 Fed. App'x. 885, 860–61 (11th Cir. 2005); *United States v. Clonts*, 966 F.2d 1366, 1371 (10th Cir. 1992); *United States v. Ross*, 905 F.2d

[38] These issues illustrate how computer technology often makes it difficult to be confident in the numbers of images that should apply to the possible Guidelines enhancements. However, even when the number of images possessed is either clear or agreed to, it is still not apparent that the quantity of images possessed on a computer correlates to the amount of harm that a defendant has caused, thus warranting more enhancements and higher Guidelines ranges. Therefore, it is useful to address how these enhancements are often disconnected from any studied assessment of whether or why harsher sentences are warranted for defendants with certain characteristics.

B. Harm and Enhancements: Making the Sentencing Compute

[39] One harm created by the possession of child pornography cited by courts, practitioner, and scholars is the possessor's contribution to the child pornography market.¹⁵⁶ It is not necessary to take issue with the contention that child pornography possessors contribute in some way to the viability of the child pornography market to critique the position that the Guidelines' image enhancements for child pornography possession capture this harm. The Guidelines' image enhancement approach assumes that possessing more images means that a defendant has contributed more significantly to the child pornography market. As Southern District of West Virginia Judge Joseph Goodwin recently pointed out, "this market-based justification does not support the number-of-images enhancement in section 2G2.2(b)(7)."¹⁵⁷ Judge Goodwin questioned the connection between number of images and the actual effect of possession on the market.¹⁵⁸ He concluded: "The worldwide market for child pornography is

1050, 1054 (7th Cir. 1990); *United States v. Urrego-Linares*, 879 F.2d 1234, 1236 (4th Cir. 1989).

¹⁵⁶ GELBER, *supra* note 80, at 5 (explaining that possession of child pornography is punishable because it "contribute[s] to the market demands for more product, which means more child abuse.").

¹⁵⁷ *United States v. Raby*, No. 2:05-cr-00003, 2009 WL 5173964, at *7 (S.D. W.Va. Dec. 30, 2009).

¹⁵⁸ *Id.*

so vast that the relative market impact of having even 592 additional images is miniscule.”¹⁵⁹

[40] It is immaterial whether Judge Goodwin’s assessment is correct. More important is his identification of perceived deficiencies in the Guidelines resulting in him giving less credence to the Guidelines when sentencing child pornography offenders. One deficiency is based on the failure of the Sentencing Commission to explain how the enhancements are in fact related to an incremental increase in the offender’s contribution to the child pornography market in a manner that justifies the increased sentencing range. The history of the image enhancements reveals that the Sentencing Commission has failed to do so because the image enhancements were based upon a brief amendment to the PROTECT Act proposed quickly and without notification to or consultation with the Sentencing Commission.¹⁶⁰ The only information given by Congressman Tom Feeney, who proposed the amendment provision adding the image enhancements included in the “Sentencing Reform,” was that “penalties are increased based on the amount of child pornography involved in the offense.”¹⁶¹ As Representative Feeney explained, the actual focus of the amendment was to “ensure more faithful adherence to the guidelines.”¹⁶² Thus, the image enhancements exist as unexplained sentence increases

¹⁵⁹ *Id.* at *2–8. The defendant in *Raby* was sentenced under § 2G2.2, but received a base offense level of twenty-two rather than the eighteen level base that applies to possession because he was charged with a higher level of receipt. *Id.* at *2. Though he had no criminal history, after the various enhancements were applied (and a few decreases), his total offense level was thirty-seven, yielding a Guidelines range of 210 to 240 months. *Id.* The court imposed a sentence of 120 months. *Id.* at *8. It is important to note that *Raby* was also found to have had actual illegal contact with children. *Id.* at *1. Despite the court’s recognition of the seriousness of *Raby*’s conduct, the court still noted its disagreement with the Guidelines image enhancements. *See id.* at *5. These same enhancements apply to simple possession cases as well.

¹⁶⁰ *See* 149 CONG. REC. H2405, 2423–24 (daily ed. Mar. 27, 2003) (statements of Rep. Scott, Rep. Feeney & Hon. Reno).

¹⁶¹ *Id.*

¹⁶² *Id.*

that are not tied to the purpose of the overall amendment in which they appear.

[41] Objecting to the Feeney Amendment, Representative Robert Scott explained that the problem with the amendment was the lack of “hearings or markups on this matter [which was] not the way [to] amend the sentencing guidelines, without thought or consideration.”¹⁶³ Representative Scott suggested turning the matter over to the Sentencing Commission and further discussing it through “hearings, subcommittee markup, [and] committee markup,” rather than deciding it on a floor amendment.¹⁶⁴ However, the Sentencing Committee never completed the proposed examination and the amendment passed on the floor.¹⁶⁵ Thus, the sentencing enhancements advised by the Guidelines based upon number of images possessed appears to be divorced from any study of actual increase in harm caused by the offender.

[42] Additionally, there is that argument that, despite the effect on the market, child pornography possession has a detrimental effect on the victims in the images. This argument relies on studies indicating that each viewing of an image of child abuse re-victimizes the child in that image.¹⁶⁶ These studies report that “a significant part of the healing process for children traumatized by sexual abuse is the ability to control the disclosure of the abuse.”¹⁶⁷ Accordingly, each time an offender views an image, he is causing harm to the victim by robbing the victim of the ability to control

¹⁶³ *Id.*

¹⁶⁴ *Id.* at H2424.

¹⁶⁵ *Id.* at H2424, H2438.

¹⁶⁶ *See* Allen, *supra* note 87, at VI.

¹⁶⁷ *Id.* (citing ETHEL QUAYLE ET AL., CHILD PORNOGRAPHY AND SEXUAL EXPLOITATION OF CHILDREN ONLINE 46 (2008), *available at* http://www.childcentre.info/public/Thematic_Paper_ICTPsy_ENG.pdf).

access to and circulation of the depictions of the abuse.¹⁶⁸ In sum, the more images are viewed, the more incidences of harm caused by the offender to the victim, and the more deserving the offender is of increased punishment.

[43] One difficulty with this line of thought is that possession and viewing may not be synonymous. For example, it is possible for an offender to possess images that he has not actually seen either by downloading directly or by accessing a file with several images or by unknowingly downloading images that have hidden thumbnail files associated with them.¹⁶⁹ File-sharing, as the most popular method for obtaining child pornography, presents another opportunity for an offender to have access to shared files containing images that he has never seen or even attempted to view.¹⁷⁰

[44] Another difficulty with the argument that possessing multiple images of child pornography increases the harm to victims is that the description of the harm actually suggests that the damage is done in the first instance of providing Internet accessibility to the images. The victim's harm arises from, and is limited to, the knowledge that "the

¹⁶⁸ See Rogers, *supra* note 2, at 862.

[T]he possessor causes actual harm because re-publication inflicts shame and humiliation upon the child depicted. This psychological damage can lead to anti-social, destructive and depressive behavior. The circulation over the Internet to innumerable individuals who receive, possess and view the images cause the victims to suffer further in the knowledge that the images are forever in cyberspace, able to resurface at any time.

Id.

¹⁶⁹ See, e.g., Hollander, *supra* note 9, at 58; Sweeny, *supra* note 154, at 31.

¹⁷⁰ See Kris Pickel, 'Accidental' Download Sending Man To Prison (Dec. 2, 2009), <http://cbs13.com/local/limewire.child.porn.2.1346842.html> (describing the situation of a man who was using a file-sharing service and claimed to have accidentally downloaded child pornography which he promptly deleted, but was later charged with child pornography offenses) (last visited Mar. 10, 2010).

images are forever in cyberspace, able to resurface at any time.”¹⁷¹ The victim does not actually know how many people have viewed or saved the images.¹⁷² But this specific knowledge is immaterial to whether the victim would feel harm from the potential of the images being viewed. Therefore, in reality, one additional person possessing the images makes little difference to the victim and is much less harmful than the initial posting of an image to the Internet.

[45] To align with this circulation-harm argument, a more severe Guidelines enhancement ought to apply to the person who first uploaded the images to the Internet, whether or not that person is the producer of the images. It is this particular offender who has made the images accessible and able to resurface at any time. At that point, because the victim would constantly fear that such viewing could happen at any moment, the victim would experience the harm created by the potential of circulation, even if the images are never viewed. Therefore, a person that actually views the images after they have been uploaded has not added to the harm, especially since the victim would not actually know about the number of people viewing the image. Thus, even if the possessor has viewed all of the images, he is not incrementally more harmful to the victim in this manner based solely on the number of images he possesses.

[46] Once the market and re-victimization arguments are rethought, the only reason to increase an offender’s offense level based on the number of images possessed is the belief that viewing more images makes the offender more deviant. With each image possessed, the offender demonstrates an increased willingness to break the law. As already

¹⁷¹ See Rogers, *supra* note 2, at 862.

¹⁷² Of course, there could be a situation in which the victim does know how many people have viewed the image before any offender is charged. If that is the case and the offender had any causal connection to the victim’s knowledge, then there would be an argument that the offender should receive increased punishment. Otherwise, the argument holds that an unknown possessor has not increased the original harm of potential circulation to the victim.

explained, it is possible to amass a large number of images on a computer quite easily and even unintentionally. Thus, if an offender has hundreds of child pornography images on his computer, it does not necessarily mean that all of those images were collected individually, or that all of the pictures were intentionally downloaded. Even if every possessor possessed each image purposefully, the image enhancements are still not clearly appropriate.

[47] Possessing child pornography certainly deserves punishment, but it is unclear how having 150 to 300 images stored on an offender's computer necessarily makes that offender more deviant than an offender who has 10 to 150 images stored on his computer. The Guidelines treat computer possession in the same manner that it treats traditional possession crimes—by increasing enhancements based upon quantities of illegally possessed items. An obvious example of this traditional approach is drug offenses. The current Guidelines have seventeen different categories of offense levels for various drug quantities.¹⁷³ For instance, the possession of three kilograms to less than ten kilograms of heroin gets a base offense level of thirty-four.¹⁷⁴ An offender would receive a base offense level of thirty-six for possessing ten kilograms to less than thirty kilograms of heroin.¹⁷⁵ The base offense level would be thirty-eight for the possession of thirty kilograms or more of heroin.¹⁷⁶ This would result in an increase in the applicable Guidelines ranges for a first time offender in the following manner: 151 to 188 months for less than 10 kilograms of heroin; 188 to 235 months for 10 kilograms to less than 30 kilograms of heroin; and 235 to 293 months of imprisonment for possessing 30 kilograms or more of heroin.¹⁷⁷ This effectively increases the possible Guidelines sentence from twelve and a half years to over twenty-four years of

¹⁷³ U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2009).

¹⁷⁴ *Id.* § 2D1.1(c)(3).

¹⁷⁵ *Id.* § 2D1.1(c)(2).

¹⁷⁶ *Id.* § 2D1.1(c)(1).

¹⁷⁷ U.S. SENTENCING GUIDELINES MANUAL ch.5, pt. A (2009).

incarceration for a difference of twenty kilograms of heroin. In his statement before the Sentencing Commission, Second Circuit Court of Appeals Judge Jon Newman questioned this approach to punishment, which he has termed “precise incremental immorality.”¹⁷⁸ Judge Newman explained that the issue with such an approach is that “every minute increment of offense conduct must result in a minute increment of punishment.”¹⁷⁹ The difficulty of having meaningful sentencing enhancements based upon quantity is that it is unclear how the possession of a few more illegal items truly makes one offender different from the offender with a few less. This is especially true with child pornography possession when it is committed using a computer.

[48] The child pornography possessor who views and stores the images on his computer operates very differently than the child pornography possessor who orders the illegal materials through the mail or undertakes a hand-to-hand purchase with the seller of child pornography in some illicit meeting place. Imagine the person who willfully orders 200 print images of child pornography through the mail, or the person who makes the effort to leave his house and meet someone to purchase 200 such images and then transport them home. Both of those offenders have to exert much more effort and conscious decision-making than the offender who pushes a few buttons on his computer to download those same 200 images. This is not to say that one offender is necessarily more or less culpable than are the others. When considering quantities, however, there is quite a distinction. While a sentencing enhancement for the non-computer offenders based on possession quantity may be warranted, such enhancements for the computer offender is not related to that offender’s culpability in the same manner. Of course, this critique is necessarily a critique of the two-level computer enhancement. With computer use being the typical manner in which child pornography possession manifests, and with the low effort that is required to carry out the offense, there is a good

¹⁷⁸ *Federal Sentencing Practices and the Operation of the Federal Sentencing Guidelines: Reg’l Hearing Before the U.S. Sent’g Comm’n*, at 11 (July, 2009) (statement of 2d Cir. Judge Jon O. Newman), available at http://www.ussc.gov/AGENDAS/20090709/Newman_testimony.pdf.

¹⁷⁹ *Id.* at 7–8.

argument that the sentencing enhancement should actually be applied to the child pornography possessor who does *not* use a computer to carry out the crime. In other words, a non-computer offender has to act with the determination necessary to actually demonstrate criminal deviance. Each of these arguments indicate a need for the Sentencing Commission to reconsider the child pornography possession guidelines in light of the realities of what the typical offense and offender look like today.

CONCLUSION: SUGGESTIONS FOR THE NEW SYSTEM

[49] Sentencing of child pornography possessors ought to reflect some study of how the imposed sentences relate to the harm and danger created by offenders. District judges are required to consider those factors in constructing appropriate sentences, and the Sentencing Guidelines claim to do so, as well.¹⁸⁰ Because political trends, rather than sentencing research, have driven the increase in the child pornography possession Guidelines, some judges have lost confidence in their ability to guide the court to reasonable sentences. Now that district judges are no longer bound to follow the Guidelines, if the Guidelines are to be meaningful, the Sentencing Commission must persuade sentencing courts that the child pornography possession Guidelines are informative and useful. The Commission can do this by carrying out its mandate to study and consider appropriate sentences that reflect the purposes of sentencing recognized by Congress.¹⁸¹ However, for any revisions of the child pornography

¹⁸⁰ Among others, 18 U.S.C § 3553(a) requires that the sentencing court consider to the seriousness of the offense, the need to provide just punishment, and the need to protect the public from further crimes of the defendant. §§ 3553(a)(2)(A), (C).

¹⁸¹ 28 U.S.C § 991(b) explains that the purposes of the Sentencing Commission are to establish sentencing practices that:

(A) assure the meeting of the purposes of sentencing as set forth in [18 U.S.C. § 3553(a)(2)]; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and (C) reflect, to the extent practicable,

possession Guidelines to be effective, Congress must allow the Sentencing Commission to perform this task. Otherwise, courts will continue to depart from the Guidelines for policy reasons, resulting in the very increase in departures that Congress sought to avoid in recent amendments to increase the severity of the Guidelines.

[50] Child pornography possessors deserve punishment for the harm and danger that their offense creates and the exploitation that the offense represents. Ultimately, however, any enhancements to child pornography possession sentences should reflect aspects of the offense that actually make the offender more harmful than the typical child pornography possessor. If the harm is based on contributing to market demand for child pornography, then the corresponding sentencing enhancement ought to apply to those who actually contributed to that demand in some manner that was truly more significant than other offenders. If the harm is re-victimization through Internet access to the images, then only the possessor who also posted the images to the Internet ought to receive the enhancement. Further, any sentencing enhancements related to the notion that the more images a person possess demonstrates their increased willingness to break the law ought to only apply to defendants who had to take some significant steps or form the repeated intent to amass the additional images.

[51] All of these possible revisions must reflect the influence of computers and the Internet on the offense in order for the sentencing guidance to be meaningful. Once the Commission conducts a true study to determine what makes one possessor worse than the next, and sentencing courts can see the relationship between the offense and the applicable Guidelines, then courts may be more likely to follow the Commission's suggestions. The same can be done for other child pornography offenses beyond simple possession. Then, courts can reserve deviations from the Guidelines for individual, offender-specific reasons. This allows for district courts to act in their superior position of tailoring individualized

advancement in knowledge of human behavior as it relates to the criminal justice process

Id. § 991(b)(1) (2006).

sentences, while the Sentencing Commission can carry out the promise of its institutional strength by setting reasoned sentencing policy.