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On Behalf of the Federal Public and Community Defenders

Before the United States Sentencing Commission

Public Hearing on Child Pornography Sentencing

February 15, 2012

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My name is Deirdre D. von Dornum and I am Deputy Attorney-in-Charge for the Federal Defenders of New York, Eastern District of New York. I would like to thank the Commission for holding this hearing and giving me the opportunity to testify on behalf of the Federal Public and Community Defenders regarding federal child pornography offenses.

I. Introduction

Federal sentences for non-contact child pornography offenses have increased rapidly in recent years.[1] While there is no doubt that children must be protected, and those who exploit them punished, there is a "spectrum of criminal culpability"[2] involved in this crime that is not accounted for in the current sentencing framework, and current sentences are unduly severe. Yet there is significant political pressure to do nothing but continue to increase penalties for these offenders, the "modern-day untouchables."[3] In this climate, we urge the Commission to take the difficult step of rising above the politics and fear, and work to reform the sentencing scheme for child pornography offenders based on empirical evidence, to ensure that sentences for these offenders, as for others, are fair and just, and consistent with the purposes of sentencing.

Among those who are most closely connected to the sentencing of these offenders, there is wide agreement that the current sentencing scheme for child pornography offenders is broken. We are pleased the Commission is taking steps, through this hearing and in other ways, to fix it.

Below, we address the topics that the Commission has identified as being of particular interest, but first we provide a brief discussion of the current state of sentencing for federal child pornography offenders.

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[1] *See* Melissa Hamilton, *The Child Pornography Crusade and Its Net Widening Effect*, 33 Cardozo Law Review 8-9 (2012), http://ssrn.com/abstract=1914496 (hereinafter *Child Pornography Crusade*). Between 1997 and 2011, sentences for persons convicted of non-contact child pornography offenses increased from an average of 20.59 months to 119.1 months – a 478% increase. *See* Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* 2, (Jan. 1, 2009), http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf (hereinafter *Deconstructing the Myth*); USSC, *Preliminary Quarterly Data Report: 4th Quarter Release, Preliminary Fiscal Year 2011 Data Through October 31,* 2011, tbl.19 (2011) (hereinafter *2011 4th Qtr. Data*).

[2] *United States v. Cruikshank*, 667 F. Supp. 2d 697, 701 (S.D.W. Va. 2009).

[3] *Id.* at 703.

II. Background: The Current Sentencing Framework is Broken.

The current federal sentencing scheme, driven by congressional directives and mandatory minimums, produces excessively severe sentences for non-contact child pornography offenders and fails to adequately distinguish between different offenders and offenses.[4] The Defenders do not stand alone in this view; many judges and prosecutors agree. The Commission, too, has indicated that a "preliminary review of the available sentencing data suggests that the mandatory minimum penalties for certain child pornography offenses and the resulting guidelines sentencing ranges may be excessively severe and as a result are being applied inconsistently."[5]

A. Sentences Are Too Severe And the Current Framework Fails to Reasonably Distinguish Offenders.

As Defenders have repeatedly indicated, federal sentences for non-contact child pornography offenses are extraordinarily and disproportionately severe.[6] In addition, the mandatory minimums and guidelines that group almost all offenders at the top of the statutory range result in unwarranted disparity by treating different offenders the same.

Even though the vast majority of non-contact child pornography offenders fall within Criminal History Category I (81.2%), the average sentence in 2010 (120.1 months) was higher than for all other offenders except for those convicted of murder and kidnapping. Indeed, in 2010 it was higher than for sexual abuse offenders (113.8 months).[7] In 2011, the average sentence for sexual abuse offenders rose to 124.2 months, and child pornography dropped by one month to 119.1 months, so now contact sex offenders receive on average a sentence only 5.1 months longer than non-contact child pornography offenders.[8] Notably, other serious offenses including violent crimes against persons receive significantly lower sentences. Robbery, for example, which carries the longest sentence after non-contact child pornography has an average sentence length of 83.1 months, 36 months less than child pornography.[9]

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[4] *See*, *e.g.*, Statement of Nicholas T. Drees Before the U.S. Sentencing Comm'n, Denver, Colo., at 25 (Oct. 21, 2009).

[5] USSC, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 301, 365 (2011) (hereinafter *Mandatory Minimum Report*).

[6] *See*, *e.g.*, Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 9 (Aug. 26, 2011).

[7] USSC, *2010 Sourcebook of Federal Sentencing Statistics* tbl.14 (2010) (hereinafter *2010 Sourcebook*).

[8] USSC, *2011 4th Qtr. Data*, at tbl.19.

[9] *Id.* at tbl.19.

These long sentences exist even though offenders routinely receive sentences below the guidelines range. The latest numbers from the Commission show offenders sentenced under USSG §2G2.2 receive below range sentences for reasons other than cooperation at a rate of 62.5%. That is, most offenders sentenced under this guideline receive a below-guideline sentence for reasons other than cooperation. The comparable rate (which excludes below range sentences based on USSG §5K3.1, which do not exist for child pornography offenders) across all other offenses is only 21.6%.[10]

Not only are federal sentences for non-contact child pornography offenses disproportionately high when compared with other offenses, they are significantly greater than sentences for identical conduct that is prosecuted and punished in the state court systems.[11] The states with available data recognize probation is often an appropriate and just sanction for non-contact child pornography offenders, and impose probation-only sentences much more frequently than in the federal system.[12] And when incarceration is deemed necessary, the period of incarceration is much shorter in the states than in the federal system. In Maryland, for example, the average sentence for offenders convicted of possession from 2008-2010, was 15.9 months.[13] During that same time frame, in Massachusetts, first time possession offenders sent to a house of corrections received an average sentence of 10 months, and those in state prisons had average minimum and maximum terms of 36.4 and 45.9 months respectively. In Minnesota, the vast majority (71.8%) of first time and repeat possession offenders were not sentenced to prison, but instead were given a short jail term as a condition of probation. The average jail term was

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[10] *Id.* at tbls.1 & 5.

[11] Defenders contacted several states with state sentencing commissions and were able to gather relevant data from a few of them. A summary of the available data is appended to this testimony ("App."). There is no reason to believe cases prosecuted in state court involve conduct or offenders any less culpable than in federal court. *Cf.* Janis Wolak, David Finkelhor, & Kimberly Mitchell, *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 Sex Abuse: J. Res. & Treatment 22 (2011) (discussing study designed to yield a nationally representative sample, and not indicating any significant differences between state and federal offenses or offenders).

[12] *Compare* App. (For example, 66% of possession/trade offenders in Oregon received a sentence of probation, 48% of possession (first offense) offenders in Missouri received probation, and 29% of possession offenders in Maryland received probation) *with* USSC, *2010 Sourcebook*, at tbl.12 (only .8% of offenders convicted in federal court of non-contact child pornography offenses received probation-only sentences).

[13] *See* App. It is also notable that a sizable percentage of these offenders (29%) were sentenced to time served.

3.4 months. The much smaller percentage of these Minnesota possession offenders who were sentenced to prison (8.0%), received an average sentence of 52.9 months.[14]

In addition to producing sentences that are too high, the current framework fails to adequately distinguish between offenders. As the Commission has acknowledged, unwarranted disparity occurs both when there is "different treatment of individual offenders who are similar in relevant ways," and "similar treatment of individual offenders who differ in characteristics that are relevant to the purposes of sentencing."[15] The mandatory minimums create "unwarranted uniformity, by making one or two facts about a case controlling" and "assigning undue weight to those facts and no weight to others, thus failing to track the seriousness of the offense or the dangerousness of risk of recidivism of the defendant."[16] The child pornography guidelines only aggravate the problem by grouping all offenders not just at the high end of the guideline range, but toward or at the statutory maximum. In 2010, almost all (96.6%) of the defendants sentenced under USSG §2G2.2 received an enhancement for number of images.[17] The rates for use of a computer, and for at least one image of a person under the age of 12, were similarly high, at 96.2% and 95.6% respectively. In addition, the enhancement for possession of at least one image involving sadistic or masochistic conduct was applied to 73.7% of offenders.[18] This concentration at the top is "fundamentally incompatible with § 3553(a)."[19]

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[14] *Id*. Missouri, Oregon and Pennsylvania similarly rely on much less prison time as an appropriate sanction for non-contact child pornography offenses. In Missouri, 60% of first time and repeat possession offenders received probation only or an intermediate sanction of 120 days incarceration followed by probation. Those sentenced to prison received an average sentence of 67.7 months. In Oregon, 66% of offenders convicted of possession/trades received probation. The minority who were sent to prison received an average sentence of 42.1 months. In Pennsylvania, first time possession offenders were sent to prison in only 11.2% of cases where the average minimum and maximum sentences were 11.4 and 48.7 months, respectively. A larger percentage of offenders (41.7%) were sent to county jail, where minimum and maximum sentences averaged 5.7 and 22.2 months.

[15] USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 113 (2004) (emphases omitted).

[16] Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, Attachment at 12 (Aug. 26, 2011).

[17] USSC, *Use of Guidelines and Specific Offense Characteristics, Fiscal Year 2010* 38 (2010) (hereinafter *2010 Use of SOCs*).

[18] *Id.* at 37-38.

[19] *United States v. Dorvee*, 616 F.3d. 174, 187 (2d Cir. 2010).

B. Many Judges and Prosecutors Agree Sentences are Unjustly Severe and Fail to Appropriately Differentiate Between Offenders.

1. Judges

Judges share the view that the penalties are too severe and that the "guidelines skew sentences even for . . . average offenders towards the very upper end, not just of the guidelines, but of the statutory maximums, and that's true regardless of the offenders actual intent or important mitigating factors."[20] Judges have indicated this in a variety of ways: in testimony before this Commission;[21] in response to a survey by this Commission;[22] in written opinions;[23] and in the sentences they impose.[24] Notably, while the rate of non-government sponsored below range sentences across all offenses has begun to drop,[25] the rate for non-contact child pornography offenders continues to climb. In 2010, the rate of non-government sponsored below range sentences under USSG §2G2.2 was 44.6%, and in 2011 it increased to 47.9%.[26]

Much of the judicial criticism has been leveled at the absence of an empirical basis for USSG §2G2.2, concluding that it is "an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results."[27] Specifically, "§2G2.2 was

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[20] Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Chicago, Ill., at 55 (Sept. 9, 2009) (Judge Gerald E. Rosen).

[21] *See*, *e.g.*, Transcript of Public Hearing Before the U.S. Sentencing Comm'n, Chicago, Ill., at 36-38, 53-60, 238 (Sept. 9, 2009) (Judges James G. Carr, Gerald E. Rosen, Frank H. Easterbrook); Transcript of Public Hearing Before the U.S. Sentencing Comm'n, New York, NY, at 54, 113-14, 124, 139-44, 337-38 (July 9-10, 2009) (Judges Richard J. Arcara, Donetta W. Ambrose, John A. Woodcock, Jr., Jeffrey R. Howard).

[22] A Commission survey of district court judges indicated the vast majority believed the guidelines for possession and receipt of child pornography were too high (70% believed possession guidelines are too high, and 69% believed receipt guidelines are too high). USSC, *Results of Survey of United States District Judges, January 2010 Through March 2010*, tbl.8 (June 2010).

[23] *See*, *e.g.*, *Dorvee*, 616 F.3d. at 184-88; *United States v. Diaz*, 720 F. Supp. 2d 1039, 1041 (E.D. Wis. 2010) (collecting cases where judges, "recognizing the flaws in this guideline . . . have declined to impose sentences within the range it demands"). *See also infra* nn.28, 30, 31.

[24] USSC, *2011 4th Qtr. Data*, at tbl.5 (indicating judges impose non-government sponsored below range sentences at a rate of 47.9%).

[25] The rate of non-government sponsored sentences was 17.2% in 2011, down from 17.8% in 2010. USSC, *2011 4th Qtr. Data*, at tbl.1; USSC, *2010 Sourcebook*, at tbl.N.

[26] USSC, *2010 Sourcebook*, at tbl.28; USSC, *2011 4th Qtr. Data*, at tbl.5.

[27] *Dorvee*, 616 F.3d at 188; *id.* at 184 (finding that "the Commission did not use [an] empirical approach in formulating the Guidelines for child pornography").

not developed pursuant to the Commission's institutional role and based on empirical data and national experience, but instead was developed largely pursuant to congressional directives."[28]

Judges also have consistently criticized the guideline's excessive uniformity that fails to distinguish between offenders, and instead incorporates multiple enhancements that apply to most offenders.[29] The enhancements that were "cobbled together . . . routinely result in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases."[30] The problem with this is:

> By concentrating all offenders at or near the statutory maximum, §2G2.2 eviscerates the fundamental statutory requirement in § 3553(a) that district courts consider "the nature and circumstances of the offense and the history and characteristics of the defendant" and violates the principle, reinforced in *Gall*, that courts must guard against unwarranted similarities among sentences for defendants who have been found guilty of dissimilar conduct.[31]

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[28] *United States v. Grober*, 624 F.3d 592, 608 (3d Cir. 2010). *See also United States v. Henderson*, 649 F.3d 955, 962-63 (9th Cir. 2011) (same); *Diaz*, 720 F. Supp. 2d at 1045 ("the Commission probably did the best it could under difficult circumstances, but to say that the final product is the result of Commission data, study and expertise simply ignores the facts"); *Cruikshank*, 667 F. Supp. 2d at 702 ("Because they are not based on empirical data and past practices, the Guidelines for consumers of computer-based child pornography are skewed upward."); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1104 (N.D. Iowa 2009) (the "first policy objection to U.S.S.G. § 2G2.2 is that the guideline does not reflect empirical analysis, but congressional mandates that interfere with and undermine the work of the Sentencing Commission").

[29] As one Judge explained to this Commission regarding one of these enhancements: "As widespread as computer use is now, enhancing for use of the computer is a little like penalizing speeding, but then adding an extra penalty if a car is involved." Statement of Judge Robin J. Cauthron Before the U.S. Sentencing Comm'n, Austin, Tex., at 6 (Nov. 19, 2009).

[30] *Dorvee*, 616 F.3d at 186. *See also Cruikshank*, 667 F. Supp. 2d at 702 ("Instead of imposing enhancements for more severe offenses, the §2G2.2 enhancements apply in nearly every case."); *Diaz*, 720 F. Supp. 2d at 1042 ("the guideline requires significant enhancements for conduct present in virtually all cases" and they "produce a sentence approaching the statutory maximum"); *Beiermann*, 599 F. Supp. 2d at 1105 (concluding that "the guideline impermissibly and illogically skews sentences for even 'average' defendants to the upper end of the statutory range" and, "thus, blurs logical differences between least and worst offenders, contrary to the goal of producing a sentence no greater than necessary to provide just punishment").

[31] *Dorvee*, 616 F.3d at 187 (quoting *Gall v. United States*, 552 U.S. 38, 55 (2007)); *see also Henderson*, 649 F.3d at 965 (Berzon, J., concurring) (same).

By routinely sentencing below the guidelines, judges reduce the excessive uniformity built into the guidelines.[32] These "reasoned sentencing judgment[s], resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors . . . should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw."[33] If the Commission now "perform[s] its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts . . . district courts will have less reason to depart from the Commission's recommendations."[34]

2. Prosecutors

Many prosecutors have also indicated that the current framework results in sentences that are unduly severe for certain non-contact child pornography offenders. Defenders see many prosecutors reject the severity of the mandatory minimums when prosecutors elect to charge a defendant with *possession* instead of *receipt* of child pornography. Even though these offenses are forensically identical in almost every case,[35] *receipt* carries a 60 month mandatory minimum sentence, but *possession* has no mandatory minimum sentence. Defenders' anecdotal experience in this regard is supported by data recently released by the Commission. Where as a practical matter there is almost never an evidentiary difference between an offense with a 5 year mandatory minimum and an offense with no mandatory minimum, the mandatory minimum offense is charged in only 50.1% of cases.[36]

Particularly telling is the data from the Commission's special coding project, which the Commission found supports that "prosecutors may believe the mandatory minimum penalties for certain child pornography offenses, and the resulting guidelines sentence range, are excessive in

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[32] Letter from Thomas W. Hillier, II, Michael Nachmanoff, Marjorie Meyers & Miriam Conrad to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, Attachment at 40 (Sept. 7, 2011).

[33] *Rita v. United States*, 551 U.S. 338, 358 (2007).

[34] *Id*. at 382-83 (Scalia, J., concurring in part and concurring in the judgment).

[35] Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 Fed. Sent'g Rep. 108, 112 (2011) (hereinafter *Method for Careful Study*) ("From an evidentiary standpoint, the forensic evidence necessary to prove possession nearly always provides the basis for at least adding a receipt charge as well."). *See also* USSC, *Mandatory Minimum Report,* at 366 ("there does not seem to be a significant practical difference in the offense conduct that constitutes simple possession of child pornography. . . and offense conduct that constitutes receipt of child pornography"; "in the vast majority of child pornography cases the offender in fact knowingly received the child pornography that was possessed"); USSC, *Sex Offenses Against Children: Findings and Recommendations Regarding Federal Penalties* 11 (1996) (hereinafter *Sex Offenses Against Children*) ("[T]here appears to be little difference in the offense seriousness between typical receipt cases and typical possession cases. Indeed, all material that is possessed must at some point have been received (unless it was produced, in which case the defendant would be sentenced under the more severe production guideline).").

[36] USSC, *Mandatory Minimum Report*, at 303.

individual cases."[37] The project examined "whether there was evidence that offenders convicted of *possession* who did not face any mandatory minimum penalty could have been convicted and sentenced based on *distribution*, a more serious child pornography offense carrying a mandatory minimum penalty."[38] The Commission "found that the majority (53.0%) of offenders convicted of only simple *possession* also engaged in *distribution* conduct."[39] That is, the data shows prosecutors are rejecting the severity of the five year mandatory minimum even in cases that involve *distribution* of child pornography. And it is highly likely that almost all offenders convicted of possession also engaged in conduct that could have been charged as receipt in light of their evidentiary similarity.[40]

Prosecutors also have indicated that the child pornography guidelines are unjustly harsh and fail to adequately distinguish offenders. One such indication the Commission points to is that in "in 9.2 percent of all child pornography cases sentenced in fiscal year 2010, the offender received a sentence below the guidelines range for reasons sponsored by the government other than substantial assistance."[41] That percentage is growing. In 2011, the rate for such government sponsored sentences under §2G2.2 was 14.6%, significantly higher than the 4.4% rate across all offenses.[42]

Defenders see a variety of other signs that prosecutors believe the guidelines are too severe. For example, plea agreements pursuant to Fed. R. Crim. P. 11(c)(1)(C) which include agreements to sentences below the guidelines are used by some prosecutors, and in at least one district we understand this to be the standard practice for non-contact child pornography offenses. Some prosecutors fact bargain; prosecutors and defense attorneys negotiate facts relevant to sentencing enhancements, and in districts where probation relies on the prosecution for the relevant facts, only the negotiated facts appear in the pre-sentence report.[43] Defenders also see prosecutors take an official position in favor of a within-range sentence, but then at the sentencing hearing the prosecutor either does not contest defense arguments that the guidelines

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[37] *Id.* at 365.

[38] *Id.* at 317 (emphasis added).

[39] *Id.* at 318.

[40] We understand the Commission is in the process of studying this. *See* USSC, *Mandatory Minimum Report,* at 318.

[41] *Id.* at 365-66.

[42] USSC, *2011 4th Qtr. Data*, at tbl.5. The rate has steadily increased to this current rate of 14.6% from 4.6% in 2007, to 6.4% in 2008, to 8.1% in 2009. USSC, *2007-2010 Sourcebook of Federal Sentencing Statistics*, at tbl.27.

[43] *See* Stabenow, *Method for Careful Study*, at 113.

are too high, and unjustly place nearly every offender close to the statutory maximum, or directly expresses concern that §2G2.2 "doesn't work well anymore" and "lump[s] everyone real close to the [statutory maximum], and that's just not reasonable."[44]

The actions by prosecutors who reject the unduly severe one-size-fits all mandatory minimums and guidelines have led to better sentences for many people. Disparity, however, arises where similar defendants get different sentences dependent on local, and even personal, charging decisions. The mandatory minimums for non-contact child pornography offenses, like all mandatory minimums, are nefarious tools for generating this kind of disparity. With mandatory minimums, "[s]entences for similarly situated offenders vary dramatically depending on the charging and plea bargaining decisions of individual prosecutors."[45] According to Commission data, the average sentence for non-contact child pornography offenders subject to a mandatory penalty was 132 months, whereas the average for offenders not subject to a mandatory minimum was 54 months.[46]

The mandatory minimums so skew the bargaining process, that in addition to the obvious disparate impact from charge bargaining, they also inject other less obvious disparities into the system. For example, in exchange for not charging or dismissing a receipt charge, some, but not all, prosecutors extract promises that the defendant will forego arguing for a below-range sentence. In one district, there is one prosecutor who insists on an even more specific concession: while the defendant can ask for a sentence below the guideline range, he cannot argue that the guidelines are not sufficiently supported by empirical data.

In addition to mandatory minimums, the high guidelines that clump everyone together at the top also produce disparity. Because the guidelines are so high, and fail to distinguish the less culpable from the most culpable, prosecutors officially support below guideline sentences in a significant number of cases.[47] But again, not all, and the practice varies from one prosecutor to another. More hidden, but still very much present, are the disparities that arise from other practices of some prosecutors, but not all, to avoid full application of the guidelines, including:

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[44] Argument of Assistant United States Attorney at a sentencing hearing in 2010.

[45] Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, Attachment at 12 (Aug. 26, 2011).

[46] USSC, *Mandatory Minimum Report*, at 310. While the different average sentence lengths could be interpreted to indicate prosecutors only charge the more serious offenses and offenders with crimes carrying the mandatory minimum penalties, discussions with Defenders across the country indicate otherwise.

[47] USSC, *2011 4th Qtr. Data*, at tbls.1 & 5 (2011) (prosecutors sponsored sentences under §2G2.2 for reasons other than cooperation at a rate of 14.6%, compared with 4.4% across all offenses).

plea agreements pursuant to Fed. R. Crim. P. 11(c)(1)(C), unofficial suggestions that the guidelines are too high, and fact bargaining.

Thus, the message from Defenders, judges and prosecutors is clear: the sentencing framework for non-contact child pornography offenders is broken. We are hopeful the Commission will take steps to fix it by recommending to Congress that the mandatory minimums be eliminated, and by crafting a guideline that is less severe and provides better guidance on how to differentiate between the wide variety of non-contact child pornography offenders. Defenders stand ready to assist and begin below by addressing as best we can the topics identified by the Commission.

III. Persons Who Commit Child Pornography Offenses Do Not Fit a Single Typology. Most Federal Child Pornography Offenders, However, Share Certain Key Characteristics. More and Less Serious Offenders Can be Distinguished by The Role they Play in Child Pornography Offenses, their Offense Conduct, and their Criminal History.

A. Our Typical Clients Access Child Pornography Out of Curiosity, Impulse, or to Satisfy Sexual Fantasies. Few are Involved in the Offense for Financial Gain or to Facilitate a Hands-On Sex Offense.

Child pornography offenders are a heterogeneous group. Researchers have not agreed upon a single set of typologies to describe child pornography offenders.[48] Some, however, have categorized such offenders into four broad categories, consisting of those who:

> (a) access child pornography out of curiosity or impulse, without specific sexual interest in children; (b) access child pornography to satisfy sexual fantasies, but do not commit contact sex offenses; (c) create and distribute child pornography solely for financial gain; and lastly, (d) use the Internet to facilitate contact sex offenses.[49]

In our experience, most of our clients fit into the first and second categories. We encounter few individuals in the third and fourth categories. A "typical" offender convicted of

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[48] *See generally* Jeremy Prichard, Caroline Spianovic, & Paul A. Watters, *Internet Subcultures and Pathways to the Use of Child Pornography,* 27 Computer L. & Security Rev. 585, 586 (2011) (heterogeneity of online child pornography offenders has resulted in a number of typologies to describe the behavior) (hereinafter *Internet Subcultures*).

[49] Kelly M. Babchishin, Karl Hanson, & Chantal Hermann, *The Characteristics of Online Sex Offenders: A Meta-Analysis*, 23 Sexual Abuse: J. Res. & Treatment 92, 94 (2011) (hereinafter *Characteristics of Online Sex Offenders*); Helen Wakeling, Phillip Howard, & Georgia Barnett, *Comparing the Validity of the RM 2000 Scales and OGRS3 for Predicting Recidivism by Internet Sexual Offenders*, 23 Sexual Abuse: J. Res. & Treatment 146, 149 (2011) (hereinafter *Comparing the Validity*).

possession, receipt, or distribution of child pornography is a first-time offender with no previous convictions, no arrests for child sex offenses, and no prior contact with authorities responsible for investigating allegations of child sexual abuse.[50] Within that group, we find a wide array of individuals. Our clients range from the 63-year-old man suffering from early Alzheimer's, to the 19-year-old with Asperger's. We have represented the young graduate student working toward a degree in aerospace engineering with a fellowship at NASA, and the mentally retarded man living in a small town on the plains, who lived with his parents and never worked outside the family business. And we have defended the decorated military veteran, and the married-with-two-kids career Navy man, as well as the 23-year-old with social anxiety, depression and Tourette syndrome. A characteristic common to many is that, contrary to popular belief and congressional assumptions,[51] there is no evidence that they had already sexually abused a child or pose a substantial risk of doing so.[52]

B. The Sentences for Child Pornography Offenders Should be Based on the Defendant's Offense Conduct, Including His Place in the Distribution Chain, and Prior Criminal History.

As we discuss in greater detail throughout this testimony, the fairest and most sensible way to distinguish which offenders should receive the highest sentences is to treat them the same as all other offenders – by looking at the offense conduct and their prior criminal history. Focusing on these factors for sentencing would be consistent with the way many judges currently view the spectrum of child pornography offenses. The least culpable offenders on the spectrum are the possessors, followed by distributors, producers, and child molesters. Along this continuum, possessors and distributors are the ones who typically benefit from below guideline range sentences. Offenders with significant criminal histories or who produced or molested children receive higher sentences.[53]

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[50] *See Cruikshank*, 667 F. Supp. 2d at 701 (noting court's experience that most defendant convicted of possession have no prior criminal history, and "usually have healthy family lives and productive careers"). We have also represented offenders with prior histories of contact offenses and those involved in production or the commercial distribution of child pornography. Those offenders, however, are a minority of our clients.

[51] *See generally* Carissa Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 Wash. U. L. Rev. 853, 872-73 & nn. 66, 67 (2010) (summarizing legislative history of various child pornography laws) (hereinafter *Disentangling Child Pornography*).

[52] *See* Discussion Section VII(B)(1), IX (discussing low rates of recidivism).

[53] *See* Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 Stan. L. & Poly'y Rev. 545, 565 (2011) (hereinafter *Severe Child Pornography Sentencing*). *See*, *e.g.*, *Cruikshank*, 667 F. Supp. 2d at 701 (noting "spectrum of criminal culpability" involved in child pornography – from production to viewing – and need to "differentiate between those

Reserving the harshest sentences for individuals who directly harm children (the abuser) and who memorialize or broadcast the abuse (the producer) would alleviate much of the criticism of the current guidelines, which often call for longer prison sentences for those who possess and distribute child pornography than for those who rape or sexually abuse a child.[54]

IV. The Nature of the Child Pornography Images or Videos Is Not a Good Measure of Offense Seriousness.

Child pornography images fall into a broad range of categories, from sexual posing that involves no adult contact, to fondling, to sexual acts, penetration, and extreme sexual assaults. Many of the images are of prepubescent children and depict acts of penetration.[55] According to Commission data, in FY 2010, 95.6% of offenders sentenced under USSG §2G2.2 received an enhancement for images depicting a child under the age of 12; 73.7% received an enchantment for sadistic or masochistic conduct or other forms of violence.[56] Similar statistics exist for prior years.[57] That the bulk of child pornography offenders are receiving these enhancements shows that they are not doing a good job of distinguishing the more culpable offenders from the least culpable.

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who create child pornography and those who consume it"); *United States v. Baird*, 580 F. Supp. 2d 889, 895 (D. Neb. 2008) (same).

[54] *See generally* Stabenow, *Deconstructing the Myth*, at 26-29.

[55] Janis Wolak, David Finkelhor, & K. Mitchell, *Child Pornography Possessors Arrested in Internet-Related Crimes Findings from the National Juvenile Online Victimization Study* vii (2005) (429 telephone interviews with law enforcement officers across the country reported that 83% of offenders had images of prepubescent children, with 80% depicting acts of penetration).

[56] USSC, *2010 Use of SOCs*, at 37.

[57] The §2G2.2(b)(2) enhancement (child under 12) applied in 94.8% of cases in FY 2009, 95.5% in FY 2008, 95.1% in FY 2007, 96.2% in FY 2006, and 91.7% in FY 2005 (combined percentage for trafficking under §2G2.2 and possession under §2G2.4). The §2G2.2(b)(4) (sadistic or masochistic conduct of other depictions of violence) applied in 73.4% of cases in FY 2009, 70% in FY 2008, 68.3% in FY 2007, 63.2% in FY 2006, and 44.2% in FY 2006. It is unclear whether the increase in the §2G2.2(b)(4) enhancement is a result of changes in the nature of images being circulated or changes in the law, including the 2004 amendment to USSG §2G2.2, comment. (n.2), which made defendants strictly liable for possessing these images, and case law broadly interpreting the enhancement to apply to any act of penetration. *See United States v. Johnson*, 450 F.3d 831, 834 (8th Cir. 2006) (sexual penetration of a minor female by an adult male is per se sadistic); *United States v. Grigsby*, 2012 WL 35587, *1 (9th Cir. Jan. 9, 2012) (applying §2G2.2(b)(4) because image depicted act of penetration); *United States v. Hoey*, 508 F.3d 687, 691-92 (1st Cir. 2007) (same).

One consequence of the frequent application of these enhancements, along with the computer enhancement under USSG §2G2.2(b)(6),[58] is that they increase the sentence for first-time offenders so that their guidelines are often near the statutory maximum for the offense. As one court put it:

> This in turn, can lead to less of a distinction between the sentence of first-time offenders and those who are more dangerous offenders, who for example, distribute pornography for pecuniary gain. This undercuts the directive in § 3553(a) to consider the nature and circumstances of the offense and the history and characteristics of the defendant.[59]

Two other major problems exist with these enhancements: (1) they apply no matter whether the defendant viewed or accessed the image and no matter whether he even intended to possess, receive or distribute it; and (2) image severity is not related to offender risk. Unlike in the past when a person had to deliberately search out and order the kind of child pornography he wanted, modern technology makes all types of child pornography easily available. A recent analysis of the Top 300 search terms on a global Peer-to-Peer network, *isoHunt*, showed that links to child pornography consistently appeared.[60] Broad search terms for “porn” or “pthc”[61] in a P2P network can bring up all types of images, including those depicting “sadistic or masochistic conduct or other depictions of violence,[62] and prepubescent children of all ages.

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[58] The computer enhancement applies in virtually every case. When this enhancement was added to the guidelines, it applied in approximately 28% of cases. USSC, *The History of the Child Pornography Guidelines* 30 n.148 (2009) (hereinafter *History of the Child Pornography Guidelines*). In FY 2010, it applied in 96.2%. USSC, *2010 Use of SOCs*, at 38 (2010). That a person has used a computer to access child pornography says nothing about his culpability or risk of reoffending. Indeed, the ease of acquisition made possible by computers may well explain why a person with no real interest in children first accesses it “impulsively and/or out of curiosity.” Prichard, *Internet Subcultures*, at 594.

Numerous courts have criticized the enhancement. *See*, *e.g.*, *United States v. Tapp*, 2010 WL 4386523, at *6 (N.D. Ind. Oct. 28, 2010); *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008).

[59] *United States v. Schinbeckler*, 2011 WL 4537907, at *5 (N.D. Ind. Sept. 29, 2011).

[60] Prichard, *Internet Subcultures*, at 593.

[61] “Pthc” is an abbreviation for “pre-teen hard core,” i.e., child pornography.

[62] The enhancement for “sadistic, masochistic, violent” conduct is construed broadly to include any image that depicts an act likely to have caused physical or emotional pain. This includes all acts of penetration of prepubescent children and other depictions of minors engaged in sexual acts with an adult. *See, e.g., United States v. Rodgers*, 610 F.3d 975, 978-79 (7th Cir. 2010) (§2G2.2(b)(4) applies to “conduct which causes mental suffering or psychological or emotional injury in the victim”); *United States v. Parker*, 267 F.3d 839, 847 (8th Cir. 2001) (applies regardless of whether act involved bondage or penetration); *United States v. Groenendal*, 557 F.3d 419, 425-26 (6th Cir. 2009) (enhancement applied because one image depicted penetration of young girl by an adult); *United State v. Lyckamn*, 235 F.3d 234, 237-39 (5th Cir.

Thus, a defendant looking for nude photos of a twelve-year-old can end up possessing other types of images without any intention of doing so. In some of our cases, prosecutors have acknowledged the need for some "give" in the guidelines because every defendant's collection is going to have at least one image of a prepubescent minor and that the automatic two-level enhancement, therefore, no longer makes sense.

In an ideal system, individuals with an especially deviant interest in pictures of young children or violent content would be accurately identified. Current forensic analysis, however, makes such a holistic analysis impractical. To determine whether a defendant deliberately searched out and viewed particular types of images would require a thorough examination of the defendant's entire collection to determine patterns of activity – *e.g.,* when it was acquired, whether it was viewed, and whether there is evidence of an escalating pattern of searches focused on more extreme content.[63] Such analyses would require an enormous expenditure of prosecutorial and defense resources. This expenditure might be justified if image severity was a risk marker, but it is not.

The available research evidence fails to show that the types of images possessed are relevant to the risk of committing another child pornography offense or a contact offense. A study of 78 Internet child pornography offenders on community supervision in the United Kingdom examined whether image severity[64] or victim age correlated with the offender's risk

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2000) (penetration of prepubescent female by adult male); *United States v. Rearden*, 349 F.3d 608, 614-15 (9th Cir. 2003) (enhancement applies any time image depicts penetration of prepubescent children). Because of their broad applicability, the enhancements are poor measures of culpability. *United States v. Meysenburg*, 2009 WL 2948554, at *9 (D. Neb. Sept. 11, 2009) (broad definition under §2G2.2(b)(4) applies in "many, if not most, cases.").

[63] The Adam Walsh Act, 18 U.S.C. § 3509, presents significant barriers for defense counsel in obtaining even routine discovery in a child pornography case. Hard drives must be analyzed at government locations – often during restricted time periods. The analysis itself f is extraordinarily time-consuming and expensive, requiring special expertise and digital forensic software. Among other things, the forensic examiner must determine when and how files were obtained, the search terms that may have been used, and whether and when the images were viewed. That information must be placed into the larger context of the defendant's computer habits, which can only be determined by examining the entire hard drive. *See generally* Ian Friedman and Kristina Walter, *How the Adam Walsh Act Restricts Access to Evidence*, 31 Champion 12, 13 (2007); *United Sates v. Tummins*, 2011 WL 2078107 (M.D. Tenn. May 26, 2011) (provides an example of the difficulties faced in conducting forensic examinations).

[64] The images were rated according to a 5 level scale used in the UK: (1) erotic posing no sexual activity; (2) non-penetrative sexual activity between children or solo masturbation by a child; (3) sexual activity between adults and children; (4) penetrative sexual activity involving child/children, or both child and adults; and (5) images of child/children depicting sadism, or penetration of or by an animal.

category.[65] The study showed that neither factor was related to risk.[66] "The results also suggested that not only are a higher proportion of low-risk offenders viewing images of a higher severity level than medium and high-risk offenders, but they also appear to be collecting images depicting younger children."[67]

In sum, because the forensic analysis necessary to determine whether a defendant deliberately sought out and viewed severe images would be costly and time-consuming and because the empirical evidence does not show a link between risk and type of image, we believe there are better ways of identifying more culpable offenders, as discussed below.

V. The Volume of Images or Videos Involved in the Offense Should Not Be An Aggravating Factor.

Empirical evidence never supported the current enhancement for number of images or videos.[68] Nor does any new evidence show that the volume of images or videos possessed is in any way correlated with offense seriousness. With the advent of high speed broadband Internet, instantaneous downloading, and gigabytes of storage, large volumes of material can be acquired faster and easier than ever before. Whereas it might take years for a collector of print images to acquire thousands of images, an occasional downloader using nothing more than a high speed connection can acquire 600 images or more in three minutes or a two-hour video in less than six minutes.[69] With peer-to-peer applications[70] or downloading software,[71] a user need not search

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[65] Jody Osborn, Ian Elliott, David Middleton, Anthony Beech*, The Use of Actuarial Risk Assessment Measures with UK Internet Child Pornography Offenders*, 2 J. Aggression, Conflict & Peace Res.16 (2010) (hereinafter *Use of Actuarial Risk Assessment Measures*).

[66] *Id.* at 19.

[67] *Id*. at 22.

[68] *See generally* Stabenow, *A Method for Careful Study*, at 123. This testimony uses the generic term "images" to encompass both still images and videos. Just as the enhancements for the number of still images is a poor measure of culpability or risk, so is the arbitrary rule that counts each video as 75 images. USSG §2G2.3, comment. (n. 4). This rule came about as a result of the Department's desire to have each video receive a 2- or 3-level enhancement, USSC, *History of the Child Pornography Guidelines*, at 43-44, not from any finding that persons with videos as opposed to still images were any more culpable or presented a greater risk. *Schinbeckler*, 2011 WL 4537907, at*6 (video conversion "greatly increases the magnitude of the Defendant's offense without a showing of corresponding culpability). *See also Tapp*, 2010 WL 4386523, at*6 (noting lack of downward departure for short videos). It is difficult to see how the person who possesses eight, three-second video clips is any more culpable than one who possesses one hundred images, but under the guidelines the former would receive a 5-level adjustment and the latter would receive a 2-level adjustment.

[69] These calculations are based upon a download speed of 35Mbs. *See* http://www22.verizon.com/home/fiosinternet (demonstrating the speed of Verizon FiOS).

and download each file individually. The program will download hundreds of files. In one 2003 study, a single search for the term "porn" turned up over 25,000 files, including child pornography.[72] Nor does a user have to sort through files and place them in separate folders. Software, like Internet Download Manager, will automatically handle that task. Hence, a person can neatly store thousands of images and videos on a computer without even viewing them. The child pornography in those images and videos may make up only a small portion of a larger collection of pornography that includes mostly adult pornography.

The volume of images does not *per se* increase the harm of the offense and has no bearing on the culpability of the offender. For example, a person who acquires thousands of images over a peer-to-peer network usually does so unbeknownst to the source, i.e., other users on the peer-to-peer network. No one may ever know that he acquired and possessed the images.[73] In such cases, the possessor has not in any way increased the market for child pornography or created incentives for others to create more. In other cases, a person may have sought to trade just a few images, but then unexpectedly received thousands of images. On the other hand, a person who views a streaming video of a child being sexually abused, and who does not save a single image, has promoted the fresh abuse of a child and likely encouraged repeated abuse.

These examples help demonstrate that the volume of images or videos has no bearing on the culpability of the offender or the harm caused by the offense. Image volume sheds no light on the viewing habits of the offender, his predilections, or whether he presents a genuine risk to children. Amassing a large number of images may not even be for sexual purposes. For some offenders, the act of collecting, rather than the sexual aspects of the collection, is the driving force behind the behavior. The collecting behavior may serve as a "social activity" or to meet "emotionally avoidant needs.[74] Law enforcement officers in the United Kingdom even recognize

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[70] *See* U.S. Gov't Accountability Office ("GAO"), *File-Sharing Programs: Child Pornography Is Readily Accessible Over Peer-to-Peer Networks* 15-20 (2003) (hereinafter *File-Sharing Programs*) (describing peer-to-peer networks).

[71] For a description of such software such as New Downloader or Internet Download Manager, *see* http://download.cnet.com.

[72] GAO, *File-Sharing Programs*, at 6; Minority Staff, Special Investigations Division, Committee on Government Reform, U.S. House of Representatives, *Children's Access to Pornography through Internet File-Sharing Programs* 10-11 (2001) (screen shot of search showing file names suggestive of child pornography), http://democrats.oversight.house.gov/images/stories/documents/20040817153928-98690.pdf.

[73] For a more detailed example of how this works, *see* Stabenow, *A Method for Careful Study*, at 124.

[74] Max Taylor & Ethel Quayle, *Child Pornography: An Internet Crime* (2003) (quoted in Mare Ainsarr and Lars Loof, Council of the Baltic Sea States, *Online Behavior Related to Child Sexual Abuse: Literature Report* 53, 55 (2011)).

that the number of images in a collection is "an unreliable indicator" of the "risk posed to children by its owner."[75]

Lastly, the evidence does not even show that the increased volume of images found in the possession of offenders is a result of there being new images in circulation or offenders having easier access to old images to complete a collection.[76] For all of these reasons, the volume of images or videos possessed should not be an aggravating factor at sentencing. Numerous judges and commentators agree.[77]

VI. Enhancements for Distributors Should Focus on Those Individuals Who Deliberately and Intentionally Make Pornography Available for Distribution to a Wide Audience.

A. The Guidelines Do A Poor Job of Distinguishing Between More and Less Culpable "Distributors."

Section 2G2.2(a)(2) sets the base offense level for persons convicted of distribution of child pornography at 22 – 4 levels higher than that for persons convicted of possession. All "distributors," whether convicted of distribution or not, are then subjected to at least an additional 2-level increase under §2G2.2(b)(3)(F) and quite possibly a 5-level increase for

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[75] Victoria Baines, UK Child Exploitation and Online Protection Centre, *Online Child Sexual Abuse: The Law Enforcement Response* 34 (2008), (hereinafter *Law Enforcement Response*) http://www.ecpat.net/worldcongressIII/PDF/Publications/ICT_Law/Thematic_Paper_ICTLAW_ENG.pdf.

[76] United Nations Office on Drugs and Crime ("UNDOC"), *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* 13 (2010) (hereinafter *Globalization of Crime*).

[77] *United States v. Donaghy*, 2010 WL 2605375, at *3 (E.D. Wis. June 24, 2010) ("The number of images enhancement makes little sense because, as a result of internet swapping, defendants readily obtain the necessary number of images with minimal effort. Further, to the extent that number of images may serve as a proxy for harm, the guideline overstates that harm."); *Diaz*, 720 F. Supp. 2d at 1042 (questioning number of images enhancement because they can be obtained with "minimal effort); *United States v. Strayer*, 2010 WL 2560466 (D. Neb. June 24, 2010) (enhancements for number of images lacks "value as a reliable proxy for culpability"); *Schinbeckler*, 2011 WL 4537907, at *6 (number of images enhancement not linked to empirical data and does not "provide an accurate indication of culpability"); *United States v. Maguire*, 436 Fed. Appx. 74, 78 (3d Cir. 2011) (district court observed that "number of images doesn't reflect intent any longer, because the click of the mouse can result in many more images than anybody even really perhaps wanted"); *United States v. Raby*, 2009 WL 5173964, at *6-7 (S.D.W. Va. Dec. 30, 2009) ("The worldwide market for child pornography is so vast that the relative market impact of an [sic] having even 592 additional images is miniscule); Jelani Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 15 Rich. J.L. & Tech. 8, 45 (2010) (hereinafter *Making the Punishment Fit*) ("one additional person possessing the images makes little difference to the victim and is much less harmful than the initial postings of an image to the Internet").

distribution for a "thing of value."[78] In actual prison time, this means a convicted distributor sentenced at the low end of the advisory guidelines will receive 88-159% more time than the convicted possessor. If the defendant is convicted of only possession, but receives a 2- or 5-level enhancement for distribution, his low-end advisory guideline sentence will be 22-70% higher than if he were sentenced for possession.[79]

These guidelines do not meaningfully distinguish distributors from possessors.[80] Nor do they identify the more culpable distributors.[81] The 5-level increase for distribution for a "thing of value" and the generic 2-level distribution enhancement sweep in numerous offenders who may do nothing more than use common peer-to-peer networks to access images.[82] In many of these cases, our clients did nothing more than install the software and download some images. Because of the way the software works, and not because of any deliberate intent to distribute child pornography or even any affirmative act, a defendant may distribute child pornography

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[78] In FY 2010, distribution in exchange for a thing of value applied in 17.1% of cases, and the distribution not otherwise covered applied in 20.9% of cases. The remaining distribution enhancements applied in less than 3% of cases under §2G2.2. USSC, *2010 Use of SOCs*, at 37.

[79] A defendant subject to any of the other enhancements for distribution of child pornography will receive even more time. Other enhancements include distribution for pecuniary gain (at least 5 levels); distribution to a minor (5 levels); distribution to entice a minor to engage in illegal activity (6 levels); and distribution to entice a minor to engage in prohibited sexual conduct (7 levels). USSG §2G2.2(b).

[80] *See* Hessick, *Disentangling Child Pornography*, at 895 (noting how "[m]any post-internet offenders simply do not resemble the image of the professional marketer and dealer conjured up by the term 'distribute.'"); Jesse Basbaum, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 Hastings L.J. 1281, 1298-99 (2010).

[81] *See, e.g., Schinbeckler*, 2011 WL 4537907, at *6 (declining to recognize enhancement for distribution where it was passively done through a P2P network); *United States v. Brasfield*, 2011 WL 3844181, at *4 (E.D. Wis. Aug. 29, 2011) (giving guidelines little weight because, among other things, the "type of file-sharing seen in this case," P2P, "is a typical method by which such images are obtained;" also noting how distributors always start at least a level 24 rather than a base offense level of 18 for possessors).

[82] Several circuits have found that a distribution enhancement applies to defendants using P2P networks. The circuits are split on whether the 5- or 2-level enhancement applies. *See, e.g., United States v. Vadnais*, __ F.3d __, 2012 WL 104661 (11th Cir. Jan. 13, 2012) (use of peer-to-peer file sharing software did not support 5-level enhancement); United *States v. Geiner*, 498 F.3d 1104, 1111 (10th Cir. 2007) (faster downloading speed was a "thing of value" for defendant who used file sharing program even if defendant did not expect to receive other files in exchange for sharing); *United States v. Griffin*, 482 F.3d 1008, 1012-13 (8th Cir. 2007) (upholding 5-level enhancement because defendant expected to receive files in exchange for sharing); *United States v. Layton*, 564 F.3d 330, 335 (4th Cir. 2009) (relying on decisions from Seventh, Eighth, and Eleventh Circuits affirming 2-level enhancement for use of peer-to-peer file sharing program); *United States v. Rogers*, 666 F. Supp. 2d 148, 153 (D. Me. 2009) (declining to apply 5-level enhancement simply because defendant used Limewire to distribute child pornography; distribution must be for a "thing of value").

images to others.[83] As one court put it: "[b]ecause of the nature of peer-to-peer file sharing programs, a simple possessory crime evolves into a distribution offense as soon as someone accesses a shared file."[84] A report from the Federal Trade Commission even noted how "[s]ome [peer-to-peer] users may not understand the configuration of the P2P file-sharing software's 'shared folder' and may inadvertently share sensitive personal files residing on their hard drives."[85] Viruses on P2P programs can also cause significant problems by adjusting shared folders on a user's hard drive so that the user ends up sharing more files than he intends.[86]

Even for those defendants who may understand that the software permits others to access their files, the use of a file-sharing software program "is a tenuous basis on which to urge the application of §2G2.2(b)(3)."[87] "If a file-sharing program allows the user to download child pornography from other computers, whether or not the user makes his own images available to other parties, then the user's distribution is gratuitous and not done for a "thing of value."[88]

We encourage the Commission to carefully study the various methods of distributing child pornography and focus on those where the defendant has engaged in conduct with the express purpose of making child pornography widely available to others. The occasional distributor and users of file-sharing networks should be captured within a base offense level that is 2 levels higher than the base offense level for possession.[89]

B. Methods of Distribution that May Reflect Upon a Defendant's Increased Culpability.

Unless the Commission significantly lowers base offense levels under §2G2.2, and eliminates use of enhancements for computer use, the types of images, and number of images or videos, we cannot support any enhancements for certain methods of distribution. Without meaningful fixes to the current guidelines, too many offenders will receive sentences greater than

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[83] A report from the Federal Trade Commission acknowledges how a P2P user may enter an innocuous search term, unintentionally download pornographic files, and then distribute those files. Staff Report, Federal Trade Commission, *Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues* 11 (2005).

[84] *Strayer*, 2010 WL 2560466, at *12.

[85] *Id*. at 7.

[86] *Id*. at 9.

[87] *United States v. Bastian*, 603 F.3d 460, 468 (8th Cir. 2010) (Colton, J., concurring).

[88] *Id*.

[89] The base offense levels should be lowered at least to their 1991 levels – 13 levels for possession and 15 levels for distribution.

necessary to satisfy the purposes of sentencing. With that caveat, a sensible guideline that meaningfully and fairly distinguishes offenders with different levels of culpability would narrowly target for enhancements those distributors who knowingly and intentionally focus their activities on distributing child pornography. Such acts might include the following: (1) *creating* a closed private network[90] and then sharing files for the purpose of distributing child pornography;[91] (2) setting up, maintaining, or moderating a server, website, blog, or hosting area specifically for the purpose of distributing child pornography; and (3) charging a fee to distribute child pornography. As discussed below, we also think it appropriate for the Commission to consider an enhancement for the person who first uploaded a fresh image to the Internet.

VII. Offender Behavior that May Warrant a More Severe Sentence Is Typically Covered by Another Offense or Occurs Too Infrequently to Catalog or Quantify as a Sentencing Enhancement.

The Commission has asked "[o]ther than the types or volume of images or videos or the type of distribution conduct, what types of offender behavior (such as involvement in an online "community" dedicated to child pornography and sexual offending against minors or reliance on advanced technology) are more severe such that they ordinarily should warrant higher sentences?" Based upon our experience with our client population, we are hard pressed to identify other behaviors that may warrant the addition rather than deletion of specific offense characteristics in USSG §2G2.2.

"Involvement" in an "online community" is not an appropriate enhancement. An "online community" can be anyplace on the Internet where individuals share stories, information, and data files about any number of topics. Levels of participation in an online community vary considerably. One person may periodically read the information and ideas posted by others and do nothing more. Another person may comment occasionally or download files. Another person may be a prolific contributor to the community. These communities can be public forums, open to anyone to examine posts, or private forums requiring registration. While some communities may focus on topics of interest to those who may have a sexual interest in children, not all postings in such communities or forums are unlawful. In fact, much of it is protected speech under the First Amendment.

Some hypothesize that participation in an "online community" may encourage the sexual abuse of children. This is theory only, not proven by empirical evidence. Anecdotal evidence from a qualitative study of online "pedophile" communities shows that "a number of forum users

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[90] The chief difference between a "closed" network like GigaTribe and an "open" network like "Limewire" is that in a closed network the person must pre-approve others to have access to his files.

[91] We recognize that there might be other similarly directed and enabling conduct that might warrant consideration. Additional experience with private networks may inform our future analysis on this point.

stated that they restrained themselves from sexual relations by choice."[92] Some posts even made clear that "some pedophiles need not have sexual contact with children."[93] Such comments may serve to discourage actual contact with children rather than encourage it. If in some cases, the conduct associated with an online community turns criminal, then the appropriate course of action is to prosecute it. For example, if a member of an online community sexually abuses a child as a result of his participation in the community, then the person may be prosecuted for sexual abuse. If another member of the community encourages unlawful behavior, then he may be subject to prosecution for conspiracy or as an aider and abettor. If a member of an online community knows that another member committed an offense and hid it, then he may be liable for misprision of felony. In short, rather than adopting a new enhancement not based on empirical evidence, we believe it far better to focus on the conduct underlying the count of conviction.

We also believe that sexual offending against minors should be prosecuted separately, not sentenced "on the cheap" as relevant conduct to another offense of conviction. In any event, the current guideline contains several provisions that account for acts such as "online grooming" and more serious behavior. Section 2G2.2(b)(3)(E) contains an enhancement for online grooming, which is used infrequently. Section 2G2.2(c)(1) contains a cross-reference – also used infrequently – to impose harsher sentences on the basis of uncharged conduct against minors such as taking or soliciting photos.[94]

"Advanced technology" is also not the kind of factor that warrants special consideration as an aggravating factor. In our experience, persons apprehended for Internet child pornography are keeping pace with technological change at the same pace as the rest of society. Technologies like virtual private networks, anonymizers, encryption software, and file shredders that were unknown in years past, are more available today. For example, many persons use virtual private networks that connect to proxy servers before connecting to the Internet. These networks permit users to encrypt data and protect the user's IP address. Such networks are not used to evade

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[92] Thomas Holt, Kristie Blevins, and Natasha Burkert, *Considering the Pedophile Subculture Online*, 22 Sexual Abuse: J. Res. & Treatment 3, 12-13 (2010).

[93] *Id*.

[94] *See, e.g, United States v. Caudill*, 427 Fed. Appx. 301, 302 (5th Cir. 2011) (applying cross-reference to defendant convicted of transporting child pornography where evidence showed defendant took nude photography of underage child even though he was not charged with producing child pornography); *United States v. Bauer*, 626 F.3d 1004, 1009) (8th Cir. 2010) (offering to purchase a "would-be minor a web camera to use for taking photos of herself); *United States v. Shuler*, 598 F.3d 444, 445 (8th Cir. 2010) (defendant encouraged her minor daughter to take nude photos and upload them onto computer).

detection, but to avoid having information harvested for commercial use.[95] Persons without access to a VPN can securely browse the Internet with anonymous proxy servers – a simple process explained on such common websites as wikiHow. or howstuffworks.[96]

Internet security threats are increasing at an astounding rate. Symantec, one of the leading makers of Internet Security, Anti-Virus and Anti-Malware software, reported that in 2010 they encountered more than 286 million unique variants of malware.[97] Keeping your privacy on the Internet is no longer an option but a standard practice. A standard proxy server is one of the simplest forms of protecting your privacy.

With the increased use of technology for purchasing items, tracking investments, paying bills, checking balances, etc., advanced technology is being built into standard systems. The newer version of Microsoft Windows Operating System has built in encryption software called BitLocker. It can easily be used to encrypt an internal hard drive and USB devices, such as flash drives or external hard drives. Encryption is becoming the standard, not the exception.

Encryption software is regularly reviewed and available for download from a popular computer site: cnet.com. CNET offers this explanation about the popular encryption software, Hotstpot Shield: "The Internet connection protector Hotspot Shield encrypts your traffic to protect you from all kinds of spying while your computer communicates with the rest of the world. . . . we highly recommend Hotspot Shield for anybody concerned with privacy. In today's world that ought to be anybody connecting a computer to the Internet." [98] As to "file shredding" software, it is fundamentally no different than using a paper shredder to destroy your bank statements. And unlike a paper shredder, file shredders like Eraser are free.

The truly advanced technologies on the Internet are those that have cyber security experts worried, like the use of "cutout servers" that make it difficult to determine where data is being sent and where it came from. Because the computers are in foreign countries, it is difficult for

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[95] Larry Greenemeier, *Seeking Address: Why Cyber Attacks Are So Difficult to Trace Back to Hackers*, Sci. Am. (June 11, 2011), http://www.scientificamerican.com/article.cfm?id=tracking-cyber-hackers&page=2.

[96] WikiHow, *How to Surf the Web Anonymously with Proxies*, http://www.wikihow.com/Surf-the-Web-Anonymously-with-Proxies; Dave Roos, *How to Surf the Web Anonymously*, http://electronics.howstuffworks.com/how-to-tech/how-to-surf-the-web-anonymously3.htm.

[97] Symantec, *Symantec Internet Security Threat Report: Trends for 2010*, https://www4.symantec.com/mktginfo/downloads/21182883_GA_REPORT_ISTR_Main-Report_04-11_HI-RES.pdf.

[98] Seth Rosenblatt, *Hotspot Shield: CNET Editor's review*, http://download.cnet.com/hotspot-shield/?tag=dropDownForm;productListing.

law enforcement officers to acquire log files that may help them track activity.[99] Unremarkably, we have not seen use of such technology among our clients. Accordingly, we think it counter-productive to try to define the kind of advanced technology that might be sufficiently aggravating to warrant a sentencing enhancement.

VIII. A Child Pornography Offender's Past Conduct and the Risk of Recidivism Should Be Considered as Part of the Defendant's Criminal History.

The guidelines should account for a child pornography defendant's past conduct and risk of recidivism the same way other guidelines typically do – through the use of criminal history. Chapter Four of the guidelines is expressly designed to account for a defendant's past record of criminal conduct and the likelihood of recidivism. USSG §4A1.1, Pt. A, intro. comment. (Nov. 1, 2011). Where the criminal history score underrepresents the defendant's "criminal history or the likelihood that the defendant will commit other crimes," the court may upwardly depart. USSG §4A1.3.[100] These provisions have been in place since the inception of the guidelines. There is no need to adopt special rules for child pornography offenders, particularly since criminal history has proven to be a reliable predictor of recidivism for sex offenders in general.[101] This is especially true for child pornography offenders given their proven low rate of recidivism. Nor is the "pattern of activity" enhancement in USSG §2G2.2(b)(5) necessary.

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[99] *See* Larry Greenemeier, *The Fog of Cyberwar: What Are the Rules of Engagement?,* Sci. Am. (June 13, 2011), http://www.scientificamerican.com/article.cfm?id=fog-of-cyber-warfare.

[100] Courts have used the upward departure provision in child pornography cases, albeit infrequently given the current harshness of the guideline. *See, e.g., United States v. Boland*, 374 Fed. Appx. 424, 426 (4th Cir. 2010) (defendant returned to same conduct after being previously convicted); *United States v. Jones*, 444 F.3d 430, 434 (5th Cir. 2006) (acknowledging that court could have departed upwardly upon proper finding that defendant sexually assaulted his niece).

[101] Jerome Endrass, et. al., *The Consumption of Internet Child Pornography and Violent Sex Offending*, 9 BMC Psychiatry 6 (2009) (previous convictions for hands-on sex offenses are relevant risk factor for future hands-on offenses); Michael C. Seto, Karl Hanson, and Kelly Babchishin, *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 Sexual Abuse: J. Res. & Treatment 124, 138 (2011) (hereinafter *Contact Sexual Offending*) (online offenders with criminal history were more likely to offend in the future); Washington State Institute for Public Policy, *Sex Offender Sentencing in Washington State: Sex Offender Risk Level Classification Tool and Recidivism*, Technical Appendix A (2006). Truly dangerous and repeat sexual offenders – those guilty of actual contact offenses such as sexual abuse – are already included within USSG §4B1.5.

A. The Sentences for Child Pornography Offenses Should Not Be Based Upon the Assumption That Offenders May Have Committed an Undiscovered "Contact" Offense in the Past.

1. Sentences Should Be Based on the Defendant's Individual Culpability, Not a Statistical Assumption that He Committed a Prior Bad Act.

We think it a grave mistake to construct a sentencing scheme on the assumption that a significant enough percentage of child pornography offenders have a "contact" offense in their past that it justifies higher sentences for all.[102] Setting aside the validity of the studies looking at "self-reported" past conduct, see discussion below, many offenders have no such prior contact offense history. In no other context do we sentence a person based upon a statistical estimation that he may have committed some other offense in the past. Sex offenders should not be treated any differently than other offenders.

To punish a person based upon a statistical estimation that he may have committed some prior bad act is antithetical to a system of justice based upon a presumption of innocence and that requires proof beyond a reasonable doubt to pierce that presumption.[103] Judge Pratt described the flaws with such an approach when the government raised such an argument at a sentencing:

> The inference that the Government asks the Court to draw is distasteful and prohibited by law. Uncharged criminal conduct may generally only be considered in sentencing if proved by a preponderance of the evidence. *See United States v. Howe*, 538 F.3d 842, 855 (8th Cir. 2008); *see also United States v. Tyndall*, 521 F.3d 877, 882 (8th Cir.2008). Moreover, the Government bears the burden of proof. *United States v. Azure*, 536 F.3d 922, 933 (8th Cir.2008). The Butner Study, even if credible, falls far short of this standard because it fails to demonstrate whether Defendant has, personally, previously assaulted a child sexually. At most, the Study reveals that a majority of other individuals with a similar criminal history committed crimes against children, but the Court cannot see how evidence of those individuals' crimes establishes by a preponderance of the evidence that Defendant committed a prior sexual crime.

United States v. Johnson, 588 F. Supp. 2d 997, 1005 (S.D. Iowa 2008).

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[102] Some government officials see child pornography as a proxy for punishing child sex abusers. *See* Hessick, *Disentangling Child Pornography* , at 879-84.

[103] Hessick, *Disentangling Child Pornography*, at 884.

To base a sentence on presumed past misconduct also stretches the already problematic construct of "relevant conduct"[104] well past its breaking point. At the very least, the legitimacy of a sentence, and respect for the law, depends upon the sentence being based upon the *defendant's actual conduct* – be it part of the offense conduct, relevant conduct or past conduct.

2. The Available Evidence Does Not Support the Conclusion that a Sizable Percentage of Federal Child Pornography Offenders Have Committed a "Contact" Offense.

Even if there were some sound penological justification to punish a person based upon his membership in a group where some portion had committed some uncharged or unproven past act, the available evidence does not unequivocally support the conclusion that a sizable percentage of child pornography offenders have committed past "contact" offenses. The latest published study to address the likelihood of an "online" offender having a history of offline sexual offending is a meta-analysis of twenty-four prior studies performed by Michael Seto and colleagues.[105] The analysis as to past behavior yielded widely disparate results. Studies based upon official reports suggested that 4.8% to 11.2% of online offenders had prior contact offenses, whereas the six studies based upon self-report data, including the controversial Butner Study, suggested that 51.4% to 60% had prior offenses.[106]

This meta-analysis of studies looking at past behavior should not be relied upon to form sentencing policy. First, the definition of "online offender" was overbroad. It included not just those guilty of possession or distribution of child pornography via the Internet, but also an undisclosed number of persons who used the Internet to solicit minors for sexual purposes, as well as other offenses.[107] Second, the studies varied in how they defined "contact" sexual offending. Not all of the studies limited the prior offending variable to sexual offenses against children by adults.[108] Yet, the meta-analysis consolidated the studies without controlling for the

[104] We have repeatedly set forth our position on why the relevant conduct guidelines should be modified. *See e.g.*, Letter from Marjorie A. Meyers, Chair, Federal Defender Sentencing Guidelines Committee, to the Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n, at 2-6.

[105] Seto, *Contact Sexual Offending*, at 124-145.

[106] *Id*. at 133.

[107] *Id.* at 141.

[108] For example, Bourke and Hernandez, the Butner Study, included offenses against adult victims. Buschman and Bogaerts asked broad questions, which could have been interpreted to mean consensual acts between minors. Neutze defines child "sexual abuse" as a range of behaviors, including undressing in the presence of a child and engaging in sexual talks with a child. Quayle and Taylor refer generally to "contact offenses against children," but do not further define the term. Email from Melissa Hamilton, J.D., Ph.D., Visiting Ass't Professor of Law, University of South Carolina School of Law (Jan. 25, 2012, 06:29 EST) (on file with Federal Defender Sentencing Resource Counsel).

different definitions.[109] Third, at least two of the studies reporting on "contact" offenses used questionable methodology.[110] Fourth, many of the studies were "skewed toward high risk groups of convicted prisoners and mental health patients."[111] Fifth, with the exception of the now debunked Butner study, none of the "self-report" studies involved federal offenders whose primary offense was the possession, receipt, or distribution of child pornography.

In sum, the available evidence is insufficient to conclude that a sizable percentage of federal child pornography offenders have committed some undisclosed contact offense in the past, and certainly inadequate to warrant sentencing all offenders based upon a statistical assumption about their past conduct rather than on actual proof of prior bad acts.

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[109] Hamilton, *Child Pornography Crusade*, at 50 n.253.

[110] The Butner study has been severely criticized for its methodology. *See, e.g*., Richard Wollert et. al., *Federal Internet Child Pornography Offenders – Limited Offense Histories and Low Recidivism Rates*, in The Sex Offender, Volume VII (Barbara K. Schwartz ed.. forthcoming 2012) (hereinafter *Federal Internet Child Pornography Offenders*); *Johnson*, 588 F. Supp. 2d at 1005 (court refuses to consider results of Butner study "until either the Government or the researchers provide transparency for its many apparent failings"). *See also* Statement of Heather E. Williams Before the U.S. Sentencing Comm'n, Phoenix, Ariz., at 49-51 (Jan. 21, 2010) (hereinafter *Williams Testimony*) (discussing many flaws with the Butner Study).

Upon learning that the results of the study were being used to "fuel the argument that the majority of [child pornography] offenders are indeed contact sexual offenders and, therefore, dangerous predators," Dr. Hernandez wrote: "This simply is not supported by the scientific evidence." *See* Andres E. Hernandez, *Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment*, Global Symposium: Examining the Relationship between Online and Offline Offenses and Preventing the Sexual Exploitation of Children, The Injury Prevention Research Center at The University of North Carolina, Chapel Hill at 4 (April 5-7, 2009). www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf.

Another one of the studies, Buschman and Bogaerts (2009), used the results of polygraph exams on volunteers (child pornography defendants) from sex offender programs in the Netherlands. This is hardly a representative or random sample of child pornography offenders. Nor is polygraph testing widely accepted as scientifically valid. Theodore Cross and Leonard Saxe, *Polygraph Testing and Sexual Abuse: The Lure of the Magic Lasso,* 3 Child Maltreatment 195 (2001); Ewout H. Meijer, Bruno Verschuere, Harald L. Merckelbach, and Geert Crombez, *Sex Offender Management Using the Polygraph: A Critical Review*, 31 Int. J. L. & Psychiatry 423 (2008).

[111] Hamilton, *Child Pornography Crusade*, at 50 n.253.

B. The Criminal History Score Accounts for the Risk of Recidivism. Beyond That, Sentencing Guidelines Should Not Consider a Defendant's Propensity to Commit Future Contact Offenses or other "Sexually Dangerous Behavior"[112] When Imposing a Term of Imprisonment.

The guidelines account for the risk of recidivism through criminal history. Prior convictions increase the criminal history score. Uncharged conduct of a similar nature may support an upward departure.[113] While some have argued that child pornography offenders present a greater risk of recidivism and should be more closely scrutinized than other offenders, the evidence does not support the need for special risk assessments for child pornography offenders at sentencing.

1. The Evidence Does not Support the Common Belief that Online Child Pornography Offenders Present a High Risk of Committing Contact Offenses or Otherwise Engaging in "Sexually Dangerous Behavior."

Sex offender laws provide a perfect example of how media coverage of a particularly horrific crime spurs legislators into adopting draconian measures that are quite costly, but unnecessary to protect public safety.[114] Notwithstanding the widespread panic about sexual predators that lead to such legislative action as the PROTECT Act of 2003 and the Adam Walsh Child Protection and Safety Act of 2006, the available evidence paints a different picture of child sexual abuse in this country than many politicians would have us believe. First, most sexual abuse is committed by persons known to the child, not strangers or Internet predators.[115] Second, the rate of reported child sexual abuse has been declining since 1992. Out of 48 states submitting data, "33 states have seen declines of 50% or more in sexual abuse since 1992."[116]

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[112] No standard definition of "sexually dangerous behavior" exists. The definition of "sexually dangerous person" set forth in 18 U.S.C. § 4247 (the civil commitment statute) refers to sexually violent conduct or child molestation. We understand that the Commission may be referring to a much broader range of acts that may involve no violence or contact, such as a sexually oriented chat with a minor. No risk prediction methodology speaks to such a broad range of behaviors.

[113] *See United States v. Carpenter*, 149 Fed. Appx. 652, 652 (9th Cir. 2005) (upward departure accounted for defendant's greater likelihood of recidivism as reflected in uncharged conduct).

[114] *See generally* Tamara Rice Lave, *Inevitable Recidivism: The Origin and Centrality of an Urban Legend*, 34 Int'l J.L. & Psychiatry 186 (2011) (discussing how many politicians and the public believe that sex offenders will continue to reoffend notwithstanding evidence that most sex offenders do not re-offend).

[115] Emily Douglas and David Finkelhor, *Childhood Sexual Abuse Fact Sheet* 8 (2005), http://www.unh.edu/ccrc/factsheet/pdf/CSA-FS20.pdf.

[116] Lisa Jones and David Finkelhor, *Updated Trends in Child Maltreatment, 2007* 2 (2007). http://www.unh.edu/ccrc/pdf/Updated%20Trends%20in%20Child%20Maltreatment%202007.pdf.

How much of this decline can be attributed to increased *state* law enforcement efforts and incarceration is unclear.[117] What is clear, however, is that the declines started a full decade before passage of the PROTECT Act or the Adam Walsh Act.

Notwithstanding the declining rates of child sexual abuse, fears of the pedophile amongst us persist, infecting sentencing policy and litigation in individual cases. Seeking to capitalize on these fears, the government sometimes relies upon a study by Michael Seto and colleagues, which suggests that viewing child pornography is a valid diagnostic indicator of pedophilia.[118] From this, the government reasons that those who possess child pornography are predisposed to commit a contact offense.[119] What too often gets overlooked is that not all pedophiles commit hands-on offenses. Indeed, Seto's research concludes that child pornography offenders who suffer from pedophilia are "relatively unlikely to go on to have sexual contact with a child, especially if they have no such history in their past."[120]

Regardless of whether child pornography offenders have more pedophilic tendencies or deviant sexual interests than child molesters or not, they have lower rates of recidivism than child molesters.[121] In past testimony and comments, we have provided the Commission with numerous studies addressing the likelihood of child pornography offenders to commit future contact sex offenses.[122] Those studies find that child pornography offenders present a low risk of

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[117] *See id*.

[118] Michael C. Seto, James M. Cantor, & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. Abnormal Psychol. 610-615 (2006) (hereinafter *Diagnostic Indicator*). Significantly, of the 685 patients sampled in the study, only 100 had been charged with child pornography. *Id*. at 611.

[119] Numerous problems exist with this reasoning. Chief among them is the researchers' own acknowledgment that the 100 child pornography offenders referred for study may have been "less representative of child pornography users in general" and that a higher percentage has also been charged in the past with a sexual offense involving a child compared to the percentage in other studies (33% and 24%). *Id*. at 614.

[120] Michael Seto, *Assessing the Risk Posed by Child Pornography Offenders* 6-7 (2009), http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf (hereinafter *Assessing the Risk*).

[121] Wollert, *Federal Internet Child Pornography Offenders,* at 13 (review of nine research studies confirms that "the great majority of [child pornography offenders] have not had problems with sexual contact crimes prior to being convicted of a child pornography offense, and the great majority will not have post-conviction problems with the commission of sexual contact crimes"). *See generally* Discussion IX.

[122] *Williams Testimony*, Appendix 5-1.

recidivism in general and "do not, as a group, present a significant risk of escalation to contact sexual offenses."[123]

A more recent review by the Association for Treatment of Sexual Abusers (ATSA) – an international, multi-disciplinary organization dedicated to preventing sexual abuse – concludes that child pornography offenders "present less risk for future hands-on offenses" than contact sex offenders.[124] The ATSA also concludes that "[c]hild pornography offenders also presented a relatively low risk to commit another child pornography offense."[125]

The nine studies of online sexual offenders examined in Seto's meta-analysis on future risk all reported low rates of new contact or child pornography offenses.[126] Two of the studies found no recidivism.[127] Three more studies found no re-offenses for sexual contact.[128] Overall, the rates were "substantially lower than the recidivism rates of typical groups of offline sexual offenders."[129] Unlike the studies of past contact offenses set forth in Seto's meta-analysis, which produced widely disparate results, the studies on recidivism uniformly reported low recidivism rates.

The low risk of recidivism among online offenders may be because they have "greater self-control and less impulsivity than offline offenders."[130] Online offenders also "tend to have fewer cognitive distortions, less emotional identification with children, and greater victim empathy than offline offenders."[131] One researcher described the significance of such findings:

> The finding that Internet offenders do not appear to have the same levels of cognitive distortions or victim empathy distortions is potentially a very positive one. The lower frequency of pro-offending attitudes and beliefs

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[123] Wakeling, *Comparing the Validity*, at 164.

[124] Association for the Treatment of Sexual Abusers, *Internet-facilitated Sexual Offending* (2010), http://www.atsa.com/internet-facilitated-sexual-offending.

[125] *Id*.

[126] Seto, *Contact Sexual Offending*, at 136.

[127] *Id*. at 131, 136.

[128] *Id*. at 131.

[129] *Id*. at 136. *See also* Wakeling, *Comparing the Validity*, at 158 (in two year follow-up "generalist sex offenders had a higher rate of proven sexual reoffending (6.6) than internet-only child pornography offenders (1.6%)).

[130] Babchishin, *Characteristics of Online* Sex Offenders, at 107. *See also* Seto, *Assessing the Risk*, at 7-8.

[131] Babchishin, *Characteristics of Online Sex Offenders*, at 93.

> that serve to legitimize and maintain sexually abusive behaviors displayed by Internet offenders suggests that they may be unlikely to represent persistent offenders or potentially progress to commit future contact sexual offenses.[132]

Given the low rates of recidivism among child pornography offenders, we do not believe that the sentencing guidelines or statutes should incorporate special rules for considering the risk of recidivism. The criminal history rules provide increased sentences for persons with prior convictions, including prior sexual offenses. The criminal history guidelines also provide for the possibility of an upward departure in cases where the government can show with reliable information that the defendant committed a prior sex offense not resulting in conviction. USSG §4A1.3(a)(2)(E). Lastly, the current statutory provisions provide for a mandatory minimum sentence for anyone who is convicted of possession of child pornography after any number of prior sex offenses, including a prior child pornography offense. 18 U.S.C. § 2252A(b)(2).[133] These provisions give the courts more than enough latitude to account for whatever risk of recidivism a child pornography offender may present.

2. Consideration of a Defendant's Risk of Recidivism Beyond the Use of Past Criminal History is Fraught with Peril and Would Unduly Complicate the Sentencing Process with Little Benefit.

While an entire industry has been devoted to the prediction of future behavior, we think it a grave mistake for the Commission to chart a path that incorporates into the sentencing framework complicated assessments and evaluations.

Risk analysis is a complicated endeavor – whether it involves clinical judgment, actuarial measures, or some combination of both. No studies have tested the accuracy of clinical judgment in predicting future reoffending. [134] And while risk instruments have been developed for some categories of sex offenders,[135] no risk instrument has been developed for child

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[132] Ian Elliott, Anthony R. Beech, Rebecca Mandeville-Norden, and Elizabeth Hayers, *Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders,* 21 Sexual Abuse: J. Res. & Treatment 76, 87-88 (2009).

[133] We here maintain our longstanding opposition to mandatory minimum sentences. Should Congress opt to abolish mandatory minimum punishments for recidivist child pornography offenders, then we would be open to a discussion about the appropriateness of using such prior convictions as sentencing enhancements under the guidelines.

[134] Wakeling, *Comparing the Validity*, at 164.

[135] Actuarial risk assessments suffer numerous flaws, including the use of nonrandom samples, the failure to provide error rates, and a "high incidence of false positives." Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 Temp. L. Rev. 697, 726-30 (2011) (hereinafter *Public Safety*).

pornography offenders.[136] Indeed, the base rates (rate of reoffending) for online child pornography offenders may be "so low that it may be impractical to construct and validate a population-specific risk predictor for" them.[137] Even if an actuarial tool were available for child pornography offenders, the use of actuarial tools for *individualized* risk assessment is a subject of intense debate.[138] This is because child pornography offenders with no prior convictions for offline sexual offenses "may be genuinely different than those who have prior contact offense convictions."[139] While one research study suggests that some of the major risk factors used to assess contact offenders may be relevant to online offenders, such research is still in its infancy.[140] In short, there simply is no consensus in the scientific community about how to assess risk for child pornography offenders.[141]

Nor is there any consensus among forensic evaluators on how to conduct a more general "psychosexual evaluation" with the aim of predicting future risk.[142] Disagreements about how

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[136] Genevieve Parent, Jean-Pierre Guay, and Raymond A. Knight, *An Assessment of Long-Term Risk of Recidivism by Adult Sex Offenders: One Size Doesn't Fit All*, 38 Crim. Just. & Behav. 188, 190 ("no instrument predicted recidivism for hands-off sex offenders").

[137] Wakeling, *Comparing the Validity* at 165. *See generally* Hamilton, *Public Safety*, at 708-09 (discussing low base rates reported in many studies, which provide "strong evidence that the vast majority of sex offenders do not sexually reoffend").

[138] *See* Wakeling, *Comparing the Validity*, at 147; Fred Berlin, Nathan Galbreath, Brendan Geary & Gerard McGlone, *The Use of Actuarials at Civil Commitment Hearings to Predict the Likelihood of Future Sexual Violence*, 15 Sexual Abuse: J. Res. & Treatment 377, 381 (2003) ("Actuarials can potentially be very misleading if one incorrectly attributes the overall risk of a previously screened group to a specific individual within it."); James Vess, *Ethical Practice in Sex Offender Assessment: Consideration of Actuarial and Polygraphy Methods*, 23 Sexual Abuse J. Res. & Treatment 381, 386 (2011) (hereinafter *Ethical Practice*) (discussing debate about whether the "margin of error for actuarial risk assessments is far too great to be used to estimate an individual's risk for future offending, and should be used with great caution or not at all"). Nor is there enough information about online-only offenders for assessors and treatment providers to provide existing frameworks to such persons. Babchishin, *Characteristics of Online Sex Offenders*, at 94.

[139] Wakeling, *Comparing the Validity*, at 164.

[140] Seto, *Contact Sexual Offending*, at 139.

[141] Forensic risk assessment in general is a controversial proposition. Even "reviews of the field of forensic risk assessment share significant methodological weaknesses," including a failure to consider the effect of study settings (the group from which the study sample was drawn) and the absence of standardized guidelines. Jay P. Singh and Seena Fazel, *Forensic Risk Assessment: A Metareview*, 37 Crim. Just. & Beh. 965, 983-84 (2010).

[142] Ruth E. Mann, R. Karl Hanson, & David Thornton, *Assessing Risk for Sexual Recidivism: Some Proposals on the Nature of Psychologically Meaningful Risk Factors*, 22 Sexual Abuse J. Res. & Treatment 191, 192 (2010) ("There is considerable disagreement among researchers and practitioners about the best way to assess sexual offenders' recidivism risk").

best to conduct such evaluations have been well-documented. For example, while some evaluators believe that polygraph testing is a useful tool in sex offender assessment, its use is "considered controversial, with little consensus regarding its accuracy or appropriate applications."[143] Similar debates have emerged over the use of penile plethysmography (PPG).[144]

The Commission examined risk-classification methods in its 1996 Report to Congress regarding child sex offenses. It concluded that the "data are insufficient to base sentencing policy on these methods of classification."[145] The same holds true today.

3. Psychosexual Evaluations Are Costly Endeavors, Not Widely Available in All Jurisdictions, and Often Viewed With Skepticism by Prosecutors.

Current practices in assessing the risk of recidivism demonstrate how impractical, costly, and legally complicated it would be to use psychosexual evaluations as a matter of course when accounting for an offender's risk of committing a future sexual offense.

A survey of Defender offices shows widely divergent uses of psychosexual evaluations. A few offices regularly obtain evaluations early on in the case to help negotiate pleas and at sentencing. Some offices do so only to develop mitigation for use at sentencing. Other offices rarely retain experts to conduct evaluations. The experts, who include Ph.D's, M.D.s. and M.S.W.'s, have no set protocols for conducting the evaluations. The assessments may include any or all of the following: clinical assessments, personality testing, intelligence tests, neuropsychological tests, visual reaction tests, polygraphs, plethysmograms, and actuarial tools. Depending upon the availability of experts in the local community, which varies considerably from district-to-district, and the type of evaluation, expert costs (not including testimony) range from as low as $600 to as high as $6000, with most evaluations running in the $2,000-$3,000 range.

Prosecutors and judges have mixed reactions to these psychosexual evaluations. Many prosecutors are highly skeptical of the evaluations. The judiciary's view of the evaluations is quite mixed. Some judges depend upon them in sentencing below guideline ranges that they believe are too high. Others, skeptical about the ability to assess future risk in general or of a particular expert, place little stock in risk assessments.

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[143] Vess, *Ethical Practice*, at 381.

[144] *See United States v. Rhodes*, 552 F.3d 624, 626-27 (7th Cir. 2009) (discussing how experts disagree as to effectiveness of PPG).

[145] USSC, *Sex Offenses Against Children*, at 36.

Given this state of affairs, it would be impractical and costly to construct a sentencing system that instructs judges to account for an offender's future sexual dangerousness in any way other than through past criminal history. Because there is no uniformity in either the type of testing or its availability, the use of psychosexual evaluations could lead to unwarranted sentencing disparities.

The use of psychosexual evaluations at sentencing also raises thorny Fifth Amendment issues. A defendant may not be compelled to testify against his will at a sentencing hearing without running afoul of the Fifth Amendment. *Mitchell v. United States*, 526 U.S. 314, 316 (1999). Nor may the court draw from the defendant's silence an adverse inference about the specifics of his crime. *Id.* at 329. In reaching this conclusion, the *Mitchell* Court relied upon its earlier decision in *Estelle v. Smith*, 451 U.S. 454 (1981), which held that a capital defendant has a Fifth Amendment right to remain silent during an examination for future dangerousness that might be used at sentencing. Under *Estelle* and *Mitchell*, a defendant may not be compelled to answer questions during an examination to assess his risk of recidivism. Nor may a court draw an adverse inference from a refusal to participate in such an evaluation.[146]

The Fifth Amendment issues cannot be avoided by placing the burden on the defendant to show he is a low risk of recidivism and by calling a sentence reduction a "benefit." A "low risk" reduction could only be considered a "benefit" if sound reasons exist to set the guideline at a higher level. For example, if the Commission had sufficient evidence to conclude that the typical defendant posed a high risk of recidivism then it might be constitutionally permissible to require that the defendant prove he is not. Where the evidence does not support a presumption of sexual recidivism, as here, then the government has no legitimate interest in placing a burden on the defendant and requiring that he waive his Fifth Amendment right to obtain a sentencing reduction. In short, in the absence of strong evidence supporting a presumption of dangerousness, a requirement that the defendant prove he presents a low risk of future danger would impermissibly burden his privilege against self-incrimination.

4. Other Legal Mechanisms Exist to Reduce The Risk of "Sexually Dangerous Behavior."

Sentencing is but one component of a system aimed at reducing the risk of future "sexually dangerous behavior." Since the early 1990's, state legislatures and Congress have enacted sexual predator laws designed to impose preventative detention upon convicted sex offenders who may pose a danger to public safety.[147] In addition to these civil commitment

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[146] *But see United States v. Kennedy*, 499 F.3d 547, 551-52 (6th Cir. 2007) (court could consider defendant's unwillingness to complete court ordered evaluation).

[147] *Kansas v. Hendricks*, 521 U.S. 346, 373 (Kennedy, J., concurring) ("incapacitation is a goal common to both the criminal and civil systems of confinement").

statutes, many jurisdictions have residency restrictions designed to keep convicted offenders away from places where children congregate (schools, child-care facilities, parks). And of course, numerous states have sex offender registration laws that require offenders to register with local authorities for long periods of time or suffer criminal penalties. These laws, singly and in combination, place unprecedented restraints on the liberty of convicted sex offenders – all for the purpose of preventing future criminal behavior. Given these mechanisms, it makes little sense for federal sentencing law to consider a defendant's risk of reoffending beyond what is already taken into account within the defendant's criminal history.

5. The "Pattern of Activity Enhancement" Should Be Deleted.

In addition to counting criminal history points along the horizontal axis, the current guidelines contain a 5-level enhancement for a "pattern of activity involving the sexual abuse or exploitation of a minor." USSG §2G2.2(b)(5). This enhancement may be based on prior uncharged allegations, no matter how old, and which need only be proven by a preponderance of the evidence of questionable reliability.[148] The definition of "sexual abuse or exploitation of a minor" sweeps so broadly that it includes allegations of attempted sexual acts between a twelve- to fifteen-year-old teenager and her older (albeit only by 4 years) boyfriend, 18 U.S.C. § 2243(a), as well as non-contact offenses. If the enhancement happens to be based upon convicted conduct, those convictions are then double-counted as part of the defendant's criminal history score. USSG §2G2.2, comment. (n.3).

When the Commission added the enhancement to the previous version of §2G2.2 in 1990, several groups objected, including the Criminal Law Committee of the Judicial Conference (CLC), the American Bar Association, and Federal Defenders.[149] The CLC's letter stated that "[i]n order to retain the integrity of the structure of the guidelines, it would appear that such prior criminal conduct considerations would be more properly addressed in Chapter Four."[150] We continue to believe that the "pattern of activity" enhancement is unnecessary and should be deleted.[151]

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[148] Defenders have long encouraged the Commission to revise the relevant conduct rules by eliminating the use of acquitted conduct and limiting the use of uncharged conduct. We have also pointed out myriad problems with USSG §6A1.3 and how it provides insufficient procedural safeguards against the use of unreliable evidence at sentencing. *See* Letter from Marjorie Meyers, Chair, Federal Defender Guideline Committee, to the Honorable Patti Saris, Chair, U.S. Sentencing Comm'n., at 2-6, 16-18 (June 6, 2011).

[149] USSC, *Sex Offenses Against Children*, at 15.

[150] *Id*.

[151] This is especially true in light of the high base offense levels set under USSG §2G2.2 for possession and distribution. Those levels jumped dramatically in the period between 1991 and 2004, with possession

C. Sentencing Should Focus on the Crime Before the Court.

Our answer to the question of how sentencing judges should consider the likelihood of a defendant committing a contact offense or other "sexually dangerous behavior" is best summarized in *United States v. Ontiveros*:

> 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.

United States v. Ontiveros, No. 07-CR-333, 2008 U.S. Dist. LEXIS 58744, at *13 (E.D. Wis. 2008).[152]

IX. Probation and other Alternatives to Incarceration Should Be Available for Federal Child Pornography Offenders.

For many federal child pornography offenders convicted of possession, receipt and distribution, probation or a short period of imprisonment followed by supervision best meet the statutory purposes of sentencing. As long ago as 1990, judges advised the Commission that child pornography offenders with "no significant criminal history or future likelihood of acting out should receive straight probationary periods."[153] More recently, judges have quite plainly identified federal child pornography offenders who warrant sentences of probation or short

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increasing from a BOL of 10 to 13 to 18; receipt increasing from a BOL of 10 to 13 to 15 to 20/22; and distribution increasing from BOL 13 to 15 to 17 to 22.

Should the Commission lower the base offense levels and remove some of the enhancements that do nothing to distinguish levels of culpability or risk, then we would consider supporting a narrowly targeted enhancement for prior convictions for certain hands-on sex offenses (excluding statutory rape). While we have historically opposed the double-counting of prior convictions in Chapter Four and as a specific offense characteristic, a narrow specific offense characteristic targeted at the defendant's propensity to commit sexual crimes may be appropriate, leaving the Chapter Four enhancements to cover general criminal propensity.

[152] *See also United States v. Pinson*, 542 F.3d 822, 939 (10th Cir.), *cert. denied*, 129 S. Ct. 657 (2008) (prediction of risk at sentencing is far more imprecise than an evaluation undertaken after incarceration).

[153] USSC, *History of the Child Pornography Guidelines*, at 16.

prison sentence notwithstanding the lengthy prison terms called for under the guidelines.[154] Many of these individuals have stable employment, family support, and no prior contact with the criminal justice system. Punitive terms of imprisonment do nothing but weaken or destroy prosocial influences in their lives, making the transition back into society harder, and thus placing them at greater, not lesser, risk of recidivism.

First-time child pornography offenders present such a low risk of recidivism that scarce prison resources should be preserved for more dangerous offenders. Data from two separate federal districts show that this population presents little risk of recidivism.

(1) Dr. Richard Wollert and his colleagues studied seventy-two federal child pornography offenders on supervision. Over an average span of four years, only two of the child pornography offenders had been arrested for another child pornography offense. None was arrested for child molestation or a contact offense.[155]

(2) Between 1999 and 2011, U.S. Probation officers in the Eastern District of New York supervised 280 sex offenders, 108 of whom were convicted of child pornography offenses. Only one of the child pornography offenders committed a new sexual contact offense.[156]

A third study of Internet child pornography offenders on community supervision in the United Kingdom also showed the low risk of recidivism these offenders present. Of 74 Internet offenders convicted of possession or distribution of child pornography, not one was "reconvicted

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[154] *See United States v. Autery*, 555 F.3d 864, 867-68 (9th Cir. 2009) (affirming probationary sentence for possession of child pornography where guideline range was 41-51 months); *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008) (affirming sentence of probation for possession where guideline range was 46 to 57 months); *United States v. Stall*, 581 F.3d 276, 277-78 (6th Cir. 2009) (affirming 1-day sentence where guideline range was 57-71 months); *United States v. Manke*, No. 09-CR0172, 2010 U.S. Dist. LEXIS 3757, at *5, 23 (E.D. Wis. Jan 19, 2010) (one day sentence in possession case with range of 41-51 months); *United States v. Stern*, 590 F. Supp. 2d 945, 947-48 (N.D. Ohio. 2008) (imposing sentence of one year and a day where guideline range was 46-57 months).

The Commission's own statistics show a small number of offenders sentenced under §2G2.2 received sentences of probation. For FY 2011, 1.3% of offenders sentenced for child pornography as the primary offense received sentences of probation. USSC, *2011 4th Qtr. Data*, at tbl.18. More offenders undoubtedly would have received such sentences if the guidelines did not have such an anchoring effect on judicial decisions.

[155] Wollert, *Federal Internet Child Pornography Offenders*, at 2-18.

[156] *United States v. C.R.*, 792 F. Supp. 2d 343, 595, 597 (E.D.N.Y. 2011).

of a sexual offence within a 1.5- to 4-year follow-up period."[157] The low rates led the study's authors to conclude:

> [I]f the pre-treatment assessments[158] for the vast majority of Internet offenders suggest that they are unlikely to reoffend or escalate to contact offenses against children, it may be necessary to question whether or not there is need for treatment interventions for these individuals at all, and whether it may be better practice, as is the case for other types of sexual offenders, to focus on those offenders in the medium and high-risk categories.[159]

These low rates of recidivism counsel against incarceration or over-supervision of federal child pornography offenders with no prior history of sex offenses. Rather than spend precious prison bed space on a low risk offender, the better course is to provide alternatives to incarceration. Such alternatives are also far more likely to provide an individual with needed treatment. Very few sex offenders receive treatment within the Bureau of Prisons. Just last year, a Bureau of Prisons official testified in court that BOP "has less than 1 percent of treatment beds for the total sex offender population."[160] BOP also does not have any treatment program designed for non-contact child pornography offenders even though the research indicates that such offenders differ in key ways from contact offenders.[161] "[P]rison sentences without sex offender specific treatment do not reduce recidivism rates."[162]

We also fear that prison sentences for non-contact child pornography offenders may put them at risk of becoming more – not less – antisocial and thus increase – rather than decrease – their risk of recidivism. The Bureau of Prisons mixes contact and non-contact offenders together even though there are significant differences between the two in their cognitive distortions and

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[157] Osborn, *Use of Actuarial Risk Assessment Measures*, at 21.

[158] This "pretreatment assessment" refers to an assessment made at the completion of sentence. *Id*. at 21.

[159] *Id*. at 22.

[160] *United States v. Eric Molignaro*, No. 1:04-cr-10373-MLW-1 (D. Mass. Aug. 22, 2011), Transcript of Proceedings 5-6 (hearing before Chief Judge Mark L. Wolf) (quoting BOP testimony from January 19, 2011 Adam Walsh hearing).

[161] *See* Discussion VIII(B)(1).

[162] Council of State Governments, *Sex Offender Management Policy in the States: Strengthening Policy & Practice: Final Report* 11 (2010), http://www.csg.org/policy/documents/SOMFinalReport-FINAL.pdf.

antisocial beliefs. Imprisonment also puts non-violent, non-contact child pornography offenders alongside more violent offenders, placing them at risk of being abused by other inmates.[163]

For offenders returned to the community, the terms and conditions of supervision should be narrowly tailored so as not to hinder their ability to function as law-abiding members of society. Current law, including the guideline recommendation for a court to impose the maximum term of supervised release in a sex offense case,[164] is incompatible with the principles of effective intervention.[165] Under those principles, treatments are most likely to be effective when they target higher risk offenders, address specific needs, and match treatment to the individual's learning style and abilities.

While it may be tempting to set forth a standard set of supervision conditions for persons placed on probation or supervised release, such an approach would be difficult to square with the requirement that courts must make an individualized inquiry into the need for a condition and narrowly tailor it. 18 U.S.C. § 3583(c). Individualized consideration is also important in fashioning conditions because the goal of supervised release is not punishment or incapacitation, but "to facilitate the integration of offenders back into the community."[166] The best approach to common conditions in sex offender cases (*e.g*., restrictions on computer use, Internet access, and association with children) is to narrowly tailor a prohibition "without overly restricting a defendant's liberty."[167] Blanket, one-size-fits–all, restrictions can severely interfere with an individual's integration back into the community.

We understand that the model of supervision used by U.S. Probation calls for the use of polygraph testing for convicted sex offenders. We have several concerns about the use of polygraph testing as a part of treatment and supervision. First, no standards or "best practices"

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[163] *See C.R*., 792 F. Supp. 2d at 516 (noting how "[i]nmates who are known to be sex offenders are often viciously preyed upon by other inmates").

[164] *United States v. Apodaca*, 641 F.3d 1077, 1085 (9th Cir. 2011) (Fletcher, J., concurring) (statute and guidelines governing supervised release for persons convicted of possession of child pornography "grossly overestimate the risk that defendants . . . who are convicted of possessing child pornography downloaded from the Internet, and have no prior contact child sexual abuse convictions, will commit contact sex offenses against children"), *cert. denied*, 132 S.Ct. 296 (2011).

[165] Karl Hanson, et.al., *The Principles of Effective Intervention Also Apply to Sexual Offenders: A Meta-Analysis*, 36 Crim. Just. & Beh. 865, 867 (2009) (hereinafter *Principles of Effective Intervention*).

[166] USSC*, Federal Offenders Sentenced to Supervised Release* 9 (2010).

[167] *Id*. at 22.

govern the use of polygraphs for sex offender treatment.[168] Second, some studies suggest that polygraph testing used in post-conviction supervision produces error rates of 50%.[169] Such a high rate of false positive raises troubling concerns. Third, the use of polygraphs has been associated with false self-reports when offenders are seeking to satisfy the examiner, probation officer, or treatment provider. Fourth, in one study of a community sex offender treatment program, researchers found no significant differences in sexual reoffending between sex offenders who received polygraph exams and those who did not.[170]

Fifth, the use of polygraph examinations in supervision raises Fifth Amendment issues. A defendant on supervision retains his Fifth Amendment privilege against incrimination with respect to information that may lead to criminal prosecution. His supervision cannot be revoked for invoking the privilege under those circumstances. Nor may the government "either expressly or by implication, assert[] that invocation of the privilege would lead to revocation of probation."[171] Defendants however, are not given *Miranda* warnings prior to the administration of a probation-administered polygraph examination because courts do not consider it a custodial interrogation.[172] In the absence of warnings, we fear that some defendants will involuntarily waive their Fifth Amendment right out of fear that the failure to answer questions would lead to revocation. Whether the circumstances of the polygraph or supervision gave rise to such fear would undoubtedly have to be litigated if the defendant's answers are used against him. We think the better practice is to provide use immunity for individuals subject to polygraph testing and ensure the confidentiality of the answers for treatment and supervision purposes only.

Sixth, we are concerned about the practice of using "deceptive" answers to polygraph questions as a reason to increase supervision. Based upon what little we know about U.S. Probation's sex offender management procedures, "deceptive polygraph results may be used as the sole basis to modify conditions of supervision" when the defendant waives his right to a modification hearing under Federal Rule of Criminal Procedure 32.1(c)(2)(A).[173] If the

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[168] Ken Blackstone, *The Case for Forensic Polygraph Testing in Post-Adjudication Sexual Offender Examination and Management* (Oct. 31, 2011), http://www.corrections.com/news/article/29395-the-case-for-forensic-polygraph-testing-in-post-adjudication-sexual-offender-examination-and-management.

[169] *Id*.

[170] Robert McGrath, et.al., *Outcomes in Community Sex Offender Treatment Program: A Comparison Between Polygraphed and Matched Non-Polygraphed Offenders*, 19 Sexual Abuse: J. Res. & Treatment 381, 388 (2007).

[171] *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984).

[172] *United States v. Stoterau*, 524 F.3d 988, 1004 (9th Cir. 2008).

[173] Stephen Vance, *Looking at the Law: An Updated Look at the Privilege Against Self-Incrimination in Post-Conviction Supervision*, 75 Fed. Probation 33, 37 (2011).

defendant does not waive his right then a "deceptive polygraph result may not be used as the sole basis to modify conditions of supervision."[174] We do not understand the double standard. If the polygraph result is not enough to withstand judicial scrutiny in a proceeding where the individual is represented by counsel, we fail to see why it should be sufficient to modify a release condition when the defendant does not have counsel to advise him.

Beyond the general issue of carefully tailoring conditions to the individual and the use of polygraphs, it is difficult for us to comment on the appropriate role of judicial supervision in child pornography cases. We understand that the Criminal Law Committee of the Judicial Conference of the United States recently endorsed a new sex offender management procedures manual for U.S. Probation, which was developed by a working group of U.S. Probation officers. The manual has not been made available to us. For the Commission to render advice to Congress or judges on the role of supervision for this client population, we think it important that current practices be reviewed and assessed through a collaborative process.[175]

X. The Harm to Victims Associated with Child Pornography Offenses Cannot Be Easily Measured. The Guidelines May Appropriately Account for the Harm Caused by Production and the Initial Act of Making the Image Available on the Internet.

Accurate, empirical measurement of the harm associated with child pornography is impossible. One of the stated rationales for *criminalizing* the possession and distribution of child pornography is that circulation of the image causes "new injury to the child's reputation and emotional well-being."[176] Hence, prosecution and conviction inherently account for the harm that comes to victims when their images are circulated. We also believe it generally appropriate to account for the harm caused by the production of the images and by the initial act of uploading that first makes the image available for wider distribution on the Internet.[177]

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[174] *Id.*

[175] Center for Sex Offender Management, *Enhancing the Management of Adult and Juvenile Sex Offenders: A Handbook for Policymakers and Practitioners* 10-11, 29-30 (2007) (collaborating partners in developing policies for sex offender management should include a wide variety of stakeholders, including supervising officers, defense attorneys, judges, prosecutors, law enforcement officials, victim advocates, treatment providers, and other community service providers; first step in planning process includes collecting information about the current approach to managing sex offenders, understanding the research, and examining emerging practices), http://www.csom.org/pubs/CSOM_handbook.pdf.

[176] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 249 (2002).

[177] *See* Exum, *Making the Punishment Fit*, at 45 ("circulation-harm argument" is better addressed with an enhancement for the "person who first uploaded the images to the Internet, whether or not that person is the producer of the image").

While there are high-profile, anecdotal accounts of victims reporting the emotional angst suffered when they know their images are being circulated,[178] not all victim experiences are the same."[179] Some victims suffer less trauma from the original production of the photo than others. In some images, no face is discernible.[180] For others, the victim may not even have been aware the photo was being taken. Some images may show sexual assaults, but other images depict sexually explicit posing without any touching by an adult.[181] In addition, not all victims must endure the repeated notifications from law enforcement officials each and every time their image is found, either because they cannot be identified or located, or do not wish to be notified. For those victims who are aware that their image has been recorded and circulated, whether one or more defendants possess the image or not, the essential harm is done from the initial acts of production and distribution.[182]

In considering victim harm, it is also important to remember that unlike production and initial distribution, which bear a direct causal connection to the harm suffered by victims, possession and subsequent distribution of child pornography bears a tenuous relationship to the deep harm caused by an act of sexual exploitation or abuse. To maintain proportionality in sentencing, sexual abuse and exploitation of a child through the production of child pornography must be treated differently than the possession or distribution of child pornography.

Also undercutting the defamation analogy is the unfortunate existence of a category of pornographic images circulating on the Internet that children self-produced and posted without any prompting from an adult. Once circulated, these self-produced images are indistinguishable from any other sexually explicit image of a minor available on the Internet. Whatever harm is caused to self-producers from distribution of the image is likely different than that experienced by others.

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[178] The most widely known of these victims is "Amy" who has said that she lives "in constant fear that someone will see [her] picture and recognize [her]." "Amy's" victim impact statement was publicly released and is available on the internet. http://hamptonroads.com/2009/10/document-victim-impact-statement-girl-misty-series.

[179] Association for the Treatment of Sexual Abusers, *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse* 1, 12 (2011).

[180] In our experience, about half of the images do not depict the child's face. Moreover, the more "hard core" the pornography, the less likely it is that the face is visible.

[181] Both *New York v. Ferber*, 458 U.S. 747, 752 (1982) and *Osborne v. Ohio*, 495 U.S. 103, 107 n.1 (1990); involved images of boys masturbating and posed lasciviously alone, without an adult. Others have noted that many images "do not depict actual sexual abuse, and indeed the children photographed may not even be aware that their image has been captured." Ethel Quayle & Terry Jones, *Sexualized Images of Children on the Internet*, 23 Sexual Abuse: J. Res. & Treatment 7, 10 (2011).

[182] Exum*, Making the Punishment Fit,* at 45.

In summary, because victims are not a homogenous group and the harms they suffer from being victims of the production of child pornography vary, we do not think it wise to adopt rules aimed at capturing whatever harm may be caused by the circulation of images. The harm to victims is better accounted for in the higher base offense levels for the production of child pornography under USSG §2G2.1, and the specific offense characteristics contained therein. Because the initial act of uploading the image to the Internet is what places it into circulation, the Commission might consider an adjustment for the individual who first introduces a new image onto the Internet.[183]

XI. Child Pornography Offenders with "Pedophilic Motivations"[184] Do Not *Per Se* Present A Risk of Engaging in Future "Sexually Dangerous Behavior" or Child Pornography Offenses. For Those Offenders Who Do Present Such a Risk, Treatment and Supervision Can Reduce It.

The Commission's questions about offenders with "pedophilic motivations" seem to assume that viewing child pornography is proof of an offender's pedophilia and that such offenders are likely to reoffend. Neither of these assumptions is correct. The chief study cited for the proposition that child pornography possession is a diagnostic indicator of "pedophilia" is a 2006 study by Canadian researchers.[185] Melissa Hamilton, a scholar with a Ph.D. in Sociology and a J.D., thoroughly critiqued the Seto study in a recent article. [186] Several of her observations are relevant here.

- "First, the study itself seems to undermine the concern that pedophilia is synonymous with contact offending. The group with previous child victims was significantly less likely to be classified as pedophilic. Pedophilic preferences may correlate with arousal to stories of sexual acts with children, but pedophilia is evidently weak with respect to explaining contact offending."[187]

- Second, "all groups showed a more than minimal pedophilic response to sexual stories involving children." "The fact that the sample was entirely composed of those referred to a sexual addiction clinic for assessment may mean that it was

[183] *See* Stabenow, *A Method for Careful Study*, at 130.

[184] The question the Commission posed to witnesses uses the term "pedophilic motivations." We are uncertain as to what is meant by the term, but will assume here that it means online child pornography offenders with a sexual interest in children of any age.

[185] Michael C. Seto, James M. Cantor, & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. Abnormal Psychol. 610-615 (2006).

[186] *See* Hamilton, *Child Pornography Crusade*, at 36-40.

[187] *Id*. at 36.

biased toward those whose sexual proclivities were sufficiently deviant to cause concern to themselves and/or authorities." [188]

- Third, "the study's definition of pedophilic interest is not entirely consistent with the official definition of pedophilia or with what a contingent of treatment professionals view as deviant." Significantly, it did not "strictly differentiate between prepubescent and pubescent minors as it grouped together images involving children up to age 15."[189]

- Fourth, sexual preference was measured by phallometric tests. The use of such testing "is controversial. No standard procedures exist for conducting it, and significant questions remain about its validity and reliability." A recent study, for instance, found "no correlation between a phallometric tests and a DSM-based diagnosis for pedophilia."[190]

Nor is it true that child pornography offenders with a sexual interest in children are likely to commit a future offense that is dangerous to children. Neither a sexual preference for prepubescent or pubescent children nor a diagnosis of pedophilia is synonymous with sex offending against children.[191] As discussed above, the rates of recidivism for online offenders, including those with a sexual interest in children, are low. Experts have offered several explanations for why "pedophilic interests do not necessarily result in contact sexual offenses against children."[192] One is that contact offenders are driven by a need for confrontation "rather than in the need to act out sexual fantasies against children."[193] Another is that child molesters

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[188] *Id*. at 37.

[189] *Id*. at 37-38.

[190] *Id*. at 38-39.

[191] Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with Research Evidence*, 31 N.Y.U. Rev. L. & Soc. Change 773, 824 (2007) ("pedophilia and sexual offending against children are not synonymous") (hereinafter *Drawing the Line*); Janina Neutze, Michael Seto, et. al., *Predictors of Child Pornography Offenses and Child Sexual Abuse in a Community Sample of Pedophiles and Hebephiles*, 23 Sexual Abuse: J. Res. & Treatment 212, 233 (2011) ("Some men express their pedophilic or hebephilic interests by viewing and masturbating to child pornography or to sexual fantasies about children, but do not have sexual contacts with children."). *See generally* Hamilton, *Severe Child Pornography Sentencing*, at 581 (reviewing research showing that "correlation between pedophilia and sexual contact offenses against children is not very strong").

[192] Seto, *Contact Sexual Offending*, at 140.

[193] Hamilton, *Child Pornography Crusade*, at 49 n.251 (citing Kerry Sheldon & Dennis Howitt, *Sexual Fantasy in Paedophile Offenders: Can Any Model Explain Satisfactorily New Findings from a Study of Internet and Contact Sexual Offenders?*, 13 Legal & Criminological Psychol. 137, 153 (2008)).

are generally more anti-social, whereas "child pornography offenders tend to score low on antisocial tendencies,"[194] meaning "that they are not likely to imitate the pornographic scenes with real children."[195]

In sum, because the available evidence shows that child pornography offenders with "pedophilic motivations" are "relatively unlikely to go on to have sexual contact with a child,"[196] we do not believe that special inquiry into the "pedophilic motivations" of child pornography offenders is necessary to fashion a sentencing policy that meets the statutory purposes of sentencing.

Nor can child pornography offenders who have "pedophilic motivations" be easily identified and singled out for special consideration at sentencing. Indeed, a nonforensic sample of 193 male undergraduates, showed that 21% reported a sexual attraction to small children, leading the researchers to conclude: "[t]he current data offer strong support for the motion that male sexual response to children is relatively common in our society, even among normal (non-incarcerated and nonclinical) males."[197]

For many of the reasons discussed above, it would be a difficult, time-consuming, and expensive process to determine whether a person's child pornography offense was motivated by a sexual interest in children or for other reasons. There simply is no easy, generally accepted method of assessing sexual interests. One of the most common tests is the Abel Assessment of Sexual Interest. The use of that test for diagnostic purposes, however, has been criticized and it is not widely accepted for that purpose.[198]

Researchers have described difficulties with other methods of assessing a person's sexual interests:

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[194] Michael C. Seto, *Assessing the Risk Posed by Child Pornography Offenders* 7-8 (2009), http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf (hereinafter *Assessing the Risk*).

[195] Hamilton, *Child Pornography Crusade*, at 50.

[196] Seto, *Assessing the Risk*, at 6-7.

[197] John Breiere and Marsha Runtz, *University Males' Sexual Interest in Children: Predicting Potential Indice of "Pedophilia" in a Nonforensic Sample*, 13 Child Abuse & Neglect 65, 71 (1989). *See also* K. Smiljanich and John Briere, *Self-reported Sexual Interest in Children: Sex Differences and Psychosocial Correlates in a University Sample*, 11 Violence and Victims 39 (1996); Malamuth, *Drawing the Line*, at 792 (concluding survey of studies with finding that "sexual interest or arousal in children is not confined to a 'sick few'").

[198] *See State v. Victor O.*, 20 A.3d 669, 678-79 (Conn. 2011) (Abel test is not a valid tool for diagnosing inappropriate sexual interest); *see also United States v. C.R.*, No. 09-CR-155 (JBW), (E.D.N.Y. Jan. 28. 2011), Transcript at 598-601 (prosecution cross-examination of defense expert).

> Albeit "assessing the nature of the individual's deviant sexual interests is often the centerpiece of a sex offender evaluation," the assessment of enduring sexual preference is fraught with difficulties, mainly due to the problematic psychometric properties of the most commonly used measures. This has led to general skepticism about the utility of assessing deviant sexual interest at all. Because neither the legal (based on sexual offenses) nor the clinical approach (diagnosis of pedophilia) allow for a valid inference of deviant sexual interest, conceptually more valid assessment tools are needed.[199]

In any event, persons with pedophilia or "pedophilic motivations" can be treated and supervised in ways that reduce their risk of future offending. Reviews of sex offender treatment programs show that cognitive-behavioral therapy, relapse prevention, and self-regulation have proven successful in treating offenders.[200] As one group of researchers put it: "[e]ven if a [risk] factor is immutable with current [treatment] technologies, treatment can still help offenders learn to manage or compensate for the propensity." The most effective treatments[201] target criminogenic needs and are consistent with the same principles of effective intervention used with other offenders.[202]

Some U.S. Probation offices throughout the country have adopted supervision and treatment strategies for child sex offenders that are built upon the principles of effective interventions. Properly implemented, these strategies emphasize the need to assess risk factors,

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[199] Rainer Banse, Alexander Schmide, and Jane Clarbour, *Indirect Measures of Sexual Interest in Child Sex Offenders: A Multimethod Approach*, 37 Crim. Just. & Beh. 319, 320 (2010). *See also* Robin Wilson, et. al., *Pedophilia: An Evaluation of Diagnostic and Risk Prediction Methods*, 23 Sexual Abuse: J. Res. & Treatment 260, 270 (2010) (presence of "deviant" arousal on phallometric testing not necessarily indicative of DSM-IV-TR diagnosis for pedophilia; nor was it predictive of recidivism).

[200] *See*, *e.g*., Tony Ward, Theresa Gannon, and Pamela Yates, *The Treatment of Offenders: Current Practice and New Development with An Emphasis on Sex Offenders*, 15 Int'l Rev. Victimology 183 (2008); Steve Aos, Marna Miller, and Elizabeth Drake, Washington State Institute for Public Policy, *Evidence-Based Adult Corrections Programs: What Works and What Does Not* 5-6 (2006) (concluding after review of six "rigorous" studies that "cognitive-behavioral therapy for sex offenders on probation significantly reduces recidivism").

[201] Where the base rate of recidivism is low, as it is with child pornography offenders, it is difficult to measure treatment effects by examining recidivism rates. In other words, if the rate of reoffending is relatively low regardless of treatment, no treatment effect will be observed. Leigh Harkins and Anthony Beech, *Measurement of the Effectiveness of Sex Offender Treatment*, 12 Aggression & Violent Beh. 37, 38 (2007).

[202] Hanson, *Principles of Effective Intervention*, at 886.

identify strengths, and target those needs for intervention.[203] Using a multi-disciplinary and inter-agency approach, these strategies focus on treatment, community surveillance, location monitoring, and computer monitoring.[204] Treatment modalities include cognitive behavioral techniques, *clinical* polygraphs and plythesmographs, as well as medication therapy, where appropriate.[205] Officers supervising these offenders have specialized caseloads and are directed to monitor research publications so they can use the most effective, evidence-based interventions on sex offenders.[206]

XII. Sentencing Policy Can Have Little, if Any, Effect on the Demand for Child Pornography.

Prohibitions against the possession and distribution of child pornography have been upheld on the theory that "drying-up-the-market" for such materials would deter its production and the resulting abuse of children. *Osborne v. Ohio*, 495 U.S. 103, 109 (1990); *New York v. Ferber*, 458 U.S. 747, 762 (1982). The same theory, however, does not support the notion that tough sentences on possessors and distributors will deter the production of child pornography.

A. Child Pornography Thrives in A Global Market That Cannot Be Significantly Impacted By U.S. Sentencing Policies.

In 2010, the United Nations Office on Drugs and Crime assessed the global nature of the child pornography market.[207] The report makes clear that the production, trading, and viewing of child pornography are not isolated to the United States or even North America. Instead, it is produced in numerous places around the world and crosses all continents through social networks, with concentrations in Western Europe, Canada, Russia, and the United States.[208]

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[203] *See generally* Helen Creager, LCSW, Sex Offender Treatment, U.S. Probation, Central California (2007) (powerpoint presentation), http://www. Socialworkers.org; Roger Pimentel and Jon Muller, *The Containment Approach to Managing Defendants Charged with Sex Offenses*, 74 Fed. Probation (2010), http://www.uscourts.gov/viewer.aspx?doc=/uscourts/FederalCourts/PPS/Fedprob/2010-09/index.html.

[204] *See generally C.R.*, 792 F. Supp. 2d at 598 (describing Containment Approach Model for supervision and treatment of sex offenders).

[205] Medications, such as testosterone lowering agents, have been used to alter sexual responses. *See e.g.*, Virginie Moulier et. al., *A Pilot Study of the Effects of Gonadotropin-Releasing Hormone Agonist Therapy on Brain Activation Pattern in a Man with Pedophilia*, 56 Int. J. Offender Therapy & Comp. Criminology 50 (2011).

[206] Memorandum from Nancy Gregorie on New Sex Offender Management Policy and Procedures (June 27, 2011), http://jnet.ao.dcn/Probation_and_Pretrial_Services/Memos/2011_Archive/ppspad110008.html; Administrative Office of the U.S. Courts, Guide to Judiciary Policy, Vol 8, Part I (2011).

[207] UNDOC, *Globalization of Crime, supra* note 75.

[208] *Id*. at 211, 213.

Eighty-nine countries do not even have legislation aimed at child pornography.[209] Of those that do, fifty-three do not define it; and thirty-three do not criminalize the knowing possession of child pornography.[210]

Because there is a large legal market for images of child pornography, U.S. sentencing policy can do little to stop its global proliferation. In fact, harsh U.S. sentences for child pornography will do nothing but drive the U.S. market deeper underground and potentially make such materials more rather than less enticing.[211] Moreover, just as harsh sentences for drug offenders have failed to reduce the market for illegal drugs, harsh sentences for child pornography offenders fail also.[212]

B. The Child Pornography Market Does Not Operate By The Normal Rules of Supply and Demand.

"Both the State and Federal Governments have sought to suppress child pornography for many years, only to find it proliferating through the new medium of the Internet." *United States v. Williams*, 553 U.S. 285, 307 (2008). Child pornography thrives in cyberspace independent of an organized market place. The 2010 U.N. report notes that child pornography has not attracted the attention of organized crime groups like once feared. "Although some large-scale commercial websites have been detected, most of the traffic in these materials appears to occur on a voluntary basis between amateur collectors, increasingly through peer-to-peer networks. The share of websites that are commercial seems to vary dramatically by jurisdiction. This may be related to the likelihood of being *prosecuted* in any given country."[213] Because child pornography is free, widely available and easy to produce, it is not subject to the normal laws of supply and demand. To possess or distribute child pornography, all one really needs is access to the Internet.[214] One does not have to pay or barter anything for the images,[215] and need not

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[209] John Carr, Commonwealth Internet Governance Forum, *A Joint Report on Online Child Protection Combatting Child Pornography on the Internet* 19 (2010), http://icmec.org/en_X1/pdf/Online_Child_Protection.pdf.

[210] *Id*.

[211] *See* Hamilton, *Severe Child Pornography Sentencing*, at 583 & n.258.

[212] *See Beiermann*, 599 F. Supp. 2d at 1103.

[213] UNDOC, *Globalization of Crime*, at 13 (emphasis added).

[214] The number of global internet users almost doubled in the four years from passage of the Protect Act in 2003 to 2007. UNDOC, *Globalization of Crime*, at 31 (International Telecommunication Union reported a jump in internet uses from 721 million in 2003 to 1,344 million in 2007). As of March 31, 2002, there are an estimated 2.5 million internet users in the United States, which represents about 78% of the population. *Internet World Stats, Usage and Population Statistics*, http://www.internetworldstats.com/stats14.htm.

conduct business with the producer. To produce child pornography, a person willing to abuse a child needs nothing more than a digital camera and storage media. For this reason, it is unlikely that harsh punishment of an end user will do anything to destroy the market for child pornography. "Child pornography is very difficult to counter because of its global accessibility and the anonymity afforded by the Internet."[216] "To deal with these markets, creative solutions are needed, drawing on techniques not necessarily found in the law enforcement toolkit."[217] In short, U.S. Sentencing policy is unlikely to have any meaningful impact on the demand side of child pornography.

C. Possession, Receipt, and Distribution of Child Pornography Do Not Fuel The Production of Child Pornography As Much As Previously Feared.

In determining whether sentencing can or should play a role in reducing the proliferation of child pornography distribution, receipt, and possession offenses, it is also important to consider evidence that the demand for child pornography images does not appear to fuel the production of child pornography. One of the few studies of child pornography production found no evidence to support a common assumption that possession of child pornography results in more production. In a national study of arrests for child pornography production at two different points in time (2000-2001 and 2006), researchers found no evidence that child pornography production is increasing or that child pornography producers were targeting younger victims or violent abuse. Perhaps most significantly, the data "suggest that online distribution often was not a motivation for CP production." Instead, "a substantial number of CP producers appear to be creating images for their own use and not for distribution or trading."[218] The study also pierced the myth that all production of child pornography necessarily involves sexual abuse or assault. "[A]bout one third of CP production arrests did not involve contact sexual offenses."[219]

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[215] One poll of forensic investigators estimated that pay-per-view websites accounted for only 7.5% of the sources of images, with P2P networks being the predominant means of distribution. Baines, *Law Enforcement Response*, at 33-34.

[216] Prichard, *Internet Subcultures*, at 588.

[217] UNDOC, *Globalization of Crime*, at 18. Creative demand reduction strategies include efforts by the Internet industry to "block or slow access to relevant sites"; "pop-up warnings" linked to child pornography search terms; "highlighting the illegal status of the materials; and using " warnings to combat cognitive distortions about the harm of child pornography." Prichard, *Internet Subcultures*, at 589.

[218] Janis Wolak, David Finkelhor, Kimberly J. Mitchell, & Lisa M. Jones, *Arrests for Child Pornography Production: Data at Two Time Points from a National Sample of U.S. Law Enforcement Agencies*, 16 Child Maltreatment 184, 192-93 (2011).

[219] *Id*.

Also relevant here is the U.N. Report, which remarked on the dearth of empirical evidence supporting the theory that "children are being victimized for the sole purpose of making marketable child pornography." While noting the need for more research, it concluded that "in most cases, the images are generated as a result of the abuse, rather than the abuse being perpetrated for the purpose of selling images."[220] Even if there were a commercial market for child pornography, it would be far more lucrative to create lifelike child pornography through digital imaging software than to abuse a real child.[221] While still unlawful if marketed as a real child, no harm comes to a real child from its production.

D. If Sentencing Policy is to Play a Role in Reducing the Demand for Child Pornography, It Should be Directed at Producers and Those Who Encourage the Production of New Pornography.

Even though recent research shows that child pornography is produced primarily for the producers' own use rather than for distribution or trading, we acknowledge that there have been cases of persons producing child pornography to share with others on the Internet. We believe that sentencing policy can target the minority of offenders who produce child pornography or actively encourage its production by soliciting images of fresh abuse, viewing live feeds of ongoing abuse, or commissioning "custom" production. Just as persons who play a more minor role in drug activity (users and low-level distributors) should receive lesser sentences than those who produce or traffic in large quantities of drugs, persons who play lesser roles in child pornography offenses (users and not-for-profit distributors) should receive significantly lesser sentences than producers.

XIII. Conclusion

We understand that the current political climate may make it difficult to do what is necessary to ensure just sentences for child pornography offenders. Nevertheless, we encourage the Commission to respond to judicial feedback, and base its recommendations on empirical evidence. That is, we encourage the Commission to both recommend the elimination of mandatory minimum penalties for these offenses, and craft a guideline that, first, is less severe overall, and, second, better differentiates between the range of offenders that fall within this primary offense category. We hope this testimony provided some assistance in that regard, and we welcome the opportunity for additional contributions to the process in the future.

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[220] UNDOC, *Globalization of Crime*, at 214.

[221] Hamilton, *Child Pornography Crusade*, at 56.

Sentences for Child Pornography Offenders Among States with Available Data

State	**Maryland** **2008-2010**
Sentencing summary	**Possession:** 28 cases **Incarceration rate:** 72%[1] Sentence to time served at sentencing: 29% Probation: 29% **Average Incarceration Sentences:** 15.9 mos. (mean) Among those sentenced to time served: 3.4 months Among those sentenced to prison: 24.3 months **Distribution or Production**: 23 cases **Incarceration rate:** 70% Sentence to time served at sentencing: 17% Probation: 30% **Average Incarceration Sentences:** 32.5 mos. (mean) Among those sentenced to time served: 1.3 months Among those sentenced to prison: 42.9 months
Comments	

	Massachusetts **FY 2008-2010**
Sentencing summary	**Possession-1st Offense:** 101 cases **Incarceration Rate:** 52% In house of correction: 39% In state prison 14% Probation: 48% **Average Sentences:** In house of correction: 10 mos. (mean) In state prison; 36.4/45.9 mos. minimum/maximum (means) **Possession- 2nd Offense:** 3 cases **Incarceration Rate:** 100% **Average Sentences:** In state prison; 60 mos. **Possession- 3rd Offense:** 1 case **Incarceration Rate:** 100% **Average Sentences:** In state prison; minimum/maximum; 120/180 mos.
Comments	11 cases of "dissemination" or "posing" in these years; none incarcerated

[1] Totals may not equal 100% because of rounding.

State	Minnesota 2008-2010
Sentencing summary	**Possession (1st and repeat offenders):** 174 cases **Incarceration Rate:** 79.9% Prison: 8.0% Jail term as a condition of probation: 71.8% Other non-incarceration sanction: 20.1% **Average Sentences:** In prison: 52.9 mos. (mean); 41.5 mos. (median) In jail: 3.4 mos. (mean) **Dissemination:** 22 cases **Incarceration Rate:** 91% Prison: 9% Jail term as a condition of probation: 82% Other non-incarceration sanction: 9% **Average Sentences:** In prison: 55.5 mos. (mean); 55.5 mos. (median) In jail: 4.7 mos. (mean)
Comments	Of the 196 total offenders, 8 had a prior criminal sexual conduct offense; 4 of those received a prison sentence.

	Missouri **January 2008 through June 2011**
Sentencing summary	**Possession (1st and repeat offenders):** 153 cases **Incarceration Rate:** 52% Prison: 39% Intermediate Sentence: 12%; 120 days incarceration followed by probation Probation: 48% **Average Prison Sentences:** 52.3 mos. (mean) In prison: 67.7 mos. (mean) Intermediate: 4 mos. (mean) **Promotion:** 17 cases **Incarceration Rate:** 82% Prison: 77% Intermediate Sentence: 6%; 120 days incarceration followed by probation Probation: 18% **Average Sentences:** In prison: 55.5 mos. (mean); 55.5 mos. (median) In jail: 4.7 mos. (mean)
Comments	In addition to straight probation, MO has an intermediate sanction under which an offender is incarcerated in prison for 120 days, and then released to start probation.

	Oregon **2008-2011**
Sentencing summary	**Possession/Trade(1st and repeat offenders):** 97 cases **Incarceration Rate:** 34% Probation: 66% **Average Incarceration Sentences:** 42.1 mos. (mean) **Distribution:** 115 cases **Incarceration Rate:** 52% Probation: 48% **Average Incarceration Sentences:** 43.7 mos. (mean) **Production:** 70 cases **Incarceration Rate:** 92% Probation: 8% **Average Incarceration Sentences:** 111.0 mos. (mean)
Comments	Possession is prosecuted as 2nd Degree Encouraging Child Abuse under Oregon statutes, which also includes paying for porn, observing sexual conduct. Dissemination is 1st Degree, and includes reproduction and importation into state. Production is Using a Child in Display of Sexually Explicit Conduct; it carries a 70 month mand min (although some offenders appear to avoid it through "attempt" charges). 61% of these offenders were first offenders; 26% had a prior person felony; 13% had a prior child pornography felony.

State	**Pennsylvania** **2008-2010**
Sentencing summary	**Possession-1st Offense:** 260 cases **Incarceration Rate:** 52.7% Prison: 11.2% County jail: 41.7% Probation/Community Sentences: 47.1% **Average Sentences:** In prison: 11.4/48.7 mos. minimum/maximum (mean) In jail: 5.7/22.2 mos. minimum/maximum (mean) **Possession- 2nd Offense:** 21 cases **Incarceration Rate:** 86% Prison: 62% County jail: 24% Probation/Community Sentences: 14% **Average Sentences:** In prison: 47.8/184.8 mos. minimum/maximum (mean) In jail: 6.7/24.6 mos. minimum/maximum (mean) **Dissemination**: 99 cases **Incarceration Rate:** 70% Prison: 19% County jail: 51% Probation/Community Sentences: 28% **Average Sentences:** In prison: 20.5/48.8 mos. minimum/maximum (mean) In jail: 14.4/21.1 mos. minimum/maximum (mean)
Comments	Six dissemination offenders had prior dissemination offenses.