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Dangerous Discretion: Protecting Children by Amending the Federal Child Pornography Statutes To Enforce Sentencing Enhancements and Prevent Noncustodial Sentences

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Dangerous Discretion: Protecting Children by Amending the Federal Child Pornography Statutes To Enforce Sentencing Enhancements and Prevent Noncustodial Sentences

HOLLY H. KROHEL*

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I. INTRODUCTION

Adam Stall downloaded and viewed child pornography for more than five years before the FBI uncovered the images of adult males raping young girls on his computer.¹ Some of the children were previously identified victims of sexual abuse.² The once-mandatory Federal Sentencing

1. United States v. Stall, 581 F.3d 276, 278 (6th Cir. 2009).

2. *Id.* The children were previously identified by the National Center for Missing and Exploited Children (NCMEC), which:

(A) serves as a national resource center and clearinghouse; (B) works in partnership with the Department of Justice, the Federal Bureau of Investigation, the United States Marshals Service, the Department of the Treasury, the Department of State, the Bureau of Immigration and Customs Enforcement, the United States Secret Service, the United States Postal Inspection Service, and many other agencies in the effort to find missing children and prevent child victimization; and (C) operates a national network, linking the Center online with each of the missing children clearinghouses operated by the 50 States, the District of Columbia, and Puerto Rico, as well as with international organizations, including Scotland Yard in the United Kingdom, the Royal Canadian Mounted Police, INTERPOL headquarters in Lyon, France, and others, which enable the Center to transmit images and information regarding missing and exploited children to law enforcement across the United States and around the world instantly.

Guidelines (Guidelines)³ recommended a prison sentence of approximately five to six years.⁴ The district court, however, decided a Guidelines sentence was not necessary.⁵ Instead, the court sentenced Stall to one day in prison followed by a period of supervised release.⁶

Investigators charged John Prisel with possession of child pornography after discovering his collection, which included over a thousand images, five digital movies, and four videos.⁷ Forty of the children depicted were previously cataloged in the National Child Victim Identification Program, and the videos featured children who were tied up and forced to engage in sexual acts.⁸ The presentence investigation report⁹ recommended an upward departure from the Guidelines range of twenty-seven to thirty-three months in prison because of the large number of images.¹⁰ Nevertheless, the district court imposed a non-Guidelines sentence of a single day in prison followed by a three-year period of supervised release.¹¹

42 U.S.C. § 5771(5) (2006), amended by 42 U.S.C. § 5771(9) (Supp. III 2008); see also *National Mandate and Mission*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1866 (last revised Oct. 14, 2008) (“[NCMEC’s] mission is to help prevent child abduction and sexual exploitation; help find missing children; and assist victims of child abduction and sexual exploitation, their families, and the professionals who serve them.”).

3. The Guidelines are the product of the Sentencing Reform Act of 1984, which was passed in order to remedy a system plagued by sentencing disparities. See Sentencing Reform Act of 1984 § 217(a), 28 U.S.C. § 991 (2006); *United States v. Mistretta*, 488 U.S. 361, 366 (1989). The Act established the United States Sentencing Commission to create and monitor a set of sentencing guidelines that were mandatory in the federal courts. See 28 U.S.C. § 991; U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2010).

4. *Stall*, 581 F.3d at 277.

5. See *id.* at 276, 281.

6. See *id.* at 278 n.1 (noting that a sentence of supervised release requires a nominal prison sentence).

7. *United States v. Prisel*, 316 F. App’x 377, 379–80 (6th Cir. 2008).

8. *Id.* at 379.

9. A United States probation officer must conduct a presentence investigation in accordance with the Federal Rules of Criminal Procedure, and the officer must report the results to the court before sentencing. 18 U.S.C. § 3552(a) (2006). The presentence report identifies the applicable Guidelines sentencing range and identifies any previously enumerated basis for departing from the sentencing range. FED. R. CRIM. P. 32(d)(1). The report also contains information regarding the history and characteristics of the defendant, including any prior criminal record, and any other information that might be helpful in sentencing the defendant. *Id.* 32(d)(2).

10. See *Prisel*, 316 F. App’x at 379.

11. *Id.* at 380.

In both cases, psychological testimony favoring the defendant played a critical role in the sentencing judge's decision, which is often the case when judges impose a non-Guidelines or noncustodial sentence.¹² In *United States v. Prisel*, the presentence report stated that there were not any validated risk assessment tools to determine future risk in cases in which an adult orders child pornography.¹³ The judge, however, decided to rely on Prisel's self-reported Abel Assessment test results¹⁴ and concluded the defendant was not a high risk.¹⁵ Interestingly, a recent study found that people who view child pornography are actually more likely to meet the criteria for pedophilia¹⁶ than convicted child molesters.¹⁷

Sentencing defendants convicted of child pornography offenses below the Guidelines range goes against congressional intent regarding child sex offenders, undermines the goal of uniformity in federal sentencing, and puts potential victims at risk.¹⁸ Below-the-Guidelines-range sentences, and even noncustodial sentences, have become increasingly common in federal district courts.¹⁹ Many of these non-Guidelines sentences are given

12. See *United States v. Stall*, 581 F.3d 276, 279–80 (6th Cir. 2009); *Prisel*, 316 F. App'x at 385; *United States v. Grober*, 595 F. Supp. 2d 382, 409 (D.N.J. 2008), *aff'd*, 624 F.3d 592 (3d Cir. 2010).

13. See *Prisel*, 316 F. App'x at 387.

14. The Abel Assessment for Sexual Interest (AASI) is a procedure used to measure sexual interest and arousal patterns. Richard I. Lanyon, *Psychological Assessment Procedures in Sex Offending*, 32 PROF. PSYCHOL.: RES. & PRAC. 253, 255 (2001). The AASI is a two-part test. *Id.* The first part of the test is a self-report questionnaire, which deals with the person's sexual history. *Id.* The second part measures visual reaction time. *Id.* The person views numerous slides and is asked to rate them on a scale of one to seven—highly sexually disgusting through highly sexually arousing—and the person's viewing time for each image and the person's subjective rating of each image generates a score. *Id.* The results are computer based, and the validity of the assessment is unclear. *Id.*

15. See *Prisel*, 316 F. App'x at 387.

16. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 572 (4th ed. 2000) (defining pedophilia as “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children”).

17. Michael C. Seto et al., *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610, 613 (2006).

18. See Sentencing Reform Act of 1984 § 217(a), 28 U.S.C. § 991 (2006); Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, §§ 401, 501–503, 117 Stat. 650, 667–80; Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 to -28; Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818; see also STEPHEN T. HOLMES & RONALD M. HOLMES, SEX CRIMES: PATTERNS AND BEHAVIOR 121 (2d ed. 2002) (stating that pedophiles are the largest audience for child pornography).

19. See, e.g., *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008) (affirming the district court's noncustodial sentence of sixty months of probation for a defendant convicted of possession of child pornography); *United States v. Duhon*, 541 F.3d 391, 394 (5th Cir. 2008) (affirming the district court's noncustodial sentence of sixty months of probation for a defendant convicted of possession of child pornography); *United*

to defendants convicted of possessing child pornography as opposed to those convicted of producing, distributing, or receiving child pornography.²⁰ The reasoning appears to be based, at least in part, on the opinion that possession of child pornography is a victimless crime,²¹ and that possession offenses do not warrant the substantial prison sentences the Guidelines recommend.²² Even though there are divergent views regarding the criminalization of possession,²³ Congress has indicated that possession is a serious offense that warrants serious punishment.²⁴ One major problem

States v. Phinney, 599 F. Supp. 2d 1037, 1038, 1040, 1046 (E.D. Wis. 2009) (sentencing defendant convicted of possession of child pornography to six months as opposed to the calculated range of thirty-seven to forty-six months, which included an enhancement for possessing images of prepubescent minors, namely, files of boys engaged in sex acts); United States v. McElhenny, 630 F. Supp. 2d 886, 887, 896–97 (E.D. Tenn. 2009) (sentencing defendant convicted of receipt of child pornography to prison term fifty-seven months below the bottom of the Guidelines range even though the defendant continued to download child pornography after being indicted and possessed three videos depicting sadistic behavior, one of which was of an adult trying to penetrate a two- or three-year-old girl); United States v. Riley, 655 F. Supp. 2d 1298, 1306 (S.D. Fla. 2009) (sentencing defendant convicted of transportation of child pornography with a calculated Guidelines range of 210 to 260 months to the statutory minimum of sixty months).

20. See, e.g., *Rowan*, 530 F.3d at 380; *Duhon*, 541 F.3d at 394; *Phinney*, 599 F. Supp. 2d at 1038, 1040, 1046; see also J. Elizabeth McBath, *A Case Study in Achieving the Purpose of Incapacitation-Based Statutes: The Bail Reform Act of 1984 and Possession of Child Pornography*, 17 WM. & MARY J. WOMEN & L. 37, 39 (2010) (discussing how in the majority of cases in 2009, most judges sentenced defendants within the range recommended by the Guidelines, but almost half of the federal judges in this country gave defendants sentences below the Guidelines when the defendant was charged with possession of child pornography).

21. See Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 847 (2008).

22. See *United States v. Duhon*, 440 F.3d 711, 714 (5th Cir. 2006) (“Before adjourning, the court expressed hostility toward the Sentencing Guidelines, lamented Congress’s criminalization of possessing child pornography, and promised that he would give *Duhon* ‘the lowest sentence I can give consistent with my oath.’”), *vacated*, 552 U.S. 1088 (2008); see also Rogers, *supra* note 21, at 852 (discussing how substantial deference is given to “insubstantial possession sentences” by the appellate courts and arguing to dispel the myth that possession is a victimless crime).

23. See Rogers, *supra* note 21, at 859–62 (discussing scholarly criticisms of possession and concluding that possession of child pornography is different from other possession offenses and should therefore be excluded from the general criticisms related to possession).

24. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623 (finding that illegal activities related to child pornography—including possession—“[are] harmful to the physiological, emotional, and mental health of the children depicted in child pornography and ha[ve] a substantial and detrimental effect on society as a whole”); Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818 (amending 18 U.S.C.

with pre-Guidelines sentencing was that defendants with similar criminal backgrounds often received dramatically different sentences depending on which district court judge happened to decide the case.²⁵ Thus, the Guidelines were created to avoid the disparities that existed in the pre-Guidelines world.²⁶ The advisory status²⁷ of the Guidelines brings the sentencing disparity issue back to the forefront²⁸ and requires a solution that does not violate a defendant's Sixth Amendment rights.²⁹

This Comment argues that Congress should amend the child pornography statutes in order to prevent noncustodial sentences and to make some of the otherwise discretionary enhancements within the Guidelines mandatory. Part II of this Comment discusses the legislative history of the once-mandatory Guidelines and presents an overview of the sentencing structure for those found guilty of a child pornography offense in violation of 18 U.S.C. §§ 2252 or 2252A. Part II also briefly discusses the Supreme Court's holding in *United States v. Booker*, which rendered the Guidelines advisory.³⁰ Part III illustrates how some district court judges exercised their newfound discretion—the so-called reluctant rebellion—by giving defendants noncustodial sentences and sentences far below the Guidelines,³¹ and it discusses the somewhat unsuccessful

§ 2252 (2006) to criminalize the possession of child pornography); *see also* *Constitutionality of Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Hearing*] (statement of William W. Mercer, U.S. Att'y for the District of Montana), *reprinted in* 18 FED. SENT'G REP. 205, 206 (2006) (noting that judges are using their authority to give below-Guidelines sentences in possession cases and stating that this is a major concern due to the fact that it runs contrary to the PROTECT Act).

25. *See* William W. Wilkins, Jr., *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795, 797 (1992) (discussing how before the Guidelines, “[t]he actual sentence imposed was too often a result of the luck of the draw or the assignment of a particular judge to a case”).

26. *See* Sentencing Reform Act of 1984 § 217(a), 28 U.S.C. § 991 (2006); *United States v. Mistretta*, 488 U.S. 361, 366 (1989).

27. *See* *United States v. Booker*, 543 U.S. 220, 245 (2005) (Breyer, J., delivering the opinion of the Court in part) (severing the provision within the sentencing statute that made the Guidelines mandatory and deeming the Guidelines effectively advisory—not binding—on the courts).

28. *Compare* *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008) (affirming the district court's noncustodial sentence of sixty months of probation for a defendant convicted of possession of child pornography), *with* *United States v. Cannel*, 517 F.3d 1172, 1173 (9th Cir. 2008) (affirming a defendant's seventy-two month prison sentence for possession of child pornography).

29. *See* *Booker*, 543 U.S. at 245, 259 (rendering the Guidelines advisory in light of the potential Sixth Amendment violation in cases in which the judge finds facts that change the length of the defendant's sentence).

30. *See id.*

31. *See* Mark Hansen, *A Reluctant Rebellion*, A.B.A. J., June 2009, at 54, 54–57 (discussing the criticisms related to the child pornography Guidelines and the fact that some federal judges believe they are too harsh); *see, e.g.*, *United States v. Duhon*, 541

attempt by appellate courts to draw the line under the abuse of discretion standard the Supreme Court adopted in *Gall v. United States*.³² Part IV analyzes the enumerated factors in 18 U.S.C. § 3553(a), which district courts must consider, and the appellate review process in light of the Supreme Court's mandate that substantial deference be given to the district court's sentencing determination.³³ It also evaluates the justifications judges provide when giving non-Guidelines and noncustodial sentences. Finally, Part V recommends a two-phase plan to amend the child pornography statutes in order to avoid unwarranted sentencing disparities and ensure congressional intent is carried out.

II. BACKGROUND

A. *The Sentencing Reform Act of 1984*

Congress enacted the Sentencing Reform Act of 1984 to avoid the sentencing disparities that historically existed among the federal courts.³⁴ The Sentencing Reform Act established the United States Sentencing Commission (Commission)—an independent commission in the judicial branch—to develop and monitor the Guidelines.³⁵ District court judges

F.3d 391, 394 (5th Cir. 2008) (affirming the district court's decision to give a defendant convicted of possession of child pornography a noncustodial sentence); *United States v. Phinney*, 599 F. Supp. 2d 1037, 1038, 1040, 1046 (E.D. Wis. 2009) (sentencing the defendant convicted of possession to a sentence thirty-one months below the low end of the applicable Guidelines range). For a well-reasoned response to Mark Hansen's article, see ALEXANDRA GELBER, CHILD EXPLOITATION AND OBSCENITY SECTION, CRIMINAL DIV., U.S. DEP'T OF JUSTICE, RESPONSE TO "A RELUCTANT REBELLION" 13–14 (2009), <http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf>.

32. See *Gall v. United States*, 552 U.S. 38, 51 (2007); see also *United States v. Duhon*, 440 F.3d 711, 721 (5th Cir. 2006) (reversing and remanding the district court's decision to give the defendant a noncustodial sentence), *vacated*, 552 U.S. 1088 (2008) (vacating and remanding the case for a redetermination in light of *Gall*); *United States v. Rowan*, 169 F. App'x 395, 396 (5th Cir. 2006) (per curiam) (reversing and remanding the district court's decision to give the defendant a noncustodial sentence), *vacated*, 552 U.S. 1088 (2008) (vacating and remanding the case for a redetermination in light of *Gall*).

33. See *Gall*, 552 U.S. at 51.

34. See Sentencing Reform Act of 1984 § 217(a), 28 U.S.C. § 991 (2006); *United States v. Mistretta*, 488 U.S. 361, 366 (1989).

35. See 28 U.S.C. § 991; U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2010). For an in-depth and comprehensive discussion of the development and enactment of the Guidelines under the Sentencing Reform Act of 1984, see generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

had to use the Guidelines to calculate the mandatory sentence range, which depended on the offense level, the particular crime, and the defendant's criminal history.³⁶ Although the Guidelines were mandatory, a sentencing judge could depart from the Guidelines if “there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.”³⁷

Any discretion district court judges once exercised was limited by the enactment of the Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 (PROTECT Act),³⁸ which reiterated Congress's commitment to protect children and strictly sentence those who commit sex offenses.³⁹ The PROTECT Act amended 18 U.S.C. § 3553(b), and several individual sections of the Guidelines, to allow downward departures⁴⁰ in child pornography cases only when the mitigating circumstance in question was previously and affirmatively identified as an appropriate reason for a departure.⁴¹ The PROTECT Act

36. See Sentencing Reform Act of 1984 § 212(a)(2), 18 U.S.C. § 3553 (2006).

37. *Id.*; *see, e.g.*, *United States v. One Star*, 9 F.3d 60, 61 (8th Cir. 1993) (affirming the district court's downward departure due to the “unusual mitigating circumstances of life on an Indian reservation,” which the district court deemed a mitigating circumstance not adequately taken into account by the Commission).

38. Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

39. See *id.*; *see also* Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818 (amending 18 U.S.C. § 2252 to criminalize the possession of child pornography).

40. Downward departures are sentences below the applicable Guidelines range. See Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 § 401 (discussing the limited circumstances under which a downward departure is permissible in child-related criminal cases—including all child pornography cases—and the amendments to the Guidelines); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(b)(1) (2010) (limiting the permissible grounds for a downward departure in “child crimes and sexual offenses” to mitigating circumstances that “[have] been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements”).

41. Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 § 401; *see* 18 U.S.C. § 3553(b) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(b)(1) (2010). Examples of previously identified appropriate reasons include age and extraordinary physical impairment. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.22 (2010) (stating that age “may be a reason to depart downward only if and to the extent permitted by § 5H1.1,” and that “[a]n extraordinary physical impairment may be a reason to depart downward only if and to the extent permitted by § 5H1.4”). Under the current Guidelines—amended November 1, 2010—age “may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.” *Id.* § 5H1.1. Additionally, it might “be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.” *Id.* In terms of physical impairments, “[a]n extraordinary physical impairment may be a reason

also changed the appellate standard of review to de novo for cases in which the district court sentenced a defendant outside the Guidelines range.⁴² In light of the number of downward departures in child pornography cases, Congress sought to curb judicial discretion by prohibiting downward departures on nonspecified grounds and by changing the standard of review to limit judicial discretion.⁴³ These amendments indicated Congress's clear intent for criminals convicted of child pornography offenses to face harsh penalties in every federal court.⁴⁴

*B. The Sentencing Structure for Those Found Guilty of
Child Pornography Offenses*

Defendants convicted of transporting, receiving, distributing, selling, reproducing, or possessing child pornography or visual depictions of a minor engaging in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252A or 2252,⁴⁵ are sentenced according to Guidelines section

to depart downward; e.g., in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." *Id.* § 5H1.4.

42. See Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 § 401; 18 U.S.C. § 3742(e) (2006). Prior to the PROTECT Act, appellate courts had to defer to the district court's application of the Guidelines in light of the particular facts. See 18 U.S.C. § 3742(e); Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 § 401.

43. See Alan Vinegrad, *The New Federal Sentencing Law*, 15 FED. SENT'G REP. 310, 310–12 (2003) ("A primary justification for the amendment was the perception that sentences in child pornography cases were too low because of a disproportionately high incidence of downward departures."); see also Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1467 (2008) (discussing that although the original version of the PROTECT Act would have applied in all cases, "[i]n the final bill, the nearly absolute prohibition on judicial downward departures was limited to crimes involving child pornography, sexual abuse, and child trafficking"). For an example of a pre-PROTECT Act case in which the sentencing judge gave a defendant a below-the-Guidelines sentence, see *United States v. Shasky*, 939 F. Supp. 695, 695–70 (D. Neb. 1996), which discusses the reasons for giving a below-the-Guidelines sentence of probation—including six months of home confinement—to a state trooper convicted of receiving sexually explicit material involving minors.

44. See generally Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003 § 401 (amending the then-mandatory Guidelines to reduce the incidence of departures and increase the offense level in child pornography cases involving material that portrays violent or sadistic conduct and in cases in which the defendant possesses a large number of images).

45. The term *child pornography statutes* will be used throughout this Comment to refer to offenses in violation of §§ 2252 or 2252A. Section 2252 prohibits "[c]ertain activities relating to material involving the sexual exploitation of minors" and deals with visual depictions of "a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252 (2006). Section 2252A, on the other hand, prohibits "[c]ertain activities relating to

2G2.2.⁴⁶ Both statutes impose minimum and maximum sentences for all offenses except possession, which has a maximum sentence of ten years of imprisonment but currently does not have a statutory minimum under either statute.⁴⁷ There is also an affirmative defense available to defendants charged with possession.⁴⁸ The affirmative defense is important because it eliminates the possibility of convicting a person who mistakenly downloads child pornography.⁴⁹ Once a defendant is convicted under either statute, the judge must determine the applicable offense level and the defendant's criminal history category in order to produce the proper Guidelines sentence range.⁵⁰

C. United States v. Booker and the Increase in Below-the-Guidelines Sentences

In 2005, the Supreme Court decided *United States v. Booker*, which rendered the Guidelines advisory.⁵¹ The Court held that the Guidelines

material constituting or containing child pornography.” *Id.* § 2252A. Section 2252A is broader because child pornography includes depictions “of a minor engaging in sexually explicit conduct” as well as computer-generated images that are indistinguishable from “a minor engaging in sexuality explicit conduct” or depictions “created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.” *Id.* § 2256.

46. *Id.* §§ 2252, 2252A; U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2010).

47. 18 U.S.C. §§ 2252, 2252A.

48. *Id.* §§ 2252(c), 2252A(d).

49. *See id.* §§ 2252(c), 2252A(d) (outlining the affirmative defense available if the person takes reasonable steps to destroy the material or promptly reports the matter to law enforcement).

50. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2010). The offense level in child pornography cases is predominately based upon the provisions within section 2G2.2 of the Sentencing Guidelines Manual, but potential adjustments to the initial calculation also come from other parts of the Guidelines. *Id.* §§ 1B1.1, 2G2.2; *see, e.g., id.* § 3E1.1 (giving a defendant a two-level decrease for taking responsibility); *id.* § 3B1.2 (giving a defendant who was a minimal participant in the criminal activity a four-level decrease). A defendant's prior criminal acts dictate the criminal history category into which the defendant is placed. *See id.* § 4A1.1. The criminal history category, in conjunction with the final offense level, produces the sentence range. *See id.* ch. 5, pt. A. The base level for a defendant convicted of a child pornography offense is level eighteen for possession and level twenty-two for all other offenses in violation of the child pornography statutes. *Id.* § 2G2.2(a). The defendant's offense level increases or decreases based on the specific offense characteristics listed in section 2G2.2(b) and the possible adjustments specified in chapter three of the Guidelines. *Id.* § 2G2.2(b), ch. 3; *see, e.g., id.* § 3E1.1 (stating that a defendant who “clearly demonstrates acceptance of responsibility for his offense” is entitled to a two-level decrease). Accordingly, a defendant with no criminal record who is convicted of possession of child pornography, accepts responsibility, and is not subject to any of the enhancements ends up with an offense level of sixteen and a prison sentence range of twenty-one to twenty-seven months. *Id.* § 2G2.2, ch. 5, pt. A, sentencing tbl.

51. *United States v. Booker*, 543 U.S. 220, 245, 259 (2005) (Breyer, J., delivering the opinion of the Court in part).

violate a defendant's Sixth Amendment right to a jury trial when the trial judge's additional findings enhance the sentence beyond what is authorized by the jury's verdict.⁵² The remedial majority decided that there were two options in light of this substantive holding.⁵³

The first option the Court considered would have added the Court's constitutional requirement into the Sentencing Reform Act.⁵⁴ The Guidelines would have remained mandatory as long as the jury found, or the defendant admitted, all of the facts that affected the length of the sentence.⁵⁵ This remedial approach would have only required juries to make additional decisions in a minority of cases because most criminal matters are resolved through plea bargaining, which takes place without a jury.⁵⁶ The second approach, ultimately adopted by the remedial majority, made the Guidelines advisory in order to cure the Sixth Amendment problem.⁵⁷ The remedial majority believed Congress would have preferred "mak[ing] the Guidelines system advisory while maintaining a strong connection between the sentence imposed and the offender's real conduct."⁵⁸ Thus, the decision was based on preserving "the increased uniformity of sentencing that Congress intended its Guidelines system to achieve."⁵⁹

52. *Id.* at 244–45.

53. *See id.* at 245–46

54. *Id.* at 246.

55. *See id.* This option would have ensured that there was not a violation of the defendant's Sixth Amendment rights by "preventing the sentencing court from increasing a sentence on the basis of a fact that the jury did not find (or that the offender did not admit)." *Id.*

56. *See id.* at 246–48 ("It is, of course, true that the numbers show that the constitutional jury trial requirement would lead to additional decision-making by juries in only a minority of cases.").

57. *See id.* at 246.

58. *Id.*

59. *Id.* Justice Breyer—who wrote the remedial majority opinion—explained why it was unwise to add the Court's constitutional requirement to the current Sentencing Reform Act instead of making the Guidelines advisory as follows:

To engraft the Court's constitutional requirement onto the sentencing statutes, however, would destroy the system. It would prevent a judge from relying upon a presentence report for factual information, relevant to sentencing, uncovered after the trial. In doing so, it would, even compared to pre-Guidelines sentencing, weaken the tie between a sentence and an offender's real conduct. It would thereby undermine the sentencing statute's basic aim of ensuring similar sentences for those who have committed similar crimes in similar ways.

Id. at 252. Justice Breyer actually wrote a dissenting opinion in response to the Court's substantive holding that the Sixth Amendment requires a jury to find all facts that affect the Guidelines range. *See id.* at 326–34 (Breyer, J., dissenting in part). The remedial

Despite the Court’s mandate that sentencing courts were still required to consider the applicable Guidelines range,⁶⁰ severing the provision of the sentencing statute that made the Guidelines mandatory⁶¹ inevitably opened the discretionary door.⁶²

Justices Stevens, Scalia, Souter, and Thomas dissented from the remedial majority’s opinion.⁶³ Justice Stevens’s dissenting opinion emphasized the fact that making the Guidelines advisory was not the only way to protect the Sixth Amendment rights of every defendant.⁶⁴ He also stated that the majority’s decision “represents a policy choice that Congress has considered and decisively rejected.”⁶⁵ Justice Scalia criticized the remedial majority’s interpretation of Congress’s primary objectives.⁶⁶ He characterized the irony of the remedial majority’s decision as follows: “In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.”⁶⁷ Finally, Justice Thomas argued that the Court’s precedents called for the invalidation of the statute as applied to Booker but did not permit the Court to invalidate the statute in its entirety.⁶⁸

opinion was necessary due to the substantive holding. *See id.* at 226–29 & 229 n.1 (Stevens, J., delivering the opinion of the Court in part) (stating that the first question presented is whether there is a Sixth Amendment violation in cases in which the judge finds facts that enhance the sentence, and, if yes, the second question asks the Court for the remedy). Four of the five justices who made up the remedial majority dissented regarding the Court’s substantive holding. *See id.* at 226, 244; *id.* at 326 (Thomas, J., dissenting in part). Therefore, it appears that the current advisory system was created by a group of justices who—with the exception of Justice Ginsburg—did not believe that there was a Sixth Amendment violation requiring a remedy in the first place. *See id.* at 244 (Stevens, J., delivering the opinion of the Court in part); *id.* at 326 (Thomas, J., dissenting in part).

60. *Id.* at 245 (Breyer, J., delivering the opinion of the Court in part).

61. *Id.*

62. *See* Paul J. Hofer, *Immediate and Long-Term Effects of United States v. Booker: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 425 (2006) (“Since the United States Supreme Court’s decision in *United States v. Booker*, the percentage of federal sentences falling within the range recommended by the federal sentencing guidelines has decreased.” (footnote omitted)).

63. *See Booker*, 543 U.S. at 272 (Stevens, J., dissenting in part); *id.* at 303 (Scalia, J., dissenting in part); *id.* at 313–14 (Thomas, J., dissenting in part).

64. *See id.* at 272 (Stevens, J., dissenting in part).

65. *Id.* Justice Stevens also reiterated that the Guidelines are constitutional in the majority of cases and that limiting sentences to the range supported by jury findings and the facts admitted to by the defendant eliminates the risk of violating the defendant’s Sixth Amendment rights. *See id.* at 279.

66. *See id.* at 303 (Scalia, J., dissenting in part).

67. *Id.* at 304.

68. *See id.* at 313–14 (Thomas, J., dissenting in part) (stating that the Court is not allowed to invalidate the statute in its entirety if the plaintiff does not establish that the statute is invalid in every situation).

In the wake of *Booker*, the imposition of non-government-sponsored⁶⁹ below-the-Guidelines-range sentences immediately increased.⁷⁰ Accordingly, in 2006, Congress reiterated the seriousness of all offenses related to child pornography and noted that the advent of the Internet only exacerbated the problem due to ease of access.⁷¹ Congress found that intrastate distribution, receipt, and possession of child pornography fuel the interstate market and are harmful to the children depicted and to society as a whole.⁷² Congressional findings also indicated that all of these illegal acts increase demand and encourage the production of more depictions of children being sexually abused.⁷³ Nevertheless, some district court judges believed that the Guidelines are too harsh on child pornography offenders, and armed with the discretionary power provided by *Booker*, these judges began to make their opinions known.⁷⁴

69. According to the Commission, cases are deemed as being sponsored by the government in a variety of situations, including: sponsorship pursuant to a plea bargain, due to stipulations, deportation, waiver of indictment or appeal, in cases involving early disposition program departures, and on other government motions. U.S. SENTENCING COMM'N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 159 (2007).

70. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 47 (2006), http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf [hereinafter FINAL REPORT].

71. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623; YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 1, 7-8 (2008).

72. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623.

73. See *id.*

74. See *United States v. Duhon*, 440 F.3d 711, 714 (5th Cir. 2006) (noting that the district court judge criticized Congress for criminalizing the possession of child pornography), *vacated*, 552 U.S. 1088 (2008).

III. THE RELUCTANT REBELLION BEGINS

A. Case Illustrations: Below-the-Guidelines Sentences and Noncustodial Sentences

In *United States v. Grossman*,⁷⁵ the National Center for Missing and Exploited Children received a report indicating that Kurt Grossman—the father of a two-year-old girl—attempted to entice children to engage in sexual acts.⁷⁶ The individual who supplied the tip said Grossman enjoyed discussing his interest in child abuse and “kinky kids” with people, which the individual learned by communicating with Grossman online.⁷⁷ Further investigation revealed that Grossman was an active participant in a child pornography-sharing Internet group, and that he sent multiple e-mails containing child pornography.⁷⁸ Investigating agents searched his computer and discovered over 600 images of child pornography, some involving prepubescent minors and sadistic conduct.⁷⁹ The Guidelines recommended a range of 135 to 168 months in prison.⁸⁰ The district court judge noted that he was “troubled” and “shocked” because, in his opinion, the Guidelines did not reflect what Grossman actually did.⁸¹ After pointing out that Grossman was educated and knew what he did was wrong, the judge sentenced him to a non-Guidelines prison term of sixty-six months.⁸²

In a similar case, *United States v. Wachowiak*,⁸³ a defendant convicted of receiving child pornography received a sentence of seventy months in prison even though the Guidelines recommended 121 to 151 months.⁸⁴ The judge indicated that the only reason he did not sentence the defendant to the statutory minimum of sixty months was because a number of the images involved extremely young children and sadistic conduct.⁸⁵ He also listed several factors he believed the Guidelines

75. *United States v. Grossman*, 513 F.3d 592 (6th Cir. 2008).

76. *Id.* at 594.

77. *Id.*

78. *Id.*

79. *See id.*

80. *Id.* The range had to be reduced to 120 months due to the applicable statutory maximum for possession. *Id.*

81. *Id.*; *see also* Hansen, *supra* note 31, at 56 (discussing how District Judge Robert Holmes Bell was “troubled” by the discovery that the thirty-five-year-old married man and father was facing a prison sentence of more than a decade for “a single count of possessing child porn”).

82. *Grossman*, 513 F.3d at 595.

83. *United States v. Wachowiak*, 412 F. Supp. 2d 958 (E.D. Wis. 2006), *aff’d*, 496 F.3d 744 (7th Cir. 2007).

84. *Id.* at 959, 964.

85. *See id.* at 964.

failed to take into account.⁸⁶ One of the factors mentioned was the defendant's character, which is one of the factors listed in § 3553(a)(1).⁸⁷ The judge stated that although “§ 3553(a)(1) requires the court to consider the character of the defendant, the Guidelines account only for criminal history,” and “[i]n cases where the defendant led an otherwise praiseworthy life, the court should consider a sentence below the advisory range.”⁸⁸ The Guidelines, however, provide a sentence range that gives the judge latitude to exercise discretion based on the defendant's good character.⁸⁹

The judges in *Grossman* and *Wachowiak* relied on the language of § 3553(a), which requires judges to impose a sentence that is “sufficient but not greater than necessary” to comply with the factors set forth in that section of the code.⁹⁰ Both judges indicated that the Guidelines range was greater than necessary, and due to the advisory status of the Guidelines, both judges were able to sentence the defendant according to their individual opinions.⁹¹

B. Appellate Courts to the Rescue?

1. The Story of Duhon and Rowan

Noncustodial sentences for defendants convicted of possession of child pornography also started to appear in the wake of *Booker*. The United States District Court for the Western District of Louisiana—in two separate cases decided by different judges—gave the defendants in *United States v. Duhon* and *United States v. Rowan* noncustodial sentences for possession of child pornography.⁹² Richard Rowan was convicted

86. *Id.* at 963.

87. *Id.*; see *infra* Part IV.A.2.

88. See *Wachowiak*, 412 F. Supp. 2d at 963.

89. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpt. 1(4)(h) (2010) (stating that the range “permit[s] courts to exercise the greatest permissible range of sentencing discretion”); see also Douglas A. Berman, *The Virtues of Offense/Offender Distinctions*, in CRIMINAL LAW CONVERSATIONS 611, 621 (Paul H. Robinson et al. eds., 2009) (discussing that many judges started to take offender characteristics into account due to the discretionary power provided by *Booker*).

90. See *United States v. Grossman*, 513 F.3d 592, 594 (6th Cir. 2008) (quoting 18 U.S.C. § 3553(a) (2006)); *Wachowiak*, 412 F. Supp. 2d at 959.

91. See *Grossman*, 513 F.3d at 594 (stating that the district court judge believed that the Guidelines sentence was not fair and did not reflect the defendant's crime); *Wachowiak*, 412 F. Supp. 2d at 962 (stating that a sentence within the Guidelines range was “greater than necessary to comply with the purposes of sentencing”).

92. See *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008) (discussing the district court's sentencing decision); *United States v. Duhon*, 440 F.3d 711, 713–14 (5th

after the authorities found over four hundred images of child pornography in his possession.⁹³ The district court decided his offense did not warrant any jail time.⁹⁴ Instead, the judge gave Rowan a non-Guidelines sentence of sixty months of probation.⁹⁵

David Duhon admitted he downloaded images of girls between the ages of eight and ten years old from the Internet.⁹⁶ His illegal collection included a picture of a young girl being raped by an adult male and being forced to perform oral sex.⁹⁷ At Duhon's sentencing hearing, the judge decided to wait on sentencing Duhon until after the Supreme Court decided *Booker*, and he assured the defendant he would give him "the lowest sentence I can give consistent with my oath."⁹⁸ After *Booker*, the sentencing hearing was reconvened.⁹⁹ The judge characterized the Guidelines as "totally discretionary" and stated that he would use this discretion to sentence Duhon to sixty months of probation.¹⁰⁰

The government appealed the district court's decisions in *Rowan* and *Duhon*.¹⁰¹ The Fifth Circuit held that the sentence the district court gave Duhon was unreasonable in light of the enumerated § 3553(a) factors.¹⁰² Although the district court certainly took the characteristics of the defendant into account, the ultimate sentence failed to give significant weight to other important factors, including the seriousness of the offense.¹⁰³ Additionally, the Fifth Circuit noted that the district court judge "expressed hostility toward the Sentencing Guidelines, [and] lamented Congress's criminalization of possessing child pornography."¹⁰⁴ In reviewing the district court's decision, the Fifth Circuit went on to say that the judge's comments "suggest that the court believed Duhon's offense was not harmful to children" and that the judge "suggested that

Cir. 2006) (discussing the sentence imposed by the district court), *vacated*, 552 U.S. 1088 (2008).

93. See *United States v. Duhon*, 541 F.3d 391, 399 (5th Cir. 2008) (discussing the district court's sentence of Rowan in comparison to Duhon).

94. *Rowan*, 530 F.3d at 380.

95. *Id.*

96. *Duhon*, 440 F.3d at 713, 719.

97. *Id.* at 719 (discussing the fact that the images "included photographs of a girl being raped by an adult male, forced to perform oral sex and placing foreign objects into her vagina").

98. *Id.* at 714.

99. *Id.*

100. *Id.*

101. *Id.*; *United States v. Rowan*, 169 F. App'x 395, 396 (5th Cir. 2006) (per curiam) (vacating and remanding Rowan's sentence in light of *Duhon*), *vacated*, 552 U.S. 1088 (2008).

102. *Duhon*, 440 F.3d at 713.

103. *Id.* at 715.

104. *Id.* at 714.

prosecuting child pornography cases was a waste of time and resources.”¹⁰⁵ After deciding *Duhon*, the Fifth Circuit vacated the district court’s decision in *Rowan* and remanded the case so that Rowan could receive a new sentence pursuant to the Fifth Circuit’s opinion in *Duhon*.¹⁰⁶ Both defendants petitioned the Supreme Court for a writ of certiorari.¹⁰⁷

2. *The Supreme Court’s Decision in Gall v. United States*

The fate of the defendants in *Rowan* and *Duhon* was the result of the Court’s decision in *Gall v. United States*,¹⁰⁸ which the Court decided before granting certiorari in *Rowan* or *Duhon*.¹⁰⁹ In *Gall*, the Court created a bifurcated process for appellate review.¹¹⁰ The first step in the appellate review process is determining whether the district court committed a procedural error.¹¹¹ Assuming that the district court did not make a procedural error, the appellate court must move on to the second step in the review process, which involves reviewing the sentence to determine if it is substantively reasonable.¹¹² The court must use the abuse of discretion standard in determining whether the sentence was substantively reasonable.¹¹³ Under *Gall*, appellate courts may presume that a sentence within the Guidelines is reasonable, but they cannot presume that a sentence outside the Guidelines range is unreasonable.¹¹⁴ Additionally, although circuit courts may consider how much the district court deviated from the Guidelines, they are required to “give due deference to the district court’s decision that the § 3553(a) factors, on a whole, justify the extent of the variance.”¹¹⁵ Finally, even when the circuit court disagrees with the district court, the fact that the appellate

105. *Id.* at 717–18.

106. *Rowan*, 169 F. App’x at 396.

107. *Duhon v. United States*, 552 U.S. 1088 (2008); *Rowan v. United States*, 552 U.S. 1088 (2008).

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

109. *Duhon*, 552 U.S. at 1088; *Rowan*, 552 U.S. at 1088.

110. *Gall*, 552 U.S. at 49–51.

111. *Id.* at 51. Procedural errors include any of the following: not calculating or miscalculating the Guidelines range, treating the Guidelines as mandatory as opposed to advisory, failing to consider the § 3553(a) factors, imposing a sentence based on facts that are clearly erroneous, or failing to adequately explain the chosen sentence. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

court would have imposed a different sentence is not a sufficient reason for reversal.¹¹⁶

After deciding *Gall*, the Supreme Court granted certiorari in *Rowan* and *Duhon*.¹¹⁷ Both decisions were vacated and remanded back to the Fifth Circuit for redetermination in light of the Court's opinion in *Gall*.¹¹⁸ Accordingly, the Fifth Circuit was forced to take a second look at both cases through a much more deferential lens.¹¹⁹

3. *Rowan and Duhon on Remand*

On remand, the Fifth Circuit affirmed the district court's probation-only sentences in *Rowan* and *Duhon*.¹²⁰ In *Rowan*, the court went through the two-step review process almost robotically.¹²¹ In a fairly brief opinion, which mainly consisted of a restatement of the review process set forth in *Gall*, the court affirmed the district court's conclusion that a probationary sentence was appropriate.¹²² Although the Fifth Circuit was compelled to affirm the case in light of the Court's decision in *Gall*, the cursory nature of the opinion on remand and its reluctant tone suggest that the Fifth Circuit believed it decided the case correctly the first time.¹²³

When the Fifth Circuit originally decided *Duhon*, it discussed the district court judge's opinion at length and pointed out numerous reasons why the sentence imposed was unreasonable.¹²⁴ The court emphasized the fact that the district court judge downplayed the seriousness of the

116. *See id.*

117. *Duhon v. United States*, 552 U.S. 1088 (2008); *Rowan v. United States*, 552 U.S. 1088 (2008).

118. *Duhon*, 552 U.S. at 1088; *Rowan*, 552 U.S. at 1088.

119. *See Rogers*, *supra* note 21, at 852 (“We cannot rely on the appellate courts to fix inappropriate sentences since their powers have been reined in by the recent Supreme Court decision in *Gall v. United States*, which mandates that appellate courts apply a highly deferential abuse of discretion standard in reviewing federal sentences.” (footnote omitted)).

120. *United States v. Duhon*, 541 F.3d 391, 394 (5th Cir. 2008); *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008).

121. *See Rowan*, 530 F.3d at 381 (stating that the district court concluded “that a non-Guidelines sentence of a sixty-month period of probation was appropriate” and affirming “[i]n light of the deferential standard set forth in *Gall*”).

122. *Id.*

123. *Compare Duhon*, 541 F.3d at 399 (affirming the district court's decision in light of the Supreme Court's mandate in *Gall* that substantial deference be given to the district court's sentencing decision), *with United States v. Duhon*, 440 F.3d 711, 713, 720 (5th Cir. 2006) (stating that “the district court severely misjudged the seriousness of Duhon's possession of child pornography,” and noting the sentence imposed “[was] unreasonable with regard to the sentencing factors”), *vacated*, 552 U.S. at 1088.

124. *See Duhon*, 440 F.3d at 713–21 (listing the various reasons why the judge's opinion was unreasonable and ultimately concluding that “the totality of the statutory sentencing factors fails to reasonably support the court's sentence”).

offense and assured the defendant he would give him the lowest possible sentence.¹²⁵ The judge's hostility towards the Guidelines, his criticism regarding Congress's criminalization of possession, and his statement about how prosecuting child pornography cases wastes the government's time and money all led to the Fifth Circuit's original conclusion that the sentence was unreasonable.¹²⁶ On remand, the Fifth Circuit focused on the Supreme Court's mandate that "when reviewing the district court's sentencing decision for substantive reasonableness," appellate courts are required to "give due deference to the district court's decision."¹²⁷ Nevertheless, if the type of reasoning employed by the district court judge in *Duhon* could not be vacated as substantively unreasonable, it is hard to imagine what could.

The Supreme Court did not explicitly state that it was reasonable to give a defendant convicted of possession of child pornography a noncustodial sentence, but in the end, the district court decisions in *Duhon* and *Rowan* remain intact.¹²⁸ In the absence of a mandatory minimum prison sentence for possession of child pornography, it is possible for a defendant to avoid incarceration if the sentencing judge believes that the Guidelines are too harsh, that possessing child pornography should not be a criminal offense,¹²⁹ or that child pornography is a victimless crime.¹³⁰ Congress has indicated that possession is a serious offense.¹³¹ In light of *Gall*, however, it appears that as long as a district

125. See *id.* at 718–19 (noting that the district court said "Duhon's offense was just a 'dumb thing,' a 'stupid thing,' and merely a 'screw up,'" which the Fifth Circuit said "understates the harm caused by possessing child pornography").

126. See *id.* at 714, 717–18 (saying the district court judge's comments "suggest that the court believed Duhon's offense was not harmful to children" and that the judge "suggested that prosecuting child pornography cases was a waste of time and resources").

127. *Duhon*, 541 F.3d at 399.

128. *Id.* at 394; *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008).

129. See *Duhon*, 440 F.3d at 714, 719; see also Wilkins, Jr., *supra* note 25, at 797 (discussing how before the Guidelines, "[t]he actual sentence imposed was too often a result of the luck of the draw or the assignment of a particular judge to a case").

130. See *Rogers*, *supra* note 21, at 849–52 (discussing numerous cases in which the judge agreed that child pornography is a victimless crime and took this factor into account when sentencing the defendant).

131. See generally Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623 (finding that illegal activities related to child pornography—including possession—"[are] harmful to the physiological, emotional, and mental health of the children depicted in child pornography and ha[ve] a substantial and detrimental effect on society as a whole"); Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, §§ 401, 501–503, 117 Stat. 650, 667–80 (amending 18 U.S.C. § 3553(b) to only allow departures

court judge avoids committing a procedural error and considers all of the enumerated factors set forth in § 3553(a),¹³² the appellate court faces an uphill battle in carrying out congressional intent.¹³³

IV. THE CURRENT STATE OF AFFAIRS

A. *The Enumerated Statutory Sentencing Factors and the Role of the Guidelines*

The current sentencing scheme requires district courts to consider all of the statutory factors listed in § 3553(a) and to impose a sentence “sufficient, but not greater than necessary” to comply with the purposes set forth in § 3553(a)(2).¹³⁴ The Guidelines are part of the enumerated statutory factors,¹³⁵ and the sentencing court must begin the sentencing process by calculating the Guidelines range.¹³⁶ Theoretically, and historically speaking, the calculated Guidelines range should be equivalent to the outcome of weighing all of the § 3553(a) factors.¹³⁷ Nevertheless, in *Spears v. United States*, the Court opened the discretionary door even

from the Guidelines when the applicable mitigating circumstance was previously and affirmatively identified as an appropriate reason for a departure and changing the appellate standard of review to de novo); Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 to -28 (finding that “prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material”); Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818 (amending 18 U.S.C. § 2252 to criminalize the possession of child pornography).

132. See *infra* Part IV.B.1.

133. See *Rogers*, *supra* note 21, at 852 (“We cannot rely on the appellate courts to fix inappropriate sentences since their powers have been reined in by the recent Supreme Court decision in *Gall v. United States*, which mandates that appellate courts apply a highly deferential abuse of discretion standard in reviewing federal sentences.” (footnote omitted)). In Justice Alito’s dissenting opinion in *Gall*, he discusses that the point of the remedial opinion in *Booker* was to ensure “that the post-*Booker* sentencing regime would still promote the Sentencing Reform Act’s goal of reducing sentencing disparities.” *Gall v. United States*, 552 U.S. 38, 63 (2007) (Alito, J., dissenting). He then said that “[i]t is unrealistic to think this goal can be achieved over the long term if sentencing judges need only give lipservice to the Guidelines.” *Id.* Therefore, it remains unclear what would actually warrant a reversal under the abuse of discretion standard in light of the fact that “[t]he other sentencing factors set out in § 3553(a) are so broad that they impose few real restraints on sentencing judges.” *Id.*

134. 18 U.S.C. § 3553(a) (2006).

135. *Id.* § 3553(a)(4).

136. See *Gall*, 552 U.S. at 49 (majority opinion) (reaffirming that a district court should begin the sentencing process by calculating the Guidelines range, and that “[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark”).

137. See *Rita v. United States*, 551 U.S. 338, 350 (2007) (“[I]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.”).

further by holding that a district court can categorically reject the “crack-to-powder ratio”¹³⁸ set forth by the Guidelines solely based on a policy disagreement—a belief that the Guidelines are too harsh.¹³⁹ Some district court judges utilized the holding in *Spears* to categorically reject the child pornography Guidelines.¹⁴⁰ The current system forces certain judges, who will inevitably reject the calculated range based on policy objections, to go through the motions of calculating the applicable Guidelines range only to reject it entirely.¹⁴¹ Part IV.A.1–4 discusses some of the enumerated factors judges must consider and how judges who impose sentences below the Guidelines in child pornography cases treat each factor.

1. The Nature and Circumstances of the Offense

The first factor listed in § 3553(a) is “the nature and circumstances of the offense.”¹⁴² In *United States v. Grober*, the district court began its discussion of this factor by saying that the defendant’s child pornography collection included more than 1500 pictures and over 200 videos.¹⁴³ Ultimately, the court was “not convinced that Grober’s child pornography

138. *Spears v. United States*, 129 S. Ct. 840, 844 (2009) (per curiam). Under the version of the Guidelines in place at the time *Spears* was sentenced, there was a “100:1 ratio between powder cocaine and crack cocaine quantities.” *Id.* at 841. As the Supreme Court explained in *Kimbrough v. United States*, “[u]nder the statute criminalizing the manufacture and distribution of crack cocaine, and the relevant Guidelines prescription, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine.” 552 U.S. 85, 91 (2007) (citations omitted).

139. *See Spears*, 129 S. Ct. at 843–44 (“[D]istrict courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines.”).

140. *See United States v. Beiermann*, 599 F. Supp. 2d 1087, 1104 (N.D. Iowa 2009) (stating that section 2G2.2 “should be rejected on categorical, policy grounds” because it is entitled to little deference and it is within the district court’s power to reject it completely).

141. *See Gall*, 552 U.S. at 63 (Alito, J., dissenting) (discussing the goal of decreasing sentencing disparities and noting that “[i]t is unrealistic to think this goal can be achieved over the long term if sentencing judges need only give lipservice to the Guidelines”); Jelani Jefferson Exum, *The More Things Change: A Psychological Case Against Allowing the Federal Sentencing Guidelines To Stay the Same in Light of Gall, Kimbrough, and New Understandings of Reasonableness Review*, 58 CATH. U. L. REV. 115, 117 (2008) (arguing that judges should not have to calculate the applicable Guidelines range before deciding what sentence is reasonable).

142. 18 U.S.C. § 3553(a)(1) (2006).

143. *United States v. Grober*, 595 F. Supp. 2d 382, 404 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010).

collection [wa]s egregiously large.”¹⁴⁴ The fact that the defendant also possessed a large amount of legal adult pornography appeared to play a role in the judge’s determination that the amount of child pornography was not “egregiously large.”¹⁴⁵ The judge concluded that “[t]o the extent that he viewed pornography obsessively, the great majority of it was adult pornography.”¹⁴⁶ However, it is hard to imagine that if a defendant were caught with a large quantity of illegal drugs that the fact that the same defendant had a larger quantity of legal drugs would change the nature and circumstances of the offense as it relates to the illegal drugs.

Some judges and scholars have noted that under the Guidelines, a defendant who is prosecuted for a contact offense or for seeking to engage in sexual acts with a child can receive a shorter sentence than a defendant who is prosecuted for possessing child pornography.¹⁴⁷ This discrepancy has been used as part of the reasoning for imposing a sentence below the range recommended by the Guidelines.¹⁴⁸ However, to the extent that it is even accurate,¹⁴⁹ it could just as easily indicate a flaw in the sentences for contact offenses.¹⁵⁰ In other words, it supports the argument that sentences for contact offenses should be longer just as much as it supports the argument that sentences related to child pornography offenses should be shorter.¹⁵¹ Some judges compare the sentence recommended by the Guidelines to the sentence the defendant would receive in state court for committing a contact offense.¹⁵² This is

144. *Id.* Ironically, the highest offense level enhancement related to the number of images in the child pornography Guidelines is a five-level enhancement when the offense involves “600 or more images.” U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (2010).

145. *Grober*, 595 F. Supp. 2d at 404. Most of Grober’s pornography collection was legal adult pornography. *Id.*

146. *Id.*

147. *See* United States v. Hanson, 561 F. Supp. 2d 1004, 1011 n.1 (E.D. Wis. 2008); Hansen, *supra* note 31, at 58.

148. *See* Hanson, 561 F. Supp. 2d at 1011 n.1.

149. *See* United States v. Duhon, 440 F.3d 711, 718–19 (5th Cir. 2006) (discussing that if Duhon had solicited a minor for sex, his Guidelines range would have been five times greater than the recommended range based on his conviction for possession of child pornography), *vacated*, 552 U.S. 1088 (2008); GELBER, *supra* note 31, at 9 (“Looking at the statutory punishments and sentencing recommendations under the Sentencing Guidelines, [this] argument falls apart. With few exceptions, the statutory penalties and minimum recommended sentences for . . . child molestation, and child enticement are higher than those for child pornography trafficking and possession for first time offenders.”).

150. Hansen, *supra* note 31, at 59 (“[U.S. Attorney Timothy W. Funnell] concedes that the typical penalties for child porn offenses tend to be more severe than those for contact offenses. But if that’s the case, he says, the solution is to increase the penalties for contact offenses, not to lower the penalties for child porn crimes.”).

151. *See id.*

152. United States v. Kustrzyk, No. 05-80216, 2007 WL 45929, at *7 (E.D. Mich. Jan. 4, 2007).

probably because most contact offenses are tried in state court.¹⁵³ One could argue, however, that the Guidelines should aim to set a standard that state courts could use as a benchmark when imposing sentences for contact offenses.

When imposing a below-the-Guidelines-range sentence in a child pornography case, district court judges often discuss the fact that there is no evidence that the defendant sexually abused any children or committed a more serious child pornography offense.¹⁵⁴ Essentially, the

153. See Robert F. Thompson III, *Character Evidence and Sex Crimes in the Federal Courts: Recent Developments*, 21 U. ARK. LITTLE ROCK L. REV. 241, 249 (1999) (“Because most sex crimes are prosecuted in state court, the new Federal Rules of Evidence allowing character evidence into sex-crime cases will probably have a limited impact on practicing criminal lawyers in Arkansas.”).

154. See, e.g., *United States v. Stall*, 581 F.3d 276, 280 (6th Cir. 2009) (discussing the statements made by the district court judge); *United States v. Baird*, 580 F. Supp. 2d 889, 893 (D. Neb. 2008); *United States v. Grober*, 595 F. Supp. 2d 382, 404 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010); *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008); *United States v. Wachowiak*, 412 F. Supp. 2d 958, 960 (E.D. Wis. 2006), *aff’d*, 496 F.3d 744 (7th Cir. 2007). In *United States v. Stall*, the sentencing judge stressed that there was no evidence the defendant committed a more serious crime, specifically, distribution of child pornography or sexual abuse. 581 F.3d at 280. The fact that there was no evidence Stall committed other crimes is not surprising. See *id.* at 277 (stating that Stall pleaded guilty to two counts of possession). Stall was only convicted of, and being sentenced for, possession of child pornography, and thus investigators were not concerned with gathering evidence related to these more serious crimes. See *id.*

In *United States v. Pauley*, the defendant teacher was convicted of possession after he paid an eighth grade student to take nude photographs of herself on more than one occasion. 511 F.3d 468, 469 (4th Cir. 2007). The sentencing court gave the defendant a below-the-Guidelines-range sentence, which the Fourth Circuit affirmed under the abuse of discretion standard. *Id.* at 469, 474. The district court concluded that a number of factors related to the nature and circumstances of the offense were relevant in this case, including the fact “that no other child pornography was found in Pauley’s house” and that he was “less culpable because the victim’s face did not appear in any of the photographs.” *Id.* at 474.

The defendant in *United States v. Riley* received the statutory minimum sentence of sixty months in prison for transportation of child pornography even though the Guidelines recommended a sentence of 210 to 240 months. 655 F. Supp. 2d 1298, 1306 (S.D. Fla. 2009). The defendant sent child pornography images over the Internet and told a person he thought was the mother of a minor child—who turned out to be an FBI agent—that he wanted to engage in sexual activity with her daughter. *Id.* at 1299. Two of the four images that the defendant sent the agent depicted children five years old or younger being forced to engage in sexual activity with adult males. *Id.* FBI agents discovered nine hundred additional images and ten videos of child pornography in the defendant’s possession. *Id.* Nevertheless, when discussing the offense, the district court judge stated that “[t]he defendant did not harm a child and did not engage in the production or sale of child pornography.” *Id.* at 1305.

In *United States v. Cruikshank*, the defendant was convicted of possession after investigators found “986 images of suspected child pornography” on the defendant’s

characterization of the offense is partially based on the absence of a more serious offense.¹⁵⁵ In reviewing the sentence in *United States v. Wachowiak*, the Seventh Circuit expressed its concern regarding the judge's reliance on the lack of evidence related to other crimes.¹⁵⁶ The Seventh Circuit said the judge's "reliance on the fact that the defendant did not commit a *more serious* crime" was questionable, and the court emphasized the fact that "the judge's duty is to address the crime the defendant *did* commit."¹⁵⁷ Rewarding defendants for not committing more serious crimes goes against the basic premise that people should be punished for the crimes they actually commit.¹⁵⁸

2. *The History and Characteristics of the Defendant*

Under the sentencing statute, one of the enumerated factors deals with the characteristics of the individual defendant.¹⁵⁹ Although every sentencing court must consider this factor, district court judges who ultimately impose a sentence below the Guidelines range tend to rely on the defendant's positive characteristics in order to justify their ultimate sentencing determination.¹⁶⁰ The fact that a defendant has a family, has

computer. 667 F. Supp. 2d 697, 698–99 (S.D. W. Va. 2009). The district court sentenced the defendant below the Guidelines range. *See id.* The court made the following statement in explaining the sentence:

Some of the images he viewed portrayed very young children, some under ten years of age. Notably, however, Mr. Cruikshank did not save these images to the hard drive of his computer. He did not email them, distribute them via peer-to-peer software, upload them, trade them, or otherwise show them to anyone else.

Id. at 699.

155. *See, e.g., Grober*, 595 F. Supp. 2d at 404 ("The government did not charge Grober with any contact behavior; there is not a shred of evidence that he harmed children by any means beyond his voyeuristic behavior."); *United States v. McElheney*, 630 F. Supp. 2d 886, 899 (E.D. Tenn. 2009) (noting that although the defendant continued to download child pornography after his indictment, he did not produce it, and there was not any evidence that he committed a contact offense).

156. *See Wachowiak*, 496 F.3d at 753.

157. *Id.* The Seventh Circuit also emphasized that "the Sentencing Commission sets and adjusts the guidelines ranges with the specific objective of achieving proportionality in sentencing for crimes of differing severity." *Id.*

158. *See id.* For example, in sentencing a defendant convicted of assault, it would seem inappropriate to discuss the fact that there was not any evidence that he committed murder or to reward him for not killing the person he assaulted. *Cf. United States v. Camiscione*, 591 F.3d 823, 834 (6th Cir. 2010) ("[I]t is not logical to justify a more lenient sentence on the basis that [the defendant] did not make or distribute child pornography or molest a child.").

159. *See* 18 U.S.C. § 3553(a)(1) (2006) (stating that the sentencing court must consider "the nature and circumstances of the offense and the history and characteristics of the defendant").

160. *See, e.g., United States v. Duhon*, 440 F.3d 711, 715 (5th Cir. 2006) (concluding that although the district court certainly took the characteristics of the defendant into

a good job, or is well educated might be part of the reason that some defendants receive a lower sentence.¹⁶¹ The absence of prior criminal convictions and the defendant's good standing in the community also appear to play a role in the sentencing process.¹⁶² Most child pornography defendants are white males, and many are in fact well educated.¹⁶³ Additionally, pedophiles are often strangers to the criminal justice system, and many are married.¹⁶⁴ Therefore, if the characteristics mentioned play a role in the sentencing determination, many defendants will receive a lower sentence for characteristics that do not appear to be very unique to the individual defendant.¹⁶⁵

account—in determining that a noncustodial sentence was appropriate—it failed to give due consideration to the other enumerated factors), *vacated*, 552 U.S. 1088 (2008); *United States v. Baird*, 580 F. Supp. 2d 889, 892–93, 895 (D. Neb. 2008) (noting that the defendant was “intelligent and well educated,” and giving him a sentence thirty-nine months below the low end of the Guidelines range); *United States v. Shipley*, 560 F. Supp. 2d 739, 743–44 (S.D. Iowa 2008) (noting that the court received letters that the defendant—husband and father of two—was “an intelligent, patient, and honorable man,” before imposing a sentence 120 months below the low end of the Guidelines range); *see also* GELBER, *supra* note 31, at 7 (“In child pornography cases . . . there is a distressing tendency to place greater emphasis on a defendant’s outer appearance of normalcy than on his criminal conduct, which can lead to an under-estimation of their danger and an over-estimation of their capacity for rehabilitation.”).

161. *See* STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 106–07, 161 (1988) (discussing how the characteristics of the typical white collar criminal make sentencing him more difficult and how it is harder for judges to sentence people who—aside from the crime they commit—are similar to themselves).

162. *See, e.g.*, *United States v. Grober*, 595 F. Supp. 2d 382, 404 (D.N.J. 2008) (stating that the defendant had not been charged with any contact behavior and noting the abundance of community support as part of the reason for giving the statutory minimum of five years), *aff’d*, 624 F.3d 592 (3d Cir. 2010); *see also* Berman, *supra* note 89, at 621 (discussing the fact that—due to the discretionary power provided by *Booker*—many judges started to take offender characteristics into account).

163. *See* U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN: FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS 5 (2006), <http://www.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>. In 2006, approximately 90% of the suspects charged with child pornography were white males and more than half of them had attended college. *Id.*

164. *See id.* at 5 tbl.6 (showing that approximately 80% of child pornography defendants had no prior felony convictions); *see also* *United States v. Lychock*, 578 F.3d 214, 220 (3d Cir. 2009) (“[L]ack of criminal history is typical of individuals convicted for possession of child pornography.”); HOLMES & HOLMES, *supra* note 18, at 101 (noting that pedophiles often have no criminal records and are married).

165. *See, e.g.*, *United States v. McElheney*, 524 F. Supp. 2d 983, 997 (E.D. Tenn. 2007) (“Typically, defendants in these cases are first offenders, highly educated, middle aged, with solid work histories.”), *vacated*, 310 F. App’x 857 (6th Cir. 2009).

Even when the Guidelines were mandatory, sentencing disparities based on race, education, and income were present in the federal courts.¹⁶⁶ A district court judge could depart from the Guidelines if there was “an aggravating or mitigating circumstance” that the judge believed had not been adequately considered by the Commission.¹⁶⁷ Using a defendant’s socioeconomic status or race in determining a sentence was expressly prohibited.¹⁶⁸ Additionally, under the once-mandatory Guidelines, family support, the defendant’s level of education, and the defendant’s work history were generally irrelevant in determining whether a departure was appropriate.¹⁶⁹ Now that the Guidelines are advisory, however, family support, education, and work history are highly relevant in some cases.¹⁷⁰ One judge said that one of the defendant’s personal characteristics that favored giving him a noncustodial sentence was his intelligence,¹⁷¹ and another judge emphasized the fact that the defendant was “intelligent and well educated.”¹⁷² It is troubling to think that someone who is not extremely intelligent or well educated, or who does not have the most noteworthy work history, would be sentenced more harshly based on these factors, which are seemingly unrelated to the offense.¹⁷³ Additionally, many district courts seem to give weight to the defendant’s good job and

166. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 285–86, 308 (2001) (discussing how even under the Sentencing Reform Act—which was supposed to eliminate disparities based on race, education, and income—major discrepancies still exist).

167. 18 U.S.C. § 3553(b)(1) (2006).

168. See U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2010).

169. See *id.* § 5H1.6 (family ties and responsibilities); *id.* § 5H1.5 (employment record); *id.* § 5H1.2 (education and vocational skills). “Education and vocational skills are not ordinarily relevant in determining whether a departure is warranted, but the extent to which a defendant may have misused special training or education to facilitate criminal activity is an express guideline factor.” *Id.* § 5H1.2 (citing *id.* § 3B1.3 (abuse of position of trust or use of special skill)). “Education and vocational skills may be relevant in determining the conditions of probation or supervised release for rehabilitative purposes, for public protection by restricting activities that allow for the utilization of a certain skill, or in determining the appropriate type of community service.” *Id.*

170. See, e.g., *United States v. Stall*, 581 F.3d 276, 280 (6th Cir. 2009) (emphasizing that the defendant had been “gainfully employed prior to his arrest, and had done well in school”); *United States v. Autery*, 555 F.3d 864, 867 (9th Cir. 2009) (affirming a below-the-Guidelines sentence of five years of probation). The district court “thought it critical that Autery enjoys the continuing support of his family, especially his wife and children.” *Id.* at 868.

171. See *Autery*, 555 F.3d at 868 (noting that the defendant is “motivated and intelligent” and rejecting the government’s contention that it was inappropriate to consider these factors).

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

173. See Mustard, *supra* note 166, at 308 (concluding—based on federal sentencing data—that “those with low levels of education and income are less likely to receive downward departures and more likely to receive upward adjustments compared to their counterparts”).

education, and then also give defendants leniency because they already lost so much when people discovered they committed this offense.¹⁷⁴

The personal contact the district court judge has with the defendant, coupled with the lack of contact the judge has with most of the victims, might be part of the reason the characteristics of the defendant play such an important role in the sentencing process.¹⁷⁵ Although crime victims have the right to be present, many of the victims are missing children, which means they cannot testify.¹⁷⁶ The fact that most child pornography defendants are white males, many of whom are educated, gainfully employed, and married with children, raises the possibility that some judges have a harder time sentencing these defendants.¹⁷⁷ In passing the PROTECT Act, Congress amended the Guidelines to prohibit judges from considering family relationships, responsibilities, and ties to the community in cases in which the defendant is convicted of a crime related to a minor.¹⁷⁸

174. See *Stall*, 581 F.3d at 280. After discussing that the defendant had been “gainfully employed prior to his arrest, and had done well in school,” the district court turned to the “need to provide just punishment.” *Id.* As the Sixth Circuit noted, “Stall’s education and career have been ‘put on hold’ and his fiancée broke off their engagement, consequences, the district court implied, that constituted significant punishment.” *Id.* Nevertheless, some argue that these personal losses should not decrease the severity of the sentence. See GELBER, *supra* note 31, at 7 (“That their fall from grace may have been more dramatic than other criminals does not mitigate the seriousness of the crime.”).

175. See Patrick Fitzgerald, U.S. Att’y, N. Dist. of Ill., Statement Before the U.S. Sentencing Commission in the Regional Hearing on the State of Federal Sentencing 8 (Sept. 10, 2009) [hereinafter Fitzgerald Statement] (transcript available at http://ftp.uscc.gov/AGENDAS/20090909/Fitzgerald_testimony.pdf) (stating that it is indeed possible that “the judges are more lenient because they have less personal contact with the victims and see things more through the lens of the defendant standing before the judge for sentencing”).

176. See 18 U.S.C. § 3771 (2006) (stating that crime victims have “[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding”).

177. See WHEELER ET AL., *supra* note 161, at 161 (discussing how it is hard for judges to sentence defendants who are seemingly not all that different from themselves); see also Ernie Allen, President & CEO, Nat’l Ctr. for Missing and Exploited Children, Statement Before the U.S. Sentencing Commission in the Regional Hearing on the State of Federal Sentencing 8 (Oct. 20, 2009) [hereinafter Allen Statement] (transcript available at http://www.uscc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Allen_testimony.pdf) (stating that those prosecuted for child pornography offenses “include teachers, lawyers, judges, doctors, coaches, business executives, and elected officials”).

178. See Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(b)(4), 117 Stat. 650, 669 (amending U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 in order to prohibit judges from considering family ties and responsibilities when sentencing a defendant convicted of an offense related to children).

The Sixth Circuit questioned the sentence imposed by one district court, wondering whether the court might “have more readily identified with the defendant because of his privileged background and the fact that he attended college,” and whether “this comfort with the defendant could have informed its decision not to sentence him to a lengthy term of imprisonment, as advised by the Guidelines.”¹⁷⁹ It is understandable that judges might have a hard time sentencing people they can relate to,¹⁸⁰ but it seems unfair to give more lenient sentences to those who are arguably no less culpable than the defendants the judges cannot relate to on a personal level.¹⁸¹ Additionally, if some judges take these factors into account when others do not, similarly situated defendants end up receiving very different sentences.¹⁸²

Another problem is that many characteristics of the individual defendant can have completely opposite results based on the mindset of the judge imposing the sentence.¹⁸³ Former Yale Law School Professor Stanton Wheeler interviewed federal district court judges in order to figure out the inner-workings of the sentencing process.¹⁸⁴ Although Professor Wheeler’s book focused on white-collar criminals, the findings are relevant to the discussion of child pornography offenders because of the demographic similarities and the analogous characteristics of the average defendants.¹⁸⁵ Most of the judges interviewed agreed about the general qualities that should play a role in assessing character.¹⁸⁶ The problem is that although some of the judges saw a given characteristic as a reason for leniency, others viewed the same characteristic as a reason to impose a more stringent penalty.¹⁸⁷ Many argue that the advisory status of the Guidelines is better for an individual defendant because the characteristics

179. *Stall*, 581 F.3d at 282.

180. *See* WHEELER ET AL., *supra* note 161, at 161.

181. *See supra* Part IV.A.2.

182. *See Hearing*, *supra* note 24, at 205–06 (statement of William W. Mercer, U.S. Att’y for the District of Montana) (discussing the “troubling trend[]” of “increased inter-circuit and inter-district sentencing disparity” in the wake of *Booker* and noting that these trends will “only serve to exacerbate disparities among similarly situated defendants”).

183. *See* WHEELER ET AL., *supra* note 161, at 102–03 (discussing that although some judges view certain characteristics as warranting leniency, others view the very same characteristics as warranting a harsher sentence).

184. *See id.* at ix.

185. *See* U.S. DEP’T OF JUSTICE, *supra* note 163, at 5; WHEELER ET AL., *supra* note 161, at 162–63; *see also* Allen Statement, *supra* note 177, at 8 (stating that those prosecuted for child pornography offenses “include teachers, lawyers, judges, doctors, coaches, business executives, and elected officials”).

186. WHEELER ET AL., *supra* note 161, at 102–03.

187. *See id.*

of that individual play a role in determining the sentence.¹⁸⁸ In theory, this argument is very logical, but it does not appear to fully account for situations in which similar defendants convicted of the same offense receive extremely different sentences.¹⁸⁹ Furthermore, it is important to remember that the Supreme Court only rendered the Guidelines advisory in order to prevent sentences that are not based on facts found by a jury or admitted to by the defendant.¹⁹⁰

3. *The Need for the Sentence Imposed To Reflect the Seriousness of the Offense, Deter Criminal Conduct, and Protect the Public from Future Crimes of the Defendant*

A district court judge is required to consider “the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”¹⁹¹ These factors tend to get overlooked in cases in which the defendant receives a below-the-Guidelines-range or noncustodial sentence, and they are essentially ignored when the district court judge does not believe that the

188. See, e.g., Jacqueline A. Johnson, First Assistant Fed. Pub. Defender for the N. Dist. of Ohio, Statement Before the U.S. Sentencing Commission in a Public Hearing on “The Sentencing Reform Act: 25 Years Later” 1–3 (Sept. 10, 2009) (transcript available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090909-10/Johnson_testimony.pdf) (discussing how the advisory Guidelines system works better than the mandatory system did, partly because the characteristics of the individual defendant play a role).

189. See Harris L. Hartz, Circuit Judge, U.S. Court of Appeals for the Tenth Circuit, Statement Before the U.S. Sentencing Commission in the Regional Hearing on the State of Federal Sentencing 1 (Oct. 20, 2009) (transcript available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Hartz_testimony.pdf) (“[W]hen one sees such a diversity of punishment for indistinguishable offenses, one can question whether the system as a whole is just.”); *supra* note 28.

190. See *United States v. Booker*, 543 U.S. 220, 245–46 (2005) (Breyer, J., delivering the opinion of the Court in part); see also *Gall v. United States*, 552 U.S. 38, 64 (2007) (Alito, J., dissenting) (emphasizing that “in reading the *Booker* remedial opinion, we should not forget the decision’s constitutional underpinnings”). The Sixth Amendment problem in *Booker* was that the “defendant has the right to have a jury, not a judge, find facts that increase the defendant’s authorized sentence.” *Id.* Justice Alito pointed out that the majority opinion in *Gall* was really based on “the allocation of the authority to decide issues of substantive sentencing policy, an issue on which the Sixth Amendment says absolutely nothing.” *Id.*

191. 18 U.S.C. § 3553(a)(2)(A) (2006).

offense is serious.¹⁹² The court also must consider “the need for the sentence imposed to afford adequate deterrence to criminal conduct.”¹⁹³ However, it seems reasonable to question whether a noncustodial sentence can convey the seriousness of a child pornography offense and whether imposing such a sentence deters others from committing future child pornography offenses.¹⁹⁴ Possession cases are the most problematic in this regard. Characterizing the possession of child pornography as “mere viewing” or “mere possession” is disrespectful to child pornography victims, and it discounts the seriousness of the offense.¹⁹⁵ Calling it a passive act is also inaccurate.¹⁹⁶ The offender is not just “open[ing] up

192. See *United States v. Duhon*, 440 F.3d 711, 714 (5th Cir. 2006) (noting that the district court “lamented Congress’s criminalization of possessing child pornography” before ultimately giving the defendant a noncustodial sentence), *vacated*, 552 U.S. 1088 (2008).

193. 18 U.S.C. § 3553(a)(2)(B) (2006).

194. See *Duhon*, 440 F.3d at 717–19 (discussing how the district court’s comments suggest that the court believed the defendant’s offense—possession of child pornography including images of prepubescent girls being raped—was not serious); see also *United States v. Camiscione*, 591 F.3d 823, 824, 834 (6th Cir. 2010) (holding that a sentence of supervised release and community service failed to provide general deterrence to others). In *Gall*, Justice Alito made the following statement in his dissenting opinion:

Although the Guidelines called for a prison term of at least 30 months, the District Court did not require any imprisonment—not one day. The opinion of the Court makes much of the restrictions and burdens of probation, but in the real world there is a huge difference between imprisonment and probation.

Gall, 552 U.S. at 69 (Alito, J., dissenting) (citation omitted).

195. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 623 (“Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”); *United States v. Phinney* 599 F. Supp. 2d 1037, 1038, 1046 (E.D. Wis. 2009) (giving the defendant a well-below-the-Guidelines sentence of six months, and calling the offense “simple possession”); B. Todd Jones, U.S. Att’y, Dist. of Minn., Statement Before the U.S. Sentencing Commission in the Regional Hearing on the State of Federal Sentencing 7–8 (Oct. 20, 2009) [hereinafter Jones Statement] (transcript available at http://ftp.uscc.gov/AGENDAS/20091020/Jones_testimony.pdf) (discussing how one judge continued to discount the seriousness of possession by repeatedly calling it “mere viewing”); Allen Statement, *supra* note 177, at 7 (discussing how one victim said the thought of these men watching her being raped made her “feel like [she] was being raped by each and every one of them”).

196. See *United States v. Borho*, 485 F.3d 904, 914 (6th Cir. 2007) (“In this case, like *Duhon*, the district court gave great weight to the fact that Borho’s conduct was largely passive and that there was no indication that he would ever pursue interactive behavior with young children.”); see also *United States v. Goldberg*, 491 F.3d 668, 674 (7th Cir. 2007) (*vacating* a noncustodial sentence for procedural errors and substantive unreasonableness prior to the standards set forth in *Gall*).

In the oral statement, which we just quoted, the grounds on which the judge justified the sentence were that the defendant was not a real deviant because he had committed the crime out of “boredom and stupidity,” . . . and that his life, rather than the lives of the small children who had been raped in order to enable the creation of sadistic child pornography to assist the defendant in masturbating, was the only “life that I can affect.”

Id. at 671. Possession increases demand in the market, which leads to the creation of more child pornography. See Adam Walsh Child Protection and Safety Act of 2006,

internet sites and pass[ing] them along.”¹⁹⁷ These offenders use crime scene videos and photos of children being abused and raped for their “personal sexual gratification.”¹⁹⁸

Unfortunately, the seriousness of child pornography is often overlooked.¹⁹⁹ In *Duhon*, the judge “believed Duhon’s offense was not harmful to children because Duhon himself did not physically molest anyone.”²⁰⁰ In reality, these crimes are heinous and harmful.²⁰¹ Every time someone views one of these illegal images, the child depicted is revictimized.²⁰² One victim who was raped as a child said she “thought her pulse would stop” when she found out that videos and images of the crime were being viewed.²⁰³ In a victim impact statement, she told the court that thinking about all of “those sick perverts” watching her being raped made her “feel like [she] was being raped by each and every one of them.”²⁰⁴ Although this certainly is not a pleasant thought, the reality

Pub. L. No. 109-248, § 501, 120 Stat. 587, 623; Allen Statement, *supra* note 177, at 5 (“[I]t is not difficult to understand the link between the demand for child pornography images and the actual sexual victimization of children needed to create new images.”).

197. See *United States v. Grober*, 595 F. Supp. 2d 382, 405 n.13 (D.N.J. 2008) (quoting a neighbor’s description of the “core conduct that [was] being punished so severely” and showing agreement by saying that it was said by someone “with the common sense eyes of a layperson”), *aff’d*, 624 F.3d 592 (3d Cir. 2010).

198. See Allen Statement, *supra* note 177, at 4 (“These libraries of images are collected and viewed for the offender’s personal sexual gratification and, more commonly, are traded, shared, and/or sold online to other offenders.”).

199. See *United States v. Cunningham*, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010) (“Child pornography is a vile, heinous crime. Mention the term to your average American and he responds with immediate disgust and a sense of unease. However, once it enters the legal system, child pornography undergoes sterilization. The sterilization goes far beyond properly removing emotion from sentencing decisions. Images are described in the most clinical sense. Victims all too often remain nameless. The only emotions on display are those of defendants, sorry that their actions were discovered by law enforcement.”).

200. *United States v. Duhon*, 440 F.3d 711, 717 (5th Cir. 2006), *vacated*, 552 U.S. 1088 (2008).

201. See *Cunningham*, 680 F. Supp. 2d at 847 (“Child pornography is a vile, heinous crime.”); Allen Statement, *supra* note 177, at 6 (“These images and videos often show children being penetrated by adult offenders and objects.”).

202. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623; Allen Statement, *supra* note 177, at 11. For an in-depth discussion explaining why child pornography is not a victimless crime, see generally Rogers, *supra* note 21.

203. Allen Statement, *supra* note 177, at 7.

204. *Id.*

of the offense and the effect it has on the victims need to be taken into account by the sentencing judge.²⁰⁵

Finally, a district court must consider “the need for the sentence imposed to protect the public from further crimes of the defendant.”²⁰⁶ Obviously if the judge does not feel the crime is harmful to begin with, this factor will be discounted.²⁰⁷ Expert testimony plays a major role in the judge’s determination of whether an individual defendant is likely to reoffend.²⁰⁸ Sometimes judges believe that the defendant does not pose a risk to the public when that defendant does not have a criminal record and there is no evidence the defendant committed a contact offense against a child.²⁰⁹ Beyond the fact that a defendant’s criminal history is already taken into account by the Guidelines,²¹⁰ it is worth noting that a pedophile generally molests numerous children—some estimate as many as one hundred—before ever getting caught.²¹¹ Additionally, pedophiles often have no criminal record prior to the first time they are convicted of a child-related offense.²¹²

205. See generally *United States v. Fiorella*, 602 F. Supp. 2d 1057, 1075 n.8 (N.D. Iowa 2009) (“It is easier to overlook the horrors of child pornography when, as is often the case, the material at issue is not presented to the sentencing judge. . . . But the horrors of child pornography are real even if those who sit in judgment do not have occasion to view them.”); *Cunningham*, 680 F. Supp. 2d at 854 (“Absent examining the images, one cannot get a true sense of the depravity that they depict. Thus, the Court implores any reviewing Court to personally examine the images at issue and not simply rely on a written description of their contents.”).

206. 18 U.S.C. § 3553(a)(2)(C) (2006).

207. See *United States v. Riley*, 655 F. Supp. 2d 1298, 1306 (S.D. Fla. 2009) (sentencing a defendant convicted of transportation of child pornography with a calculated Guidelines range of 210 to 260 months to the statutory minimum of sixty months). The district court judge emphasized that the defendant “sent 3 images of child pornography over the internet and expressed a desire to engage in sexual activity with a minor child,” but at the same time, “[t]he defendant did not harm a child and did not engage in the production or sale of child pornography.” *Id.* at 1305.

208. See, e.g., *United States v. Baird*, 580 F. Supp. 2d 889, 894–95 (D. Neb. 2008) (concluding that the defendant was not likely to reoffend and “stress[ing] the importance of opinions of the medical professionals who . . . have determined that he is not likely to reoffend and is not a predator”); *infra* Part IV.C.3.

209. See, e.g., *United States v. Grober*, 595 F. Supp. 2d 382, 404 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010); *United States v. McElheney*, 630 F. Supp. 2d 886, 899 (E.D. Tenn. 2009).

210. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2010).

211. HOLMES & HOLMES, *supra* note 18, at 100.

212. *Id.* at 98.

4. Avoiding Unwarranted Sentencing Disparities

Congress passed the Sentencing Reform Act in order to deal with the major sentencing disparities that existed at the time.²¹³ Similar defendants convicted of the same offense regularly received extremely different sentences, and the Commission and the Guidelines were part of the plan to solve this problem.²¹⁴ The Guidelines decreased disparity and increased transparency in sentencing.²¹⁵ Under the advisory system, district court judges still must consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”²¹⁶ Nevertheless, sentencing disparities increased in the wake of *Booker* and its progeny, and the most recent data from the Commission shows that nearly half of the defendants sentenced in fiscal year 2009 received sentences outside the Guidelines range.²¹⁷ The Guidelines became advisory in order to cure the Sixth Amendment violation that occurred in some cases when the Guidelines were mandatory.²¹⁸ The remedial majority wanted to fix the Sixth Amendment problem while preserving Congress’s goal of “uniformity of sentencing,”²¹⁹ but the current state of affairs indicates that the advisory system is not achieving that goal.²²⁰

213. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883 (1990).

214. *See id.* at 883–84.

215. *See* U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM, at xvi (2004) (discussing the impact of the Sentencing Guidelines and stating that “[s]entencing reform has had its greatest impact controlling disparity arising from the source at which the guidelines themselves were targeted—judicial discretion”).

216. 18 U.S.C. § 3553(a)(6) (2006).

217. U.S. SENTENCING COMM’N, FINAL QUARTERLY DATA REPORT 1 tbl.1 (2009) [hereinafter QUARTERLY DATA REPORT], available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2009_Quarter_Report_Final.pdf.

218. *See* United States v. Booker, 543 U.S. 220, 244–46 (2005) (Breyer, J., delivering the opinion of the Court in part); *supra* Part II.C.

219. *Booker*, 543 U.S. at 246.

220. *See* QUARTERLY DATA REPORT, *supra* note 217, at 1 tbl.1. A system that increases uniformity more effectively and protects every defendant’s Sixth Amendment rights in a way that complies with the substantive holding in *Booker* is possible. *See* Gall v. United States, 552 U.S. 38, 61 (2007) (Souter, J., concurring).

After *Booker*’s remedial holding, I continue to think that the best resolution of the tension between substantial consistency throughout the system and the right of jury trial would be a new Act of Congress: reestablishing a statutory system of

The sentencing data illustrates that many defendants who are charged with the same offense and have the same criminal history are sentenced very differently.²²¹ Unfortunately, the disparities are even greater when it comes to child pornography offenses.²²² Less than half of the defendants sentenced for possession, receipt, transportation, or distribution of child pornography received a sentence within the Guidelines range.²²³ The Guidelines were necessary because, in “a system claiming equal justice for all, disparity was an inexplicable yet constant source of embarrassment.”²²⁴ However, many wonder whether the current system is essentially the same as the system in place before the Guidelines and whether the discretionary system is “unintentionally jeopardizing the principle of equal justice under the law.”²²⁵

B. Appellate Review in Light of the Mandated Substantial Deference Standard

Some people involved in the sentencing process—including judges—question whether there is anything left in terms of appellate review.²²⁶ The Fifth Circuit likely did not believe the noncustodial sentence in *Duhon* or *Rowan* was reasonable, but in the wake of *Gall*, the court was handcuffed by its inability to engage in meaningful appellate review.²²⁷

mandatory sentencing guidelines (though not identical to the original in all points of detail), but providing for jury findings of all facts necessary to set the upper range of sentencing discretion.

Id. Justice Souter’s argument—that Congress should enact mandatory guidelines that do not violate the Sixth Amendment—is beyond the scope of this Comment. The focus of this Comment is defendants convicted of child pornography offenses. However, the recommendation to amend the child pornography statutes would increase uniformity among defendants convicted of an offense in violation of §§ 2252 or 2252A. *See infra* Part V.

221. *See* QUARTERLY DATA REPORT, *supra* note 217, at 1.

222. *See id.* at 14 tbl.5.

223. *Id.*

224. Nagel, *supra* note 213, at 884.

225. Jones Statement, *supra* note 195, at 3.

226. *See, e.g.,* United States v. Autery, 555 F.3d 864, 880 (9th Cir. 2009) (Tashima, J., dissenting) (“Abuse of discretion as now applied in this circuit to the substantive review of sentences for reasonableness is nothing more than a standardless and empty formalism—it comes close to no appellate review at all.”); United States v. Wittig, 528 F.3d 1280, 1289 (10th Cir. 2008) (Hartz, J., concurring) (“Under [the] present approach we may go through the motions of substantive-reasonableness review, but it will be an empty gesture.”); David M. Gaouette, U.S. Att’y, Dist. of Colo., Statement Before the U.S. Sentencing Commission in the Regional Hearing on the State of Federal Sentencing 3 (Oct. 20, 2009) (transcript available at http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20091020-21/Gaouette_testimony.pdf) (“Recent appellate cases suggest that there is little meaningful appellate review of sentences.”); *supra* Part III.B.2.

227. *See supra* Part III.B.1–3.

Although *Gall* set up a two-step review process,²²⁸ in the absence of a procedural error, the probability that a case will get remanded is extremely low.²²⁹ Some appellate judges have expressed concern over the current review process, saying they do not believe the Supreme Court intended to give district courts “such extreme deference from courts of appeals.”²³⁰ Part of the problem is that the Supreme Court did not discuss the types of situations that would warrant a reversal.²³¹ One appellate judge described the current state of substantive reasonableness review as follows: “[The] present approach appears to be that a sentence is substantively reasonable if the sentencing judge provides reasons for the length of the sentence.”²³² Unfortunately, that description appears to be accurate.²³³

1. *Fending Off Remand*

Many district court judges avoid remand by writing lengthy memoranda addressing all of the § 3553(a) factors.²³⁴ Doing this seems to make it almost impossible for the appellate court to say that the sentence was substantively unreasonable, even if the district court judge obviously gave much more weight to certain factors.²³⁵ For example, the Seventh Circuit affirmed a below-the-Guidelines-range sentence after noting that

228. See *supra* Part III.B.2.

229. See generally *United States v. Grossman*, 513 F.3d 592 (6th Cir. 2008); *United States v. McBride*, 511 F.3d 1293 (11th Cir. 2007); *United States v. Wachowiak*, 496 F.3d 744 (7th Cir. 2007).

230. *Autery*, 555 F.3d at 879 (Tashima, J., dissenting). The dissent vehemently objected to the majority’s affirmation of the district court’s noncustodial sentence. *Id.*

231. *Id.* (“Missing from the majority opinion in *Gall*, however, is any discussion of the circumstances under which a court of appeals may reverse a district court’s sentence as substantively unreasonable.”)

232. *United States v. Wittig*, 528 F.3d 1280, 1289 (10th Cir. 2008) (Hartz, J., concurring). Judge Hartz proposes a different approach, whereby the appellate court would focus on two of the § 3553(a) factors: the sentencing range in the Guidelines and the need to avoid unwarranted disparities. *Id.* These two factors

should be a matter of concern to appellate courts that wish to effectuate congressional intent that we be a nation of equal justice under law, in which the length of time that a defendant is deprived of liberty does not depend primarily and significantly on who the sentencing judge happens to be.

Id.

233. See *infra* Part IV.B.1.

234. See, e.g., *United States v. Grober*, 595 F. Supp. 2d 382 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010); *United States v. Hanson*, 561 F. Supp. 2d 1004 (E.D. Wis. 2008).

235. See *United States v. Wachowiak*, 496 F.3d 744, 749, 753–54 (7th Cir. 2007).

the district court judge “carefully and at length explained his choice of a 70-month sentence over a guidelines sentence.”²³⁶ The court expressed concern regarding the judge’s reliance on certain factors and disagreed with some of the judge’s “reasons for selecting a below-guidelines sentence.”²³⁷ Ultimately, however, the court decided the sentence was substantively reasonable, mostly because the judge “methodically worked through the statute” in determining the sentence.²³⁸

If the district court fails to offer a reasoned explanation for the sentence imposed, the decision might be subject to remand.²³⁹ However, the appellate court cannot remand the case even if it disagrees with the reasoning and would have sentenced the defendant differently.²⁴⁰ In *United States v. Grober*, the district court judge set forth her reasons for imposing a sentence at the statutory minimum in a twenty-nine page opinion.²⁴¹ The opinion was deemed a “must read” for defense attorneys, partly because of its “thorough and almost exhaustive explanation of the sentence imposed.”²⁴² In light of the current standard of review, a lengthy explanation that goes through all of the factors enumerated in § 3553(a) is the key ingredient to fending off remand.²⁴³

236. *Id.* at 750.

237. *Id.* at 753–54.

238. *Id.*

239. *See United States v. Morace*, 594 F.3d 340, 350 (4th Cir. 2010) (concluding that the circumstances surrounding the defendant’s case did not appear to be unusual and holding “that the court erred by failing to provide an adequate explanation of why a term of imprisonment is not warranted”); *United States v. Lychock*, 578 F.3d 214, 220 (3d Cir. 2009) (concluding that the district court put the substantive reasonableness of its decision at risk by “ignoring relevant factors and failing to offer a reasoned explanation for its departure from the Guidelines”). Some appellate courts have deemed a district court’s failure “to consider all of the § 3553(a) factors” a problem related to “the procedural reasonableness of the sentence.” *Morace*, 594 F.3d at 349 n.7. However, not offering a reasoned explanation appears to present a procedural and substantive problem. *See Lychock*, 578 F.3d at 216, 218 (holding that the imposition of a probationary sentence in a case in which the defendant knowingly possessed 150–300 images of child pornography “was procedurally and substantively unreasonable” due to the district court’s failure to “offer a sufficient justification”).

240. *See Gall v. United States*, 552 U.S. 38, 51 (2007) (“The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.”); *Wachowiak*, 496 F.3d at 754 (concluding that even though it might agree with the government that a sentence of “70 months does not adequately reflect the seriousness of Wachowiak’s offense,” the “task [of an appellate court] on reasonableness review is limited”).

241. *See United States v. Grober*, 595 F. Supp. 2d 382, 383–415 (D.N.J. 2008) (including three pages of appendices), *aff’d*, 624 F.3d 592 (3d Cir. 2010).

242. Christopher R. Clifton, *Procuring the Parsimony Provision of § 3553(a) Through Expert and Lay Witnesses*, CHAMPION, Apr. 2009, at 53, 53–54.

243. *See United States v. Wittig*, 528 F.3d 1280, 1289 (10th Cir. 2008) (Hartz, J., concurring).

2. Attempting To Engage in Meaningful Appellate Review

Despite the current standard of appellate review, some appellate courts have found a way to remand in the absence of a procedural error.²⁴⁴ In *United States v. Pugh*, the Eleventh Circuit held that even under the most recent Supreme Court precedent, the district court abused its discretion when it gave the defendant a noncustodial sentence.²⁴⁵ The court recognized that the case tested the “nature and extent of appellate review” but ultimately concluded that it could not give deference to the district court’s decision.²⁴⁶

The defendant in *Pugh* downloaded numerous images and videos of child pornography.²⁴⁷ One of the videos was of an infant being raped.²⁴⁸ The defendant pleaded guilty to possession, and the Guidelines recommended a prison sentence of 97 to 120 months.²⁴⁹ The district court decided that five years of probation was a more appropriate sentence.²⁵⁰ The defendant admitted that he pretended to be a young girl in online chat rooms and that he sent child pornography to other people.²⁵¹ However, the district court relied on expert testimony that the defendant was not likely to reoffend and that he was addicted to adult pornography as opposed to child pornography.²⁵² The defendant voluntarily entered into treatment for his addiction to adult pornography, and continuing treatment was a condition of his probation-only sentence.²⁵³ Ultimately, the Eleventh Circuit could not see how a probationary sentence could “promote general deterrence, reflect the seriousness of Pugh’s offense, [or] show respect for the law.”²⁵⁴ Thus, the court concluded that the sentence was unreasonable.²⁵⁵

244. See, e.g., *United States v. Abu Ali*, 528 F.3d 210, 258–69 (4th Cir. 2008) (holding that a below-the-Guidelines thirty-year sentence in the terrorism-related case was substantively unreasonable); *United States v. Pugh*, 515 F.3d 1179, 1202 (11th Cir. 2008) (holding that a sentence of probation was substantively unreasonable).

245. *Pugh*, 515 F.3d at 1182.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. See *id.* at 1187 & n.5.

252. *Id.* at 1187.

253. *Id.*

254. *Id.* at 1183. The Sixth Circuit reached a similar conclusion in *United States v. Camiscione*, 591 F.3d 823, 834 (6th Cir. 2010). The defendant pleaded guilty to possession of child pornography and the Guidelines recommended a sentence of twenty-seven to

Some criticized the Eleventh Circuit’s decision and indicated that the court misunderstood its role in terms of appellate review.²⁵⁶ However, it seems unlikely that the Supreme Court would set forth a two-step process of review if the second step—substantive reasonableness review—could only lead to a single result.²⁵⁷ Indeed, some argue that the review process should only consist of a review for procedural errors.²⁵⁸ Nevertheless, the current precedent consists of a bifurcated standard of review.²⁵⁹ The Eleventh Circuit refused to “read Supreme Court precedent as having so eviscerated appellate review at the same time that it has mandated the appellate courts to continue to review sentences for reasonableness.”²⁶⁰ The court pointed out that if it could not hold that the defendant’s sentence in *Pugh* was unreasonable, it would “come perilously close to holding that appellate review is limited to procedural irregularity.”²⁶¹

thirty-three months in prison. *Id.* at 824. Instead of imposing a custodial sentence, the district court sentenced the defendant to a period of supervised release and ordered him to do 180 hours of community service. *Id.* On appeal, the Sixth Circuit found the sentence “procedurally reasonable but substantively unreasonable because the district court failed to explain adequately how its sentence ‘deterred [the defendant] from committing future crimes.’” *Id.* at 825. On remand, the district court “held two sentencing hearings, ordered a comprehensive psychological evaluation at a federal facility, delivered a written opinion, and deliberated extensively over its sentencing decision,” *id.* at 833, but ultimately “reimposed the original sentence,” *id.* at 824. The Sixth Circuit once again concluded that the sentence was substantively unreasonable because the district court did not “adequately consider or justify how its sentence promoted general deterrence or avoided unwarranted sentence disparities.” *Id.* at 833.

255. *Pugh*, 515 F.3d at 1183.

256. See Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115, 1144–52 (2008) (concluding that the court in *Pugh* failed to give the appropriate amount of discretion to the district court’s sentence in the wake of recent Supreme Court precedents).

257. See *Gall v. United States*, 552 U.S. 38, 51 (2007) (setting forth a bifurcated appellate review process).

258. See *Rita v. United States*, 551 U.S. 338, 370 (2007) (Scalia, J., concurring) (“I would hold that reasonableness review cannot contain a substantive component at all.”); David C. Holman, *Death by a Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 303 (2008) (arguing that substantive reasonableness review should be prohibited).

259. See *Gall*, 552 U.S. at 51.

260. *Pugh*, 515 F.3d at 1204.

261. *Id.* at 1203. Approximately two-and-a-half years after deciding *Pugh*, the Eleventh Circuit held that the sentence imposed by the district court judge in *United States v. Irej* was substantively unreasonable. See *United States v. Irej*, 612 F.3d 1160, 1225 (11th Cir. 2010) (en banc). In *Irej*, the defendant pleaded guilty to one count of “knowingly employ[ing], us[ing], persuad[ing], induc[ing], entic[ing], and coer[cing] minors to engage in sexually explicit conduct” in violation of 18 U.S.C. § 2251(c). *Id.* at 1168–69. He admitted to making trips overseas to have sex with minors and producing child pornography, which he transported back to the United States. *Id.* at 1169. The details of the defendant’s crime were horrific, see *id.* at 1166–68, and the range recommended by the Guidelines ended up being higher than the statutory maximum, *id.*

C. *Criticisms of the Justifications for Non-Guidelines Sentences*

1. *Policy Disagreements and the Absence of the Empirical Approach*

Several post-*Booker* Supreme Court cases—all involving drug offenses—have had an enormous impact on how district court judges treat the Guidelines in child pornography cases.²⁶² Numerous district courts have relied on *Kimbrough v. United States*,²⁶³ which held that district court judges could categorically reject the crack-cocaine Guidelines based on policy disagreements,²⁶⁴ to support their decision to

at 1169–70. Therefore, the Guidelines range became the statutory maximum, which was thirty years. *Id.* However, the district court judge decided that a seventeen-and-a-half year sentence was more appropriate. *See id.* at 1179. The Eleventh Circuit decided the sentence was substantively unreasonable mostly “because of the nature and extent of [the defendant’s] criminal conduct.” *Id.* at 1166. The court made the following closing remarks:

Because of the substantial deference district courts are due in sentencing, we give their decisions about what is reasonable wide berth and almost always let them pass. There is a difference, though, between recognizing that another usually has the right of way and abandoning one’s post. We will not quit the post that we have been ordered to hold in sentencing review and the responsibility that goes with it. . . .

In this case the district court made a substantive mistake, a clear error in judgment, by unreasonably varying downward from the advisory guidelines sentence when no sentence less than it is sufficient to fulfill the purposes set forth in the Sentencing Reform Act. To do our duty to correct that mistake, we vacate the sentence the district court imposed and remand with instructions that the defendant is to be resentenced within the guidelines range.

Id. at 1225.

262. *See Gall*, 552 U.S. at 49–51 (holding that appellate courts must give due deference to a district court’s sentencing decision); *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (holding that the district court was entitled to categorically reject the crack-cocaine Guidelines “based solely on policy considerations”); *Spears v. United States*, 129 S. Ct. 840, 843 (2009) (per curiam) (reaffirming the holding in *Kimbrough*). The Supreme Court decided *Kimbrough* on the same day it decided *Gall*. In *Kimbrough*, the Court quoted a government brief, which essentially conceded that due to the advisory nature of the Guidelines, district courts could impose non-Guidelines sentences “based solely on policy considerations, including disagreements with the Guidelines.” 552 U.S. at 101.

263. 552 U.S. 85.

264. *See id.* at 101. This holding was clarified and reaffirmed in *Spears*, 129 S. Ct. at 843–44, but even before *Spears*,

numerous district courts had read *Kimbrough* to permit a sentencing court to give little deference to the guideline for child pornography cases on the ground that the guideline did not exemplify the Sentencing Commission’s exercise of

give little deference to the child pornography Guidelines.²⁶⁵ In *Kimbrough*, the district court’s authority to reject the crack-cocaine Guidelines was based on the premise that “those Guidelines do not exemplify the Commission’s exercise of its characteristic institutional role”²⁶⁶ and the fact that the Commission did not use the empirical approach²⁶⁷ in developing the Guidelines for drug trafficking offenses.²⁶⁸

In imposing a below-the-Guidelines-range sentence, many district courts categorically reject or otherwise dismiss the child pornography Guidelines as being the product of congressional directives as opposed to the empirical approach.²⁶⁹ However, some who criticize the child pornography Guidelines for not being based on the Commission’s institutional role simultaneously indicate that few Guidelines actually are and note that even the empirical approach initially used by the Commission was inherently flawed.²⁷⁰ Instead of relying on the Guidelines, many district courts rely on, and in some cases discuss at length,²⁷¹ an article

its characteristic institutional role and empirical analysis, but was the result of congressional mandates, often passed by Congress with little debate or analysis.

265. See, e.g., *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009–11 (E.D. Wis. 2008); *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008); *United States v. Baird*, 580 F. Supp. 2d 889, 892–94 (D. Neb. 2008).

266. *Kimbrough*, 552 U.S. at 109.

267. The Court explained the empirical approach in *Rita v. United States* as follows: “[T]he Commission took an ‘empirical approach,’ beginning with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past and then modifying and adjusting past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like.” 551 U.S. 338, 349 (2007).

268. *Kimbrough*, 552 U.S. at 96.

269. See, e.g., *United States v. Riley*, 655 F. Supp. 2d 1298, 1303–04 (S.D. Fla. 2009); *United States v. McElheney*, 630 F. Supp. 2d 886, 891–96 (E.D. Tenn. 2009); *Beiermann*, 599 F. Supp. 2d at 1104; *United States v. Phinney*, 599 F. Supp. 2d 1037, 1041–43 (E.D. Wis. 2009); *United States v. Grober*, 595 F. Supp. 2d 382, 390–94 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010); *United States v. Johnson*, 588 F. Supp. 2d 997, 1003–04 (S.D. Iowa 2008); *United States v. Rausch*, 570 F. Supp. 2d 1295, 1297–98 (D. Colo. 2008); *United States v. Ontiveros*, No. 07-CR-333, 2008 WL 2937539, at *8 (E.D. Wis. July 24, 2008); *Hanson*, 561 F. Supp. 2d at 1009–11; *Shipley*, 560 F. Supp. 2d at 744; *Baird*, 580 F. Supp. 2d at 892–95.

270. See Lynn Adelman & Jon Deitrich, *Improving the Guidelines Through Critical Evaluation: An Important New Role for District Courts*, 57 *DRAKE L. REV.* 575, 578–80 (2009) (arguing that very few of the Guidelines are worthy of respect due to the fact that when the Commission drafted the Guidelines, “it had limited data concerning past practice, and the data it did have was sketchy”).

271. For example, in *United States v. Hanson*, the district court judge discussed and quoted the article at length. 561 F. Supp. 2d at 1009–11. He decided that “[he] could not conclude that under the circumstances of this case, given all of the flaws in the guideline discussed above, that the range deserved deference.” *Id.* at 1011; see Hansen, *supra* note 31, at 54–56 (“[Judge] Adelman devoted much of his opinion in *U.S. v. Hanson* to what was then a just-published critique of the child porn guidelines by an

written by public defender Troy Stabenow.²⁷² Stabenow's article illustrates the changes to the child pornography Guidelines over the years and ultimately concludes that these changes "should persuade and embolden the courts to conclude that unless a defendant was a repeat offender, or a mass distributor, the Guidelines yield a sentence 'greater than necessary' to achieve § 3553(a)'s purposes."²⁷³ Nevertheless, even if the child pornography Guidelines are the result of congressional directives, it is still possible that the directives might in fact be the will of the people.²⁷⁴

2. *Rejecting Various Enhancements that Apply to the Majority of Defendants*

Critics of the child pornography Guidelines often contend that the Guidelines are flawed because many of the enhancements enumerated in section 2G2.2 apply to most defendants.²⁷⁵ The result is that a large number of defendants end up with a Guidelines range close to the statutory maximum.²⁷⁶ Critics recognize that Congress and the Commission realized that a number of these enhancements would apply in a large number of

assistant federal defender . . . whose findings have since been cited by at least five other federal judges.").

272. Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, FED. DEFENDER (Jan. 1, 2009), www.fd.org/pdf_lib/child_porn_july_revision.pdf; see *Riley*, 655 F. Supp. 2d at 1300–02; *McElheney*, 630 F. Supp. 2d at 892; *Beiermann*, 599 F. Supp. 2d at 1100; *Phinney*, 599 F. Supp. 2d at 1041–43; *Grober*, 595 F. Supp. 2d at 390–94; *Johnson*, 588 F. Supp. 2d at 1003–04; *Ontiveros*, 2008 WL 2937539, at *8; *Hanson*, 561 F. Supp. 2d at 1009–11.

273. Stabenow, *supra* note 272, at 38.

274. See *United States v. Stone*, 575 F.3d 83, 87 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1115 (2010).

In many ways, the fact that the guidelines are a direct reflection of a congressional expression of popular will is an argument in favor, not against the imposition of a guideline sentence. Congress is, after all, the elected representatives of the people of this country, and [] it has made policy choices about this type of crime, and those choices are reflected in the guideline range. It is not this court's constitutional role to second-guess congressional policy decisions simply because they're expressed in the guidelines, and it is this court's constitutional role to express the will of the people of this country as expressed by Congress.

On this crime, the will of the people is . . . exceedingly clear.

Id. (emphasis added) (quoting Judge John A. Woodcock, U.S. District Court for the District of Maine).

275. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2010); Adelman & Deitrich, *supra* note 270, at 584–85; Stabenow, *supra* note 272, at 26–27.

276. See Adelman & Deitrich, *supra* note 270, at 584.

cases,²⁷⁷ and yet many judges cannot believe Congress intended to create a situation in which “a typical downloader”²⁷⁸ gets a range near the statutory maximum.²⁷⁹ Arguably, one could conclude that most defendants are simply committing more serious offenses that warrant a higher level of punishment.²⁸⁰

One of the most frequently criticized enhancements is the two-level increase that applies if the defendant used a computer to commit the offense.²⁸¹ Again, the Commission knew this would apply to a large number of defendants.²⁸² Some still criticize this enhancement because

277. See Stabenow, *supra* note 272, at 23, 26–27 (noting that the Commission knew various enhancements would apply to a large number of offenders (citing U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 664 (2004))).

278. United States v. Grober, 595 F. Supp. 2d 382, 394 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010). The “typical downloader,” *id.*, or the “average defendant,” Stabenow, *supra* note 272, at 14, 23, is not specifically defined. See United States v. Cunningham, 680 F. Supp. 2d 844, 852 (N.D. Ohio 2010) (“Stabenow blandly references the ‘average offender’ when asserting that it is a travesty that sentencing ranges are so high. The term ‘average offender,’ however, goes undefined.”). The court in *Cunningham* took the time to examine what exactly Stabenow, and presumably the courts that rely on his article, meant by “average.” See *id.* The court made the following observations:

A closer examination of “average” when used by Stabenow is disturbing. In order to chart out at the statutory maximum, a first-time offender must reach an offense level of 40 prior to acceptance of responsibility. To reach that level, the offender must have images of a prepubescent minor (+2 levels), distribute the images for value (+5 levels), possess images that are sadistic or masochistic (+4 levels), use a computer (+2 levels), and either engage in a pattern of abuse (+5 levels), or possess more than 600 images (+5 levels). It is only then that an offense level of 40 would be achieved. With acceptance of responsibility, a Guideline range of 210 to 262 months would be computed. In order to chart out *above* the statutory maximum, offense level 39 or above, the offender would need to both possess over 600 images and have engaged in a pattern of abuse. Thus, the term “average offender” is significantly misleading. Once one realizes that Stabenow describes an individual owning more than 600 images of prepubescent child pornography containing sadistic and masochistic images as “average” without any further description, it is somewhat easier to understand why he believes the Guidelines are too harsh.

Id.

279. *Grober*, 595 F. Supp. 2d at 394 (“Surely congress did not intend to provide a sentencing range of 19 1/2 to 20 years for a typical downloader, especially one who pleads guilty.”).

280. See GELBER, *supra* note 31, at 13–15 (“If anything, the fact that many of the enhancements tend to apply in most cases . . . simply underscores the fact that this crime problem has steadily increased in severity, which necessitates meaningful sentences that have the deterrent value to shut down the market for this abuse.”). “The fact that certain enhancements apply on a frequent basis does not serve as a basis for negating the Guidelines.” *Cunningham*, 680 F. Supp. 2d at 852. “If anything, the fact that more than fifty percent of offenders have over 300 images and that over sixty-percent have sadistic and masochistic images supports a conclusion that even more harsh sentences are required for deterrence.” *Id.* at 852–53.

281. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (2010).

282. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623.

it applies in most cases.²⁸³ However, the Internet has increased the ease of access to child pornography, and it has increased the size of the interstate market.²⁸⁴

The ease of access to child pornography on the Internet is actually one reason why the enhancement based on the number of images is criticized.²⁸⁵ Some have insinuated that there should not be an enhancement based on the number of images because the Internet makes it so easy to download a large quantity of child pornography.²⁸⁶ However, the ease of access on the Internet may actually mean the penalty needs to be more severe when the Internet is used in order to deter people.²⁸⁷ In Arizona, each image of child pornography constitutes a separate offense,²⁸⁸ and each individual offense has a mandatory minimum sentence of ten

283. See *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008); Stabenow, *supra* note 272, at 15–16.

284. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501, 120 Stat. 587, 623.

285. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7)(A)–(D) (2010); see, e.g., *Hanson*, 561 F. Supp. 2d at 1009 (“[G]iven the unfortunate ease of access to this type of material in the computer age, compiling a collection with hundreds of images is all too easy, yet carries a 5 level enhancement . . .”).

286. See, e.g., *Hanson*, 561 F. Supp. 2d at 1009 (discussing the enhancement related to the number of images by emphasizing how easy it is to download a large number of images); see also *United States v. Cunningham*, 680 F. Supp. 2d 844, 853 (N.D. Ohio 2010) (rejecting “[t]he assertion that sentences should be reduced because it is easy to accumulate a large number of pictures quickly”).

287. *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007) (“The logic of deterrence suggests that the lighter the punishment for downloading and uploading child pornography, the greater the customer demand for it and so the more will be produced.”). Deterrence theory is beyond the scope of this Comment. For an interesting discussion regarding deterrence, see Douglas A. Berman, *Making Deterrence Work Better*, in CRIMINAL LAW CONVERSATIONS, *supra* note 89, at 118, 119–20 (noting that there is a connection between deterrence and education and that “the theory of deterrence demands some intellectual sophistication, which in turn suggests that more educated populations may respond more cogently to increased punishment”); Paul H. Robinson, *The Difficulties of Deterrence as a Distributive Principle*, in CRIMINAL LAW CONVERSATIONS, *supra* note 89, at 105, 105–16 (questioning the use of deterrence as a distributive principle and concluding that it should only be considered when there is a reason to think “that the prerequisites for a deterrent effect exist”); Russell D. Covey, *Deterrence’s Complexity*, in CRIMINAL LAW CONVERSATIONS, *supra* note 89, at 116, 117 (noting that figuring out the “expected costs and benefits in a way that is likely to maximize the deterrent function of criminal law is extremely difficult”); Doron Teichman, *In Defense of Deterrence*, in CRIMINAL LAW CONVERSATIONS, *supra* note 89, at 120, 120–22 (arguing that deterrence should be part of criminal sanctions because criminal laws affect how potential criminals behave).

288. *Arizona v. Berger*, 134 P.3d 378, 379 (Ariz. 2006).

years in prison if the child depicted is less than fifteen years old.²⁸⁹ Moreover, the fact that the crime is easy to commit does not seem like a good reason for leniency.²⁹⁰ For example, it seems hard to imagine giving leniency to someone who uses a gun to commit murder even though pulling a trigger is a quick and seemingly easy way to kill a person.²⁹¹ Therefore, the fact that defendants are able to download a large number of images in a short period of time, and with a minimal amount of effort, does not appear to make them less culpable than they would be if it were more difficult or time consuming to acquire an exorbitant amount of illegal material.²⁹²

Two other enhancements that receive an abundance of criticism are those that apply if the material (1) involves a prepubescent minor under the age of twelve,²⁹³ or (2) “portrays sadistic or masochistic conduct or other depictions of violence.”²⁹⁴ Some judges and critics say the

289. See ARIZ. REV. STAT. ANN. § 13-3553(C) (2010) (“Sexual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to § 13-705.”); *id.* § 13-705(D) (listing a ten-year minimum term of imprisonment for a person who is guilty of possession who has not been previously convicted of a felony). In *Arizona v. Berger*, the Arizona Supreme Court stated that “[t]he ten-year sentence imposed for each offense is consistent with the State’s penological goal of deterring the production and possession of child pornography.” 134 P.3d at 385. The court then pointed out that the defendant “knowingly gathered, preserved, and collected multiple images of child pornography” and “also possessed a news article describing a recent arrest of another person in Arizona for possession of child pornography.” *Id.* Therefore, it logically follows that even when an informed individual was clearly not deterred, there is still a reason to sentence that person to a long prison sentence. See Jonathan S. Masur et al., *For General Deterrence, in CRIMINAL LAW CONVERSATIONS*, *supra* note 89, at 122, 123 (“[I]nstead of thinking of incapacitation theory as a competitor to deterrence theory, it should be thought of as a supplement—precisely when individuals prove themselves undeterrable is when we may think it worthwhile to incarcerate them in order to incapacitate them.”).

290. See *United States v. Cunningham*, 680 F. Supp. 2d 844, 853 (N.D. Ohio 2010) (“The assertion that sentences should be reduced because it is easy to accumulate a large number of pictures quickly also rings hollow. . . . [T]he Court has never before seen an argument that because a crime is easy to commit, it should be punished less severely.”).

291. As the court in *Cunningham* stated:

Robbery is certainly simplified from the criminal’s perspective by the use of a firearm and the choice of a feeble, elderly victim. The Guidelines, however, do not lessen punishment because the crime was easier to commit. In fact, seeking out a vulnerable victim leads to a 2-level enhancement under the Guidelines.

Id.

292. See *id.* (“The Court does not dispute that it is very likely that a defendant could acquire more than 600 images with just a few mouse clicks and several emails. But that number of images is not collected by accident. Instead, those images are sought out by a troubled mind, from like-minded individuals. Thus, a defendant makes a cognitive choice to seek out that level of images. . . . This Court, therefore, will not alter its sentence simply because accessing and growing a database of child pornography has become easier as technology has advanced.”).

293. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2) (2010).

294. See *id.* § 2G2.2(b)(4).

enhancement based on the age of the child portrayed is invalid because it applies to so many defendants.²⁹⁵ However, a plausible reason for this enhancement is that possessing pornographic images of prepubescent children makes it more likely that the defendant is in fact a pedophile.²⁹⁶ The criticism regarding the enhancement related to violent, sadistic, or masochistic conduct is that it results in a four-level increase.²⁹⁷ Although a four-level increase might seem severe, this type of material is very damaging to the children used to create it.²⁹⁸ Therefore, attempting to decrease the demand for these horrific images by making the punishment more severe seems logical and reasonable.²⁹⁹

3. *Overreliance on Expert Testimony*

In determining the defendant's sentence, the judge must consider the need to "protect the public from further crimes of the defendant."³⁰⁰ Psychological experts play a major role in determining the likelihood that the defendant will reoffend and in the judge's ultimate decision regarding the length of the sentence imposed.³⁰¹ In *United States v. McElheney*,³⁰² the district court relied on expert opinions that the defendant

295. See, e.g., *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008).

296. See Seto et al., *supra* note 17, at 613 (finding that child pornography offenders are more likely to be pedophiles than those who commit contact offenses). Pedophilia is defined by the American Psychiatric Association as "recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children." AM. PSYCHIATRIC ASS'N, *supra* note 16, at 572.

297. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2), (4) (2010). A four-level increase means that the defendant's offense level increases by four levels. For example, a defendant being sentenced for possession of child pornography has a "base offense level" of eighteen, which results in a recommended range of twenty-seven to thirty-three months in prison, assuming the defendant does not have a criminal record. *Id.* § 2G2.2(a), ch. 5, pt. A, sentencing tbl. Adding a four-level enhancement would increase the offense level to twenty-two, which results in a recommended range of forty-one to fifty-one months of imprisonment. *Id.*

298. See Allen Statement, *supra* note 177, at 6–14 ("The demand for images fuels the ongoing, abhorrent sexual victimization of children.").

299. See *id.*; see also *United States v. Cunningham*, 680 F. Supp. 2d 844, 856 (N.D. Ohio 2010) ("[E]nd users are the cogs in the wheel that drive the demand for child pornography.").

300. 18 U.S.C. § 3553(a)(2)(C) (2006).

301. See, e.g., *United States v. Baird*, 580 F. Supp. 2d 889, 894–95 (D. Neb. 2008) (concluding that the defendant was not likely to reoffend and "stress[ing] the importance of opinions of the medical professionals who . . . have determined that he is not likely to reoffend and is not a predator").

302. *United States v. McElheney*, 630 F. Supp. 2d 886 (E.D. Tenn. 2009).

was not likely to reoffend in spite of the fact that the defendant had already reoffended after he was arrested.³⁰³ He was indicted for receiving approximately 3300 images of child pornography, including videos depicting sadistic behavior, one of which was of an adult trying to penetrate a two- or three-year-old.³⁰⁴ Nevertheless, the court decided to impose a non-Guidelines sentence based on two factors: the unreliability of the Guidelines and a psychosexual assessment indicating that the defendant was not likely to reoffend.³⁰⁵ Although it is certainly reasonable for a judge to take an expert's recommendations into account, one could argue that a judge should not exclusively rely on the expert's opinion regarding whether the defendant is likely to reoffend when making the sentencing decision.³⁰⁶

The defendant in *United States v. Wachowiak* was treated by a psychologist before his arrest, but he stopped treatment after deciding he was better.³⁰⁷ He was caught with hundreds of images of child pornography three days later.³⁰⁸ The psychological experts who testified said he was a low risk, and the district court gave him a sentence below the range recommended by the Guidelines.³⁰⁹ Unfortunately, psychological future risk assessments have historically been very inaccurate,³¹⁰ and there is ultimately nothing "very definitive" in terms of sexual disorders.³¹¹ One problem is the inherent difficulty that accompanies coming up with valid empirical evidence related to these crimes and offenders.³¹²

303. *Id.* at 887, 899, 901, 904.

304. *Id.* at 899, 896–97, 904.

305. *See id.* at 887.

306. *See* Hansen, *supra* note 31, at 57 (quoting Dr. Avak Howsepian, who stated that "[t]here's nothing very definitive when it comes to sexual disorders, especially sexual disorders involving children"). *See generally* Grant H. Morris et al., *Assessing Competency Competently: Toward a Rational Standard for Competency-To-Stand-Trial Assessments*, 32 J. AM. ACAD. PSYCHIATRY & L. 231, 243 (2004) ("[T]rial court judges should not be allowed to relinquish to mental health professionals their responsibility for deciding the defendant's competency to stand trial.").

307. *United States v. Wachowiak*, 412 F. Supp. 2d 958, 960–61 (E.D. Wis. 2006), *aff'd*, 496 F.3d 744 (7th Cir. 2007).

308. *Id.* at 961.

309. *See id.* at 961, 966.

310. *See* Terence W. Campbell, *Sexual Predator Evaluations and Phrenology: Considering Issues of Evidentiary Reliability*, 18 BEHAV. SCI. & L. 111, 128 (2000).

311. Hansen, *supra* note 31, at 57 (quoting Dr. Avak Howsepian, who stated that "[t]here's nothing very definitive when it comes to sexual disorders, especially sexual disorders involving children").

312. *See* Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 184 (2009) ("The dearth of empirical knowledge about this population not only has challenged law enforcement and criminal justice officials, but also has hampered mental health professionals. For example, at the present time, there are no evidence-based protocols to guide the assessment and treatment of these offenders.").

Additionally, recidivism rates could be majorly skewed due to the fact that child molestation is an underreported crime.³¹³

Some people say that the evidence available suggests that possessing child pornography is not a strong indicator that the person will commit contact offenses in the future if other risk factors are not present.³¹⁴ Nevertheless, some studies indicate quite the opposite.³¹⁵ One study conducted in a federal prison found that most of the participants—men convicted of child pornography offenses who initially claimed to have never committed a contact offense—had in fact committed a hands-on offense against a child.³¹⁶

Possession of child pornography has also been found to be a precursor to future acts against children.³¹⁷ One study indicates that commission of child pornography offenses is a valid indicator of pedophilia even if the individual has not been previously convicted of a contact offense against a child.³¹⁸ Another study suggests that child pornography offenders are actually more likely to be pedophiles than offenders previously convicted of contact offenses.³¹⁹ The reason might be due to the fact that some people who victimize children are not actually sexually attracted to them but rather engage in these offenses as a result of psychological

313. See R. Brooks Whitehead, *Good for More than Just Driving Directions: GPS Helps Protect Californians from Recidivist Sex Offenders*, 38 MCGEORGE L. REV. 265, 267–68 (2007) (discussing how all sex offenses are “vastly underreported” and sex offenses related to children are no exception); see also *United States v. Pugh*, 515 F.3d 1179, 1201 (11th Cir. 2008) (“As Congress has found and as we have discussed, child sex offenders have appalling rates of recidivism and their crimes are under-reported.”).

314. See Hansen, *supra* note 31, at 57–58; see also Stabenow, *supra* note 272, at 30 (stating that new studies—no citations are given—indicate that child pornography defendants are less dangerous than previously believed).

315. See Bourke & Hernandez, *supra* note 312, at 187–88; Seto et al., *supra* note 17, at 613–14.

316. See Bourke & Hernandez, *supra* note 312, at 185, 187–88. For a criticism of the studies conducted at the Federal Correctional Institution in Butner, North Carolina, see Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL’Y REV. (forthcoming) (manuscript at 39–48), available at <http://ssrn.com/abstract=1689507>.

317. Seto et al., *supra* note 17, at 613.

318. *Id.* at 613–14. Furthermore, as the Assistant Deputy Chief of the Child Exploitation and Obscenity Section of the U.S. Department of Justice noted, “you can talk to any prosecutor or investigator in this area and they will tell you in no uncertain terms that with frightening frequency, investigations of offenders for possession, receipt or distribution offenses ultimately uncover evidence that the offender was also abusing children.” GELBER, *supra* note 31, at 7.

319. Seto et al., *supra* note 17, at 613.

problems other than pedophilia.³²⁰ It is not surprising that researchers have found that “people are likely to choose the kind of pornography that corresponds to their sexual interests.”³²¹ Accordingly, “few nonpedophilic men would choose illegal child pornography” when there is such a large quantity of legal adult pornography available.³²² One forensic psychiatrist advised other practitioners who assess child pornography offenders to “[a]void the temptation to predict that this will not happen again, even with treatment.”³²³ Hopefully, experts recognize the limitations in terms of the current state of knowledge because the risk assessments they provide have a major impact on the sentence a defendant ultimately receives.³²⁴

V. RECOMMENDATION: AMENDING THE FEDERAL CHILD PORNOGRAPHY STATUTES

Congress has made it very clear that child pornography is a serious offense that warrants serious punishment.³²⁵ Nevertheless, district court judges do not always punish child pornography offenders harshly, and due to the applicable standard of review, appellate courts generally must defer to the district court’s decision.³²⁶ Many judges have indicated that the child pornography Guidelines are not worthy of deference because they are the result of congressional mandates as opposed to empirical studies.³²⁷ Therefore, some judges will continue to categorically reject the child pornography Guidelines if Congress does not take action.³²⁸

320. *See id.* (“A possible explanation for this finding is that some nonpedophilic men victimize children sexually, such as antisocial men who are willing to pursue sexual gratification with girls who show some signs of sexual development but are below the legal age of consent.”); *see also* HOLMES & HOLMES, *supra* note 18, at 95 (discussing the fact that some child molesters “have deviant arousal patterns that make them sexually attracted to children”—they are pedophiles—although for others, “child molestation may be their way of acting out responses to nonsexual problems”).

321. Seto et al., *supra* note 17, at 613.

322. *Id.*

323. CARLA ROGERS, U.S. PSYCHIATRIC & MENTAL HEALTH CONG., PSYCHIATRY’S ROLE IN INTERNET CHILD PORNOGRAPHY CASES 10 (2008), <http://www.cmellc.com/psychcongress/images/08pdf/24-5%20Rodgers.pdf>.

324. *See id.*

325. *See* Sentencing Reform Act of 1984 § 217(a), 28 U.S.C. § 991 (2006); Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, §§ 401–503, 117 Stat. 650, 667–80; Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009, 3009-26 to -28; Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818.

326. *See supra* Part IV.B.

327. *See supra* Part IV.C.1.

Sentencing Guidelines are typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. However, the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the

In the wake of *Booker* and its progeny, the goal of uniformity in sentencing has been severely compromised.³²⁹ A possible solution is a two-phase plan that would amend the child pornography statutes.³³⁰ In order to ensure the amendments are the will of the people, Congress should engage in meaningful debate after receiving input from all relevant parties. Doing so also will help avoid the criticisms expressed by some regarding the passage of the previous amendments related to child pornography.³³¹

A. Phase 1: Creating a Statutory Minimum for Possession

In the absence of a clear congressional mandate, some defendants convicted of possessing child pornography will continue to serve no time in prison unless Congress imposes a statutory minimum prison sentence for possession.³³² Noncustodial sentences severely undermine the goal of uniformity in sentencing among the federal courts,³³³ and they are neither comparable to, nor adequate substitutes for, a period of imprisonment.³³⁴ These sentences also put potential victims at risk,³³⁵

Sentencing Commission has amended the Guidelines under § 2G2.2 several times . . . recommending harsher penalties.

United States v. Dorvee, 616 F.3d 174, 184 (2d Cir. 2010) (citation omitted).

328. See *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008) (“The statute here provides a broad range of punishment for this crime, and if Congress does not want the courts to try and sentence individual defendants throughout that range based on the facts and circumstances of each case, then Congress should amend the statute . . .”).

329. See FINAL REPORT, *supra* note 70, at 47.

330. See generally 18 U.S.C. §§ 2252A, 2252 (2006 & Supp. III 2009).

331. See, e.g., *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008).

332. See, e.g., *United States v. Autery*, 555 F.3d 864 (9th Cir. 2009) (affirming a noncustodial sentence of probation).

333. See Sentencing Reform Act of 1984 § 217(a), 28 U.S.C. § 991 (2006) (stating that the purpose of the Sentencing Commission—in part—is to “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants”).

334. See *United States v. Irey*, 612 F.3d 1160, 1210 (11th Cir. 2010) (en banc). Before reversing and remanding the district court’s below-the-Guidelines-range sentence, the court in *Irey* discussed why a term of supervised release, even when it includes an abundance of restrictions, is simply not a reasonable alternative to incarceration:

If being on supervised release were the punitive equivalent of being in prison, if it served the just deserts function as well, there would be no need to put most criminals in prison; we could put them on supervised release instead. If the punitive impact of the two were the same, convicted criminals would not ask for a longer term of supervised release in hopes of getting a shorter term of imprisonment. Yet they do. . . .

and they cannot reasonably deter defendants or other potential offenders.³³⁶

The Supreme Court has made it clear that Congress has the power to control sentencing disparities by prescribing mandatory minimums for all crimes proved beyond a reasonable doubt to the jury or admitted to by the defendant.³³⁷ Mandatory minimum sentences are not prohibited by *Booker* or its progeny.³³⁸ In light of the fact that some judges give noncustodial sentences to defendants convicted of possession, Congress needs to amend the child pornography statutes to establish a mandatory minimum sentence of imprisonment.³³⁹

The same is true of the other restrictions the district court imposed, all of which are required or strongly recommended for all convicted sex offenders, such as participation in a substance abuse program and a mental health program specializing in sex offender treatment, compliance with any state sex offender registration law, being subject to search based upon reasonable suspicion, and “the standard terms concerning risk control.” Those release terms may be inconvenient, annoying, and burdensome, but they are not the equivalent of being behind bars. If they were, no convicted sex offender would care whether he remained in prison or was released subject to those conditions.

Id.

335. See Seto et al., *supra* note 17, at 613 (concluding that child pornography offenders—ones never convicted of a contact offense—are more likely to be pedophiles than those previously convicted of contact offenses).

336. See *United States v. Goldberg*, 491 F.3d 668, 671–72 (7th Cir. 2007) (noting that giving the defendant convicted of possessing child pornography a prison sentence of a single day does not reflect the seriousness of the offense, provide just punishment, avoid disparities, or adequately deter criminal conduct).

337. See *Kimbrough v. United States*, 552 U.S. 85, 108 (2007) (“And as to the crack cocaine sentences in particular, we note a congressional control on disparities: possible variations among district courts are constrained by the mandatory minimums Congress prescribed . . .”).

338. See *id.* (noting that Congress has the power to control sentencing disparities by creating mandatory minimums).

339. Many states have mandatory minimums in place for possession of child pornography. See, e.g., LA. REV. STAT. ANN. § 14:81.1(E)(1) (2004 & Supp. 2009) (“Whoever commits the crime of pornography involving juveniles [including possession] shall be fined not more than ten thousand dollars and be imprisoned at hard labor for not less than two years or more than ten years, without benefit of parole, probation, or suspension of sentence.”). In Alabama, possession of child pornography is a Class C Felony. ALA. CODE § 13A-12-192 (LexisNexis 2005). Therefore, the minimum sentence for a first time offender guilty of possession is one year and one day. *Id.* § 13A-5-6. Possessing or viewing child pornography is also a Class C felony in Arkansas, ARK. CODE ANN. § 5-27-304 (2006), which means that there is a minimum sentence of three years. *Id.* § 5-4-401. Arizona has a ten-year minimum sentence if the minor depicted is less than fifteen years old. See ARIZ. REV. STAT. ANN. § 13-3553(C) (2010) (“Sexual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to § 13-705.”); *id.* § 13-705(D) (listing a ten-year minimum term of imprisonment for a person who is guilty of possession who has not been previously convicted of a felony). Each image is a separate offense, and consecutive sentences are required under the statutory scheme. *Arizona v. Berger*, 134 P.3d 378, 379 (Ariz. 2006). In Mississippi, there is a five-year minimum prison sentence for all crimes related to child pornography—including possession and

There are two possible options. The first option is to add a statutory minimum to §§ 2252(b)(2) and 2252A(b)(2).³⁴⁰ Both statutes currently set the maximum prison sentence for possession at ten years, but they are silent in terms of a statutory minimum.³⁴¹ Congress would need to decide the length of the mandatory minimum prison term after getting input from all relevant parties and engaging in meaningful congressional debate. The second option is to add possession to the list of all of the other offenses covered by the statute that have a statutory minimum of five years of imprisonment.³⁴² The first option, however, would allow possession to remain distinct from other child pornography offenses.³⁴³ Accordingly, it is the most viable option.

*B. Phase 2: Incorporating the Advisory Guidelines
Enhancements into the Statutes*

Although the statutory minimums certainly help avoid some disparities, the enhancements within the Guidelines related to specific characteristics of the offense are currently not taken into account in the child pornography statutes.³⁴⁴ The defendant in *United States v. Shipley* was convicted of receiving material involving the sexual exploitation of minors in violation of § 2252(a)(2).³⁴⁵ The judge acknowledged that the statute mandates a minimum sentence of five years and a maximum sentence of twenty years and that the Guidelines recommended 210 to 240 months, which is approximately seventeen to twenty years.³⁴⁶ However, the judge sentenced the defendant to ninety months after stating that the Guidelines were not the result of an empirical approach, and noted that even if the Guidelines reflect congressional intent, the Guidelines are not a statute.³⁴⁷ He also

distribution—and there is also a mandatory fine of at least \$50,000. MISS. CODE ANN. § 97-5-35 (2005 & Supp. 2010). Similarly, Georgia imposes a five-year minimum for all defendants convicted of a child pornography offense. GA. CODE ANN. § 16-12-100(g)(1) (2007).

340. See 18 U.S.C. §§ 2252(b)(2), 2252A(b)(2) (2006).

341. See *id.*

342. See *id.* §§ 2252(b)(1), 2252A(b)(1).

343. *Id.* §§ 2252(b), 2252A(b) (setting separate statutory sentencing mandates for defendants convicted of possession compared to all other child pornography offenses, which have the same statutory minimum and maximum).

344. *Id.* §§ 2252, 2252A; U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(1)–(7) (2010).

345. *United States v. Shipley*, 560 F. Supp. 2d 739, 741 (S.D. Iowa 2008).

346. See *id.* at 744.

347. *Id.*

said that “if Congress does not want the courts to try and sentence individual defendants throughout that range based on the facts and circumstances of each case, then Congress should amend the statute.”³⁴⁸

If Congress wants the enhancements to apply to all defendants, it will have to amend the child pornography statutes to make the advisory enhancements mandatory in cases in which the facts warranting the enhancement are found by a jury or admitted to by the defendant.³⁴⁹ This process will create the opportunity for Congress to discuss each individual enhancement in order to decide which enhancements truly warrant increasing the defendant’s sentence. Recent judicial opinions should be taken into account in determining which enhancements become mandatory, and Congress should obtain as much input as possible.

The selected enhancements will have to change the minimum sentence for each offense. This can be accomplished through an additional section in both statutes that mandates each enhancement and provides the length by which the defendant’s minimum sentence must increase when it applies. For example, if Congress selects the enhancement related to material involving a prepubescent minor,³⁵⁰ the statute should state that an additional amount of time in prison must be added to the statutory minimum when the enhancement applies to the individual defendant. The enhancements should add additional prison time to the mandatory minimum as opposed to adding levels, which are only relevant in the context of the Guidelines.

The second phase will be more of a challenge than the first. Congress will have to seriously consider which enhancements warrant a mandatory increase—when found by the jury or admitted to by the defendant. Determining the additional amount of time in prison that each enhancement selected warrants will also be challenging. However, the alternative is to leave the current system in place. In the absence of congressional action, sentencing disparities will continue, and in some cases congressional intent will continue to be ignored.

348. *Id.*

349. In light of *Booker*, the statutory enhancements will only apply when the government proves the applicable facts beyond a reasonable doubt or when the defendant admits to the facts necessary to apply the specific enhancement. *See United States v. Booker*, 543 U.S. 220, 266–68 (2005) (Breyer, J., delivering the opinion of the Court in part) (holding that the Guidelines violate a defendant’s Sixth Amendment right to a jury trial in situations in which the additional findings of the trial court require an enhanced sentence not otherwise authorized by the jury verdict).

350. *See U.S. SENTENCING GUIDELINES MANUAL* § 2G2.2(b)(2) (2010).

VI. CONCLUSION

Congress enacted the Sentencing Reform Act to prevent unwarranted disparities and overly lenient punishments.³⁵¹ Uniformity in sentencing among the federal courts is important because it prevents disparities between similarly situated defendants, and it helps ensure that there is equal justice under the law.³⁵² Now that the Guidelines are no longer mandatory, the disparities between similarly situated defendants have increased, and many defendants convicted of child pornography offenses receive sentences well below the Guidelines range.³⁵³ Congress should amend §§ 2252 and 2252A to include a mandatory minimum sentence for possession and to make some of the otherwise advisory enhancements mandatory for every defendant. Amending the child pornography statutes will ensure that congressional intent is carried out, prevent major sentencing disparities, and protect children from dangerous offenders.

351. See Nagel, *supra* note 213, at 884 (“On the whole, sentences served were considerably and consistently more lenient than public estimates of what ought to be the normative societal response.”).

352. See *supra* Part IV.A.4.

353. See *supra* Part II.C.

