FEDERAL CHILD PORNOGRAPHY OFFENSES

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TABLE OF CONTENTS

EXECUTIVE SUMMARY i
- A. Overview i
- B. Summary of the Child Pornography Sentencing Scheme iv
- C. Highlights of the Commission's Report vi
- D. Recommendations to Congress xvii
- E. Conclusion xxi

CHAPTER 1: THE PURPOSES AND METHODOLOGY OF THIS REPORT 1
- A. Introduction 1
- B. Background 3
- C. General Trends in Sentencing Data 6
- D. Criticisms of the Existing Non-Production Penalty Scheme and a Widespread Belief that Changes are Necessary 10
- E. Overview of Report 15
  1. Methodology 15
  2. Child Pornography Special Coding Project: The Commission's Contribution to the Emerging Social Science Research About Offense Conduct and Offender Characteristics 16
  3. Organization 18

CHAPTER 2: STATUTORY AND GUIDELINE PROVISIONS IN CHILD PORNOGRAPHY CASES 21
- A. Federal Statutes Concerning Child Pornography 21
  1. Overview of Federal Child Pornography Penal Statutes 21
  2. Definition of "Child Pornography" 22
  3. Production Offenses 23
  4. Non-Production Offenses 24
  5. Summary of Statutory Penalty Ranges 27
  6. Related Sex Crimes: "Enticement" and "Travel" Offenses 30
- B. Child Pornography Sentencing Guidelines 31
  1. Sections 2G2.1 and 2G2.2 31
  2. Recurring Legal Issues Concerning Enhancements in Child Pornography Cases 33
- C. Additional Sentencing Enhancements for Certain Child Pornography Offenders 36
- D. State Criminal Penalties for Child Pornography Offenses 38
- E. Conclusion 38

CHAPTER 3: TECHNOLOGY AND INVESTIGATION BY LAW ENFORCEMENT IN CHILD PORNOGRAPHY CASES 41
- A. Child Pornography Offenders' Use of Technology to Commit the Offense 41
  1. Technology Primer 43
  2. Internet Technologies Used to Access Child Pornography 47
  3. Technology Child Pornography Offenders Use to Evade Detection and Prosecution 56

4. Emerging Technology 59
5. Offender Culpability and Technology 61
B. Law Enforcement Efforts to Combat Child Pornography 62
1. Organization Overview 63
2. Law Enforcement Investigations 64
3. Digital Forensics 67
C. Conclusion 71

CHAPTER 4: CHILD PORNOGRAPHY OFFENDER BEHAVIOR 73
A. Types of Child Pornography Offenders 73
B. Motivations to Collect Child Pornography 76
1. Sexual Motivations to Collect Child Pornography 77
2. Non-Sexual Motivations to Collect Child Pornography 78
C. Child Pornography Offender Collecting Behavior 80
1. Child Pornography Collecting Activities 80
2. Child Pornography Collections 84
D. Child Pornography "Community" Behavior 92
1. Child Pornography Communities and Socialization 92
2. Structure of Child Pornography Communities 94
3. Child Pornography Communities and Deviant Beliefs 97
4. Child Pornography Communities and the Child Pornography "Market" 98
E. Relationship Between Child Pornography Offending and Criminal Sexually Dangerous Behavior 99
1. Distinguishing Child Pornography Offenders Who Have Committed Other Sex Offenses 100
2. Discussion of a Causal Relationship Between Child Pornography and Other Sex Offending 102
3. Child Pornography as an Alternative to Other Sex Offending 103
F. Conclusion 104

CHAPTER 5: VICTIMS OF CHILD PORNOGRAPHY 107
A. Victimization Through Production 107
B. Recurrent Victimization Through Existence of Images 112
C. Crime Victims' Rights Issues Specific to Child Pornography Victims 114
1. Victim Notification and the Right to Be Heard 115
2. Restitution to Victims 117
D. Conclusion 118

CHAPTER 6: ANALYSIS OF SENTENCING DATA IN CASES IN WHICH OFFENDERS WERE SENTENCED UNDER THE NON-PRODUCTION GUIDELINES 121
A. Introduction 121
B. Understanding the Data Based on the Changing Legal Landscape from 1992 to 2010 122
C. Non-Production Sentencing Data Derived from the Commission's Annual Datafiles 126
1. Introduction 126
2. Sentence Length Data 129
3. Comparative Proportionality Analysis: Other Federal Sex Offenses 136

4. Specific Offense Characteristics 138
5. Offender Characteristics 141
D. Non-Production Sentencing Data Derived from the Commission's Special Coding Project.....144
1. Offense Conduct 145
2. Fiscal Year 2012 (First Quarter) Supplemental Coding Project.....152
3. Offender Characteristics 155
E. Conclusion 164

CHAPTER 7: PRIOR CRIMINAL SEXUALLY DANGEROUS BEHAVIOR BY OFFENDERS SENTENCED UNDER THE NON-PRODUCTION CHILD PORNOGRAPHY GUIDELINES.....169
A. Relevance of Criminal Sexually Dangerous Behavior (CSDB) in Child Pornography Cases.....170
B. Existing Social Science Research 171
C. The Commission's Study: Definitions, Methodology, and Limitations 174
1. Definition of Criminal Sexually Dangerous Behavior.....174
2. Methodology 178
3. Limitations 179
D. Findings of Commission's Fiscal Year 2010 Study 181
1. Findings Concerning All Types of CSDB 181
2. Findings Concerning "Contact" CSDB 183
E. The Association Between CSDB and Offense and Offender Characteristics.....186
1. Association Between CSDB and Offense Characteristics 187
2. Association Between CSDB and Offender Characteristics 195
3. Association Between CSDB and Geographic Location of Prosecutions.....197
F. Association Between CSDB and Sentence Length.....198
G. Differences in Departure/Variance Rates Based on CSDB 200
H. Findings of Commission's Study of First-Quarter Fiscal Year 2012 Cases.....201
I. Findings of Commission's Study of Fiscal Years 1999 and 2000.....202
J. Conclusion 204

CHAPTER 8: EXAMINATION OF SENTENCING DISPARITIES IN §2G2.2 CASES.....207
A. Sentencing Framework in Non-Production Child Pornography Cases.....208
B. Common Guideline Ranges for Offenders Sentenced Under the Non-Production Guidelines: Fiscal Year 2010 Versus Fiscal Year 2004 210
1. Common 2010 Guideline Ranges 210
2. Common 2004 Guideline Ranges 211
C. Growing Sentencing Disparities Since 2004 213
1. Case Type One: No Distribution Enhancement.....213
2. Case Type Two: Distribution Resulting in a 2-Level Enhancement 215
3. Case Type Three: Distribution Resulting in a 5-Level Enhancement 217
D. Common Practices of Courts and Parties in Limiting Offenders' Sentencing Exposure Under the Statutory and Guideline Penalty Schemes 219
1. Charging Practices 219
2. Guideline Stipulations in Plea Agreements 222
3. Government Sponsored Downward Variances and Departures.....223

4. Non-Government Sponsored Downward Variances and Departures 224
E. Analysis of the Cumulative Effect of Four Practices to Reduce Defendants' Sentencing Exposure in Non-Production Cases 225
1. Variation in Sentence Lengths 226
2. Analysis of Possible Influences on Sentencing Practices 227
F. Differences in Appellate Review Among the Courts of Appeals 238
1. Review of Variances Based on "Policy Disagreements" with USSG §2G2.2 238
2. Appellate Review of Extensive Downward Variances 241
3. Conclusions About Appellate Review 244
G. Conclusion 244

CHAPTER 9: CHILD PORNOGRAPHY PRODUCTION OFFENSES 247
A. Background 247
B. Penal Statutes and Guideline Provisions Concerning Production 248
C. Analysis of Sentencing Data 252
D. Offender and Offense Characteristics 257
1. Offender Characteristics 257
2. Offense Characteristics 260
E. Classification of Production Offense Behavior 262
1. Extent of Involvement with Victims of Production Offenses 262
2. Extent of Involvement with Child Pornography Generally 264
F. Victim Characteristics 265
G. Conclusion 268

CHAPTER 10: POST-CONVICTION ISSUES IN CHILD PORNOGRAPHY CASES 271
A. Supervised Release in Child Pornography Cases 271
1. Statutory and Guideline Provisions 271
2. Analysis of Supervised Release Data 274
B. Evaluation and Treatment of Child Pornography Offenders' Sexual Disorders 277
1. Treatment Generally 278
2. Treatment in Prison and on Supervision 282
3. Risk Assessments of Child Pornography Offenders 285
C. Sex Offender Registration and Civil Commitment Issues Facing Child Pornography Offenders 287
1. Sex Offender Registration 288
2. Civil Commitment 289
D. Conclusion 291

CHAPTER 11: RECIDIVISM BY CHILD PORNOGRAPHY OFFENDERS 293
A. Introduction 293
B. Methodology of the Commission's Recidivism Study 294
C. Results of the Commission's Recidivism Study 299
D. Relevance of the Commission's Recidivism Study to Current Child Pornography Offenders 304
E. Comparison of the Commission's Recidivism Study to Other Relevant Recidivism Studies 306
1. Other Studies of Child Pornography Offenders 306

2. BJS Recidivism Study of State Sex Offenders Released in Fiscal Year 1994 307
3. Recidivism by Federal Offenders Generally 308
F. Conclusion 310

CHAPTER 12: FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS TO CONGRESS 311
A. Introduction 311
B. Major Findings Concerning §2G2.2 Cases 311
C. Commission's Recommendations for the Non-Production (§2G2.2) Guideline 320
1. Amendments to USSG §2G2.2 320
2. Supervised Release Terms for Child Pornography Offenders 325
D. Possible Changes to the Non-Production Child Pornography Statutes 326
1. Statutory Penalties 326
2. Notice to and Restitution for Victims of Non-Production Offenses 330
E. Findings and Recommendations Concerning §2G2.1 (Production) Cases 330
F. Conclusion 330

APPENDICES

APPENDIX A
GLOSSARY OF RELEVANT TERMINOLOGY A-1

APPENDIX B
CURRENT VERSIONS OF THE PRIMARY CHILD PORNOGRAPHY SENTENCING GUIDELINES, USSG §§ 2G2.1 AND 2G2.2, AND THE SENTENCING TABLE (USSG CHPT. 5, PT. A) B-1

APPENDIX C
SUMMARIES OF THE TESTIMONY OF THE WITNESSES, UNITED STATES SENTENCING COMMISSION — SENTENCING REFORM ACT 25TH ANNIVERSARY REGIONAL PUBLIC HEARINGS C-1

APPENDIX D
SUMMARIES OF THE TESTIMONY OF THE WITNESSES, UNITED STATES SENTENCING COMMISSION — PUBLIC HEARING ON FEDERAL CHILD PORNOGRAPHY CRIMES D-1

APPENDIX E
SOURCE OF CURRENT §2G2.2 BASE OFFENSE LEVELS AND SPECIFIC OFFENSE CHARACTERISTICS E-1

APPENDIX F
STATE CHILD PORNOGRAPHY STATUTES F-1

APPENDIX G
REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES — SELECTED BIBLIOGRAPHY G-1

LIST OF TABLES AND FIGURES

TABLE 1 Child Pornography Statutory Penalty Ranges.....v

TABLE 2–1 Child Pornography Statutory Penalty Ranges.....27

FIGURE 3–1 Federal Defender Technology Presentation: Screenshot of LimeWire 49

FIGURE 3–2 Federal Defender Technology Presentation: Screenshot of LimeWire Shared Folders 50

FIGURE 3–3 Federal Defender Technology Presentation: Screenshot of P2P Search Window.....70

FIGURE 4–1 Relationship Among Child Pornography Offenders, Pedophiles and Other Sex Offenders (does not reflect actual percentages).....73

FIGURE 4–2 DOJ Presentation: Screenshot of Rules of Child Pornography Community.....81–82

FIGURE 4–3 DOJ Presentation: Screenshot of Child Pornography Offender Collection 83

TABLE 4–1 Data from the Online Victimization Survey 87

FIGURE 4–4 Gender of Victims in CEOP Database.....88

FIGURE 4–5 Age of Female Victims in CEOP Database 89

FIGURE 4–6 Age of Male Victims in CEOP Database.....89

FIGURE 4–7 DOJ Presentation: Screenshot of Rules of Child Pornography Community.....96

TABLE 6–1 Increases in Base Offense Levels — Non-Production Guidelines 124

TABLE 6–2 Increase in Specific Offense Characteristics — Non-Production Guidelines 125

FIGURE 6–1 Non-Production Cases Fiscal Years 1992–2010.....126

FIGURE 6–2 Non-Production Offense Types Fiscal Year 2010 127

TABLE 6–3 Frequency of §2G2.2 Child Pornography Cases by Circuit – Fiscal Year 2010 128

FIGURE 6–3 Frequency of Non-Production Offenses by District Fiscal Year 2010 129

TABLE 6–4 Type of Sentence Imposed on R/T/D and Possession Offenders Fiscal Years 1992, 2004, 2010 131

FIGURE 6–4 Non-Production Sentences Over Time Fiscal Years 1992–2010 132

TABLE 6–5 Sentences Relative to the Guideline Range for R/T/D and Possession Offenders Fiscal Years 1992, 2004, 2010....133

FIGURE 6–5 Within Range and Out of Range Sentences: R/T/D Offenses Fiscal Years 2005–2010 134

FIGURE 6–6 Within Range and Out of Range Sentences: Possession Offenses Fiscal Years 2005–2010....134

FIGURE 6–7 Average Guideline Minimum and Sentence Imposed: Possession Offenses Fiscal Years 1992–2010 135

FIGURE 6–8 Average Guideline Minimum and Sentence Imposed: R/T/D Offenses Fiscal Years 1992–2010....135

TABLE 6–6 Sex Offenses: Prison Sentences Fiscal Year 2010....137

TABLE 6–7 Sex Offenses: Sentences Relative to the Guideline Range Fiscal Year 2010 138

FIGURE 6–9 Application of Specific Offense Characteristics: Non-Production Offenses Fiscal Years 1992–2010....139

FIGURE 6–10 Application of Specific Offense Characteristics: R/T/D Offenses Fiscal Years 1992–2004 139

FIGURE 6–11 Application of Specific Offense Characteristics Number of Images: Possession Offenses Fiscal Years 1992–2004 140

FIGURE 6–12 Application of Specific Offense Characteristics: Non-Production Offenses Fiscal Years 2005–2010....141

TABLE 6–8 Demographic Characteristics of Offenders Convicted of R/T/D and Possession Offenses Fiscal Years 1992, 2004, and 2010 142

FIGURE 6–13 Non-Production Offense Characteristics: Criminal History Category Fiscal Year 2010 143

FIGURE 6–14 Non-Production Offense Characteristics: Nature of Most Serious Offense of Conviction Fiscal Year 2010 146

FIGURE 6–15 Non-Production Offense Characteristics: Receipt and/or Distribution Conduct Fiscal Year 2010....147

FIGURE 6–16 Possession Offense Characteristics: Receipt and/or Distribution Conduct Fiscal Year 2010 148

TABLE 6–9 Non-Production Offense Characteristics: Types of Receipt Conduct Fiscal Year 2010....149

TABLE 6–10 Non-Production Offense Characteristics: Types of Distribution Conduct Fiscal Year 2010 150

FIGURE 6–17 Non-Production Offense Characteristics: Nature of Most Serious Offense of Conviction 1st Quarter, Fiscal Year 2012 153

FIGURE 6–18 Non-Production Offense Characteristics: Receipt and/or Distribution Conduct 1st Quarter, Fiscal Year 2012....153

TABLE 6–11 Non-Production Offense Characteristics: Types of Receipt Conduct 1st Quarter Fiscal Year 2012 154

TABLE 6–12 Non-Production Offense Characteristics: Types of Distribution Conduct 1st Quarter Fiscal Year 2012 155

FIGURE 6–19 Non-Production Offender Characteristics: History of Childhood Sexual Abuse Fiscal Year 2010 156

FIGURE 6–20 Non-Production Offender Characteristics: History of Substance Abuse Fiscal Year 2010 157

FIGURE 6–21 Non-Production Offender Characteristics: U.S. Military Service (Active Duty or Veteran) Fiscal Year 2010....159

FIGURE 6–22 Military Veterans by Census Age Group for Non-Production Offenders and the General Population Fiscal Year 2010....161

FIGURE 6–23 Non-Production Offender Characteristics: Offender Net Worth at Time of Conviction Fiscal Year 2010 162

FIGURE 6–24 Non-Production Offender Characteristics: Offender Employment at Time of Arrest Fiscal Year 2010 163

TABLE 7–1 Number of CSDBs for §2G2.2 Offenders Fiscal Year 2010 181

FIGURE 7–1 §2G2.2 Offense Characteristics: Most Serious CSDB Fiscal Year 2010 182

FIGURE 7–2 §2G2.2 Offense Characteristics: Categories of CSDB Fiscal Year 2010 183

FIGURE 7–3 §2G2.2 Contact CSDB Offense Characteristics: Nature of Contact Fiscal Year 2010 184

FIGURE 7–4 §2G2.2 Contact CSDB Offense Characteristics: Age of Youngest Victim at Time of Offense Fiscal Year 2010 184

FIGURE 7–5 §2G2.2 Contact CSDB Offense Characteristics: Offender-Victim Age Differential at Time of Offense Fiscal Year 2010 185

FIGURE 7–6 §2G2.2 Contact CSDB Offense Characteristics: Offender-Victim Relationship Fiscal Year 2010 186

FIGURE 7–7 CSDB for §2G2.2 Offenses by Offense Type Fiscal Year 2010 188

FIGURE 7–8 CSDB for §2G2.2 Offenders by Receipt and Distribution Conduct Fiscal Year 2010 189

FIGURE 7–9 CSDB for §2G2.2 Offenders by Type of Distribution Fiscal Year 2010 192

FIGURE 7–10 CSDB for §2G2.2 Offenders by Number of Images SOC Fiscal Year 2010 194

FIGURE 7–11 CSDB for §2G2.2 Offenders by Education Level Fiscal Year 2010 196

FIGURE 7–12 CSDB for §2G2.2 Offenders by Circuit Fiscal Year 2010 198

FIGURE 7–13 Sentence Length for §2G2.2 Offenders by CSDB Fiscal Year 2010 199

FIGURE 7–14 Sentence Length for §2G2.2 Offenders by Contact and Non-Contact CSDB Offenses Fiscal Year 2010 200

FIGURE 7–15 Within Range and Out of Range Sentences for §2G2.2 Offenses by CSDB Fiscal Year 2010 201

FIGURE 7–16 §2G2.2 Offense Characteristics: Most Serious CSDB 1st Quarter Fiscal Year 2012 202

FIGURE 7–17 §2G2.2 Offense Characteristics: Categories of CSDB Fiscal Years 1999–2000 203

TABLE 8–1 FY10 Application Rates of Enhancements in §2G2.2 209

FIGURE 8–1 Comparison of Non-Production Offenses: Common Guideline Calculations and Ranges (CHC I) Fiscal Years 2004 and 2010 212

FIGURE 8–2 Case Type One: No Distribution Enhancement 214

FIGURE 8–3 Variation of Sentence Length for Case Type One Offenders Convicted of Possession and Receipt Offenses 215

FIGURE 8–4 Case Type Two: Two-Level Distribution Enhancement 216

FIGURE 8–5 Variation of Sentence Length for Case Type Two Offenders Convicted of Possession and Distribution Offenders 217

FIGURE 8–6 Case Type Three: Five-Level Distribution Enhancement 218

FIGURE 8–7 Variation of Sentence Length for Case Type Three Offenders Convicted of Possession and Distribution Offenses 219

FIGURE 8–8 Charging Practices in Possession Offenses without Mandatory Minimums Fiscal Year 2010 221

FIGURE 8–9 Charging Practices in Non-Production Offenses with Predicate Sex Convictions and Receipt/Distribution Conduct Fiscal Year 2010 222

FIGURE 8–10 Guideline Stipulations in Non-Production Plea Agreements Fiscal Year 2010 223

FIGURE 8–11 Departures and Variances in Non-Production Offenses Fiscal Year 2010 225

FIGURE 8–12 Charging and Sentencing Practices to Limit Defendants' Sentencing Exposure Fiscal Year 2010 225

FIGURE 8–13 Distribution of Sentence Lengths for Non-Production Offenses Fiscal Year 2010 226

FIGURE 8–14 Non-Production Offense Characteristics: Distribution Conduct by Sentencing Exposure Fiscal Year 2010 228

FIGURE 8–15 Non-Production Offense Characteristics: Offender Criminal History Category by Sentencing Exposure Fiscal Year 2010 229

FIGURE 8–16 Non-Production Offense Characteristics: CSDB by Sentencing Exposure Fiscal Year 2010 230

FIGURE 8–17 Non-Production Offense Characteristics: Nature of CSDB and Allegations by Sentencing Exposure Fiscal Year 2010 231

FIGURE 8–18 Non-Production Offense Characteristics: Offender Race by Sentencing Exposure Fiscal Year 2010 232

FIGURE 8–19 Non-Production Offense Characteristics: Offender Education by Sentencing Exposure Fiscal Year 2010 232

FIGURE 8–20 Non-Production Offense Characteristics: Offender Employment by Sentencing Exposure Fiscal Year 2010 233

FIGURE 8–21 Non-Production Offense Characteristics: Offender Assets by Sentencing Exposure Fiscal Year 2010 233

FIGURE 8–22 Non-Production Offense Characteristics: Offender Age Range by Sentencing Exposure Fiscal Year 2010 234

FIGURE 8–23 Non-Production Offense Characteristics: Offender Substance Abuse History by Sentencing Exposure Fiscal Year 2010 234

FIGURE 8–24 Non-Production Offense Characteristics: Offender Military Background by Sentencing Exposure Fiscal Year 2010 235

FIGURE 8–25 Non-Production Offense Characteristics: Offender History of Sexual Abuse by Sentencing Exposure Fiscal Year 2010 235

TABLE 8–2 Non-Production Cases by Circuit Fiscal Year 2010 236

TABLE 8–3 Districts with the Most Non-Production Cases Fiscal Year 2010 237

FIGURE 9–1 Child Pornography Production Cases Fiscal Years 1992–2010 248

FIGURE 9–2 Production Cases: Most Serious Conviction Fiscal Year 2010 252

FIGURE 9–3 Child Pornography Sentences Over Time Fiscal Years 1992–2010....253

FIGURE 9–4 Within Range and Out of Range Sentences: Production Offenses Fiscal Years 1992–2010....254

FIGURE 9–5 Within Range and Out of Range Sentences: Production Offenses Fiscal Years 2005–2010....255

FIGURE 9–6 Average Guideline Minimum and Sentence Imposed: Production Offenses Fiscal Years 1992–2010 256

TABLE 9–1a Production Offender Characteristics Fiscal Year 2010 258

TABLE 9–1b Production Offender Characteristics Fiscal Year 2010 258

FIGURE 9–7 Production Offender Characteristics: Criminal History Category Fiscal Year 2010 259

FIGURE 9–8 Production Cases: Application of the Specific Offense Characteristics Fiscal Years 1992–2010 260

FIGURE 9–9 Production Cases: Application of the Specific Offense Characteristics Fiscal Years 2005–2010 261

FIGURE 9–10 Production Offender Characteristics: Physical Presence/Contact Victimization Fiscal Year 2010 263

FIGURE 9–11 Production Offender Characteristics: Involvement with Child Pornography Fiscal Year 2010 265

FIGURE 9–12 Production Offense Characteristics: Age of Youngest Victim at Time of Offense Fiscal Year 2010 266

FIGURE 9–13 Production Offense Characteristics: Number of Victims Fiscal Year 2010 266

FIGURE 9–14 Production Offense Characteristics: Offender-Victim Relationship Fiscal Year 2010 267

FIGURE 10–1 Child Pornography Offense Characteristics: Mean Months of Supervised Release Fiscal Years 1992–2010 275

TABLE 10–1 Offenders Sentenced to a Term of Supervised Release Comparison of All Child Pornography Offenders Fiscal Year 2010 276

FIGURE 10–2 Child Pornography Offenders Sentenced to Lifetime Supervision Fiscal Years 2004–2010 276

FIGURE 10–3 Non-Production Characteristics: CSDB by Lifetime and Non-Lifetime Supervision Fiscal Year 2010 277

FIGURE 11–1 Non-Production Offender Characteristics: Recidivism Fiscal Years 1999–2000 299

TABLE 11–1 Non-Production Offenders: Most Serious Criminal Justice Failure Fiscal Years 1999–2000 300

FIGURE 11–2 Non-Production Offender Characteristics: Recidivism Fiscal Years 1999–2000 301

FIGURE 11–3 Non-Production Offender Characteristics: General Recidivism by Criminal History Category Fiscal Years 1999–2000 302

FIGURE 11–4 Non-Production Offender Characteristics: General Recidivism by History of CSDB Fiscal Years 1999–2000 302

FIGURE 11–5 Average Prison Term for Recidivist and Non-Recidivist Child Pornography Offenders Fiscal Years 1999–2000 303

TABLE 11–2 Comparison of Non-Production Offenders Fiscal Years 1999–2000 and Fiscal Year 2010 304

TABLE 11–3 Comparison of Child Pornography Recidivism for White Male Offenders Fiscal Year 1992 & Fiscal Years 1999–2000 309

EXECUTIVE SUMMARY

A. OVERVIEW

This report is the result of a multi-year process in which the United States Sentencing Commission ("the Commission") examined cases of offenders sentenced under the federal sentencing guidelines and corresponding penal statutes concerning child pornography offenses. The primary focus of this report is USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), the current guideline for non-production offenses such as possession, receipt, transportation, and distribution of child pornography, the four primary offense types. One chapter of this report also analyzes cases of offenders sentenced under the guideline for production of child pornography, USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production). The purpose of this report is to contribute to the ongoing assessment by Congress and the various stakeholders in the federal criminal justice system regarding how federal child pornography offenders are prosecuted, sentenced, incarcerated, and supervised following their reentry into the community.[1]

This report complements and expands upon the Commission's 2009 report, *History of the Child Pornography Guidelines*.[2] The 2009 report chronicled the federal non-production child pornography guidelines (§2G2.2 and the former §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct)) from their inception through 2009. In particular, it tracked all substantive amendments made to those guidelines, several of which resulted from congressional directives to the Commission or other legislation. The most significant amendments to the guidelines resulted from the PROTECT Act of 2003,[3] which also created new statutory mandatory minimum statutory penalties for most child pornography offenses.[4]

Several factors have prompted the Commission to continue its examination of child pornography cases. First, during the past two decades, cases in which offenders have been sentenced under the child pornography guidelines, while only a small percentage of the overall

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[1] This report is submitted pursuant to the Commission's general statutory authority under 28 U.S.C. §§ 994 and 995 and its specific responsibility to advise Congress on sentencing policy under 28 U.S.C. § 995(a)(20).

[2] *See* U.S. SENT'G COMM'N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (Oct. 2009) (available at http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf).

[3] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (2003). The PROTECT Act is discussed in Chapter 1. *See* Chapter 1 at 4.

[4] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 38-48 (discussing the changes to the statutory and guideline penalties for child pornography offenses resulting from the PROTECT Act).

federal criminal caseload, have grown substantially both in total numbers and as a percentage of the total caseload.[5]

Second, since the enactment of the PROTECT Act of 2003 and *United States v. Booker*, which made the guidelines "effectively advisory"[6] in 2005, there has been a steadily decreasing rate of sentences imposed within the applicable guidelines ranges in non-production cases. That rate decreased from 83.2 percent in fiscal year 2004 — the last full fiscal year before *Booker*, when most offenders were not subject to increased statutory and guideline penalty ranges resulting from the PROTECT Act[7] — to 32.7 percent in fiscal year 2011.[8] The corresponding rate of below range sentences for reasons other than an offender's substantial assistance to the authorities likewise has increased significantly. By fiscal year 2011, that rate was 62.8 percent.[9] The steady decrease in the rate of sentences imposed within the applicable guideline ranges has occurred at the same time that average minimums of such ranges and average sentences imposed have significantly increased.[10] These sentencing data indicate that a growing number of courts believe that the current sentencing scheme in non-production offenses is overly severe for some offenders. As the Supreme Court has observed, the Commission's obligation to collect and examine sentencing data directly relates to its statutory duty to consider whether the guidelines are in need of revision in light of feedback from judges as reflected in their sentencing decisions.[11]

Third, as a result of recent changes in the computer and Internet technologies that typical non-production offenders use, the existing sentencing scheme in non-production cases no longer adequately distinguishes among offenders based on their degrees of culpability. Non-production child pornography offenses have become almost exclusively Internet-enabled crimes; the typical offender today uses modern Internet-based technologies such as peer-to-peer ("P2P") file-sharing programs that were just emerging only a decade ago and that now facilitate large collections of child pornography.[12] The typical offender's collection not only has grown in volume but also contains a wide variety of graphic sexual images (including images of very young victims),

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[5] *See* Chapter 6 at 126 (noting that, in fiscal year 1992, there were 77 non-production cases, which accounted for 0.2% of the total federal criminal caseload; by fiscal year 2010, there were 1,717 non-production cases, which accounted for 2.0% of the total caseload); Chapter 9 at 247 (noting that, in fiscal year 1992, there were ten production cases; by fiscal year 2010, there were 207 such cases, which accounted for 0.25% of the total caseload).

[6] 543 U.S. 220, 245 (2005).

[7] *See* Chapter 1 at 4 (discussing the effect of the PROTECT Act amendments).

[8] *See id.* at 7.

[9] *See id.* (noting that, in fiscal year 2011, 48.2% of offenders received non-government sponsored downward departures or variances, and 14.6% received government sponsored departures or variances other than for offenders' substantial assistance to the authorities).

[10] *See* Chapter 1 at 8 (noting that the average minimum of guideline ranges in non-production child pornography offenses in fiscal year 2004 was 50.1 months, and the average sentence imposed was 53.7 months; by fiscal year 2010, the average guideline minimum was 117.5 months, and the average sentence imposed was 95.0 months).

[11] Rita v. United States, 551 U.S. 338, 350 (2007); *see also* 28 U.S.C. §§ 994(o), (p), (w) & 995(a)(15), (20) (setting forth the Commission's obligation to collect and analyze sentencing data and, where appropriate, amend the guidelines and make recommendations to Congress to amend relevant legislation based on such data analysis).

[12] *See* Chapter 3 at 41–56; Chapter 6 at 146–51, 153–55.

which are now readily available on the Internet.[13] As a result, four of the of six sentencing enhancements in §2G2.2 — those relating to computer usage and the type and volume of images possessed by offenders, which together account for 13 offense levels — now apply to most offenders[14] and, thus, fail to differentiate among offenders in terms of their culpability. These enhancements originally were promulgated in an earlier technological era, when such factors better served to distinguish among offenders.[15] Indeed, most of the enhancements in §2G2.2, in their current or antecedent versions, were promulgated when the typical offender obtained child pornography in printed form in the mail.[16]

Fourth, recent social science research — by both the Commission and outside researchers — has provided new insights about child pornography offenders and offense characteristics that are relevant to sentencing policy. This research includes information regarding the prevalence of child pornography offenders' criminal sexually dangerous behavior[17] both before their arrests and after their ultimate reentry into the community following their convictions,[18] as well as emerging research on the efficacy of psycho-sexual treatment of offenders' clinical sexual disorders.[19]

Finally, most stakeholders in the federal criminal justice system consider the non-production child pornography sentencing scheme to be seriously outmoded.[20] Those stakeholders, including sentencing courts, increasingly feel that they "are left without a meaningful baseline from which they can apply sentencing principles" in non-production cases.[21]

For these reasons, the Commission prepared this report. In preparing the report, the Commission: (1) reviewed both relevant statutory and case law as well as social science and legal literature concerning child pornography offenses, offenders, and victims; (2) engaged in extensive data analyses of several thousands of federal child pornography cases from fiscal year 1992 through the first quarter of fiscal year 2012; (3) studied recidivism rates for child pornography offenders, including conducting a recidivism study of 610 federal child

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[13] *See* Chapter 1 at 5–6.

[14] *See* Chapter 8 at 209; *see also* USSG §2G2.2(b)(2), (4), (6) & (7) (enhancements for use of a computer, possession of images of a prepubescent minor, possession of sado-masochistic images, and possession of a certain number of images in increments from 10 or more to 600 or more).

[15] *See* Chapter 1 at 6.

[16] *See id.*

[17] Chapter 7 at 174 (defining criminal sexually dangerous behavior as including "illegal sexually abusive, exploitative, or predatory conduct" against "real-time victims").

[18] *See id.* at 171– 74 (discussing social science research); *id.* at 174–86 (discussing the Commission's special coding project concerning criminal sexually dangerous behavior occurring before offenders' prosecutions for non-production offenses); Chapter 11 at 294–303 (discussing Commission's recidivism study of non-production offenders).

[19] *See* Chapter 10 at 277–87.

[20] *See* Chapter 1 at 10–14 (discussing the views of the Criminal Law Committee of the Judicial Conference of the United States Courts, the Department of Justice, the defense bar, and other interested parties).

[21] United States v. Stern, 590 F. Supp. 2d 945, 961 (N.D. Ohio 2008).

pornography offenders sentenced under the non-production guidelines in fiscal years 1999 and 2000; and (4) held a public hearing at which the Commission received testimony from experts in technology and the social sciences, treatment providers, law enforcement officials, legal practitioners, victims' advocates, and members of the judiciary.

B. SUMMARY OF THE CHILD PORNOGRAPHY SENTENCING SCHEME

1. *Penal Statutes*

Several statutory provisions proscribe a variety of acts related to the production, advertising, distribution, transportation (including by shipping or mailing), importation, receipt, solicitation, and possession of child pornography.[22] For sentencing purposes, child pornography offenses generally are divided into two larger categories — production offenses and non-production offenses. Offenses related to the production of child pornography are prosecuted in approximately ten percent of all federal child pornography cases.[23] The four primary non-production offense types are distribution, transportation, receipt, and possession of child pornography, which represent approximately 90 percent of all federal child pornography prosecutions.[24]

The statutory penalties for these federal offenses vary in severity. A production offense carries a statutory mandatory minimum term of 15 years of imprisonment and a maximum term of 40 years (and higher minimum and maximum penalties if the offender has a predicate conviction for a sex offense).[25] A receipt, transportation, or distribution (R/T/D) offense carries a statutory mandatory minimum sentence of five years of imprisonment and a maximum sentence of 20 years (with increased minimum and maximum penalties if the offender has a predicate conviction for a sex offense).[26] A simple possession offense carries no statutory mandatory minimum penalty and a maximum term of ten or 20 years of imprisonment (unless the offender has a predicate conviction for a sex offense, which would result in a mandatory minimum term of imprisonment of ten years and a maximum term of 20 years).[27]

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[22] *See* 18 U.S.C. §§ 2251, 2252, 2252A, & 2260. An additional statute, 18 U.S.C. § 1466A, prohibits possession, receipt, distribution, and production of "obscene visual representations of the sexual abuse of children"; although it is an obscenity offense in the penal statutes, its violation is considered a child pornography offense for sentencing purposes. *See* USSG §2G2.2(a)(1). Section 1466A's penalty provisions mirror those in § 2252A for equivalent offense conduct. *See* 18 U.S.C. § 1466A(a), (b). Prosecutors also occasionally bring obscenity charges under other obscenity statutes when the offenses in fact involved images that would qualify as child pornography. *See* 18 U.S.C. §§ 1461 *et seq.* Such offenses, if they involved the obscene depiction of minors, are subject to the guidelines' child pornography provisions rather than the guideline applicable to obscenity depicting adults. *See, e.g.*, USSG §2G3.1(c).

[23] *See* Chapter 1 at 7 n.42.

[24] *See id.*; *see also* Chapter 6 at 146.

[25] 18 U.S.C. § 2251(a), (d)(1)(B) & (e).

[26] 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1), 2260(c)(2).

[27] 18 U.S.C. §§ 2252(b)(2) & 2252A(b)(2). In late 2012, Congress enacted the Child Protection Act of 2012, Pub. L. No. 112–206, 126 Stat. 1490 (Dec. 7, 2012), which raised the statutory maximum term of imprisonment for possession of child pornography from ten to 20 years for defendants who possessed images of a prepubescent minor

Table 1 below summarizes the statutory penalty ranges for offenses involving child pornography or sexually obscene images of children:

Table 1
Child Pornography Statutory Penalty Ranges

Production			Receipt/Distribution/ Transportation		Possession		Obscenity	
No Prior Sex Conviction	**Prior Sex Conviction**	**> 1 Prior Sex Conviction**	**No Prior Sex Conviction**	**Prior Sex Conviction**	**No Prior Sex Conviction**	**Prior Sex Conviction**	**18 U.S.C. § 1466A**	**18 U.S.C. §§ 1461 *et seq.***
15 to 30 years	25 to 50 years	35 years to life	5 to 20 Years	15 to 40 years	0 to 10 years or 0 to 20 years (depending on age of victim)	10 to 20 years	Mirrors penalties in CP statutes	0 to 5 years or 0 to 10 years (varies by statute)

2. *Sentencing Guidelines*

Sentencing guidelines for child pornography offenses are found in Chapter Two, Part G, Subpart 2 (Sexual Exploitation of a Minor), of the *Guidelines Manual*. The Commission's report focuses on §2G2.1, which addresses offenses related to production of child pornography, and §2G2.2, which addresses non-production child pornography offenses.[28] Both guidelines are reproduced in full in Appendix B at the end of the report. For readers' convenience, §2G2.2, which is a primary focus of this report, also is set forth at the end of this executive summary.

Section 2G2.1, the guideline for production offenses, has a base offense level of 32 and six sentencing enhancements for different aggravating factors primarily related to the nature of the images produced (the type of sexual acts perpetrated upon victims and the ages of the victims

or a minor under 12 years of age. *See* Chapter 1 at 4–5. Commission data show that virtually all offenders possess such images. *See* Chapter 8 at 209 (noting 96.3% of non-production offenders possessed such images in fiscal year 2010).

Violations of § 1466A involving receipt, distribution, or production of "obscene visual representations of the sexual abuse of children" carry a statutory mandatory minimum penalty of five years of imprisonment and a statutory maximum of 20 years of imprisonment. Violations of § 1466A involving simple possession of such obscene material carry no statutory mandatory minimum penalty and have a statutory maximum of ten years of imprisonment. 18 U.S.C. § 1466A(a) & (b) (subjecting violators to the same "penalties provided in section 2252A(b)" for comparable offense conduct involving child pornography rather than obscenity depicting minors). Other obscenity statutes occasionally are used to prosecute offenders who possess, receive, transport, or distribute what legally would be considered child pornography; they carry no mandatory minimum penalty and have a statutory maximum penalty of five or ten years of imprisonment depending on which statute applies. *See* 18 U.S.C. §§ 1461, 1462, 1463, 1465, 1466, 1468, & 1470.

[28] For non-production offenses committed before November 1, 2004, defendants only convicted of possession offenses were sentenced under the former USSG §2G2.4, while defendants convicted of R/T/D offenses were sentenced under the prior version of USSG §2G2.2. Offenders convicted of any type of non-production offense committed on or after November 1, 2004, are sentenced under the current version of §2G2.2. *See* Chapter 1 at 2 n.13.

depicted in the images), whether defendants distributed the images, and the relationship between the defendants and victims.[29]

Section 2G2.2, which covers non-production offenses, has a two-tiered system for assigning a base offense level to a defendant based on the nature of the most serious statute of conviction. A defendant convicted of simple possession of child pornography[30] has a base offense level of 18.[31] A defendant convicted of an R/T/D offense has a base offense level of 22.[32] The offense level of a defendant convicted solely of receipt is reduced by two levels if the court finds that the defendant's actual conduct was limited to receipt or solicitation of child pornography and that he "did not intend to traffic in, or distribute" any child pornography.[33] Section 2G2.2 thus differentiates offenders' starting points in calculating their offense levels by dividing them into three primary groups: (1) those convicted of simple possession (offense level 18); (2) those convicted of receipt who did not intend to distribute (offense level 20); and (3) those convicted of receipt but who intended to distribute as well as all those convicted of distribution or transportation (offense level 22). Section 2G2.2 contains six sentencing enhancements based on aggravating circumstances related to the nature of the images possessed (the ages of the victims depicted and whether the sexual acts depicted involved sadistic or masochistic acts or other violence), the number of images possessed, whether the defendant used a computer in the commission of the offense, whether the defendant distributed child pornography, and whether the defendant engaged in a "pattern of activity" involving the sexual exploitation or abuse of minors.[34]

C. HIGHLIGHTS OF THE REPORT

1. *All child pornography offenses, including the simple possession of child pornography, are extremely serious because they both result in perpetual harm to victims and validate and normalize the sexual exploitation of children.*

- Child pornography offenses inherently involve the sexual abuse and exploitation of children. Typical child pornography possessed and distributed by federal child pornography offenders today depicts prepubescent children engaging in graphic sex acts, often with adult men.[35] Approximately half of child pornography offenders in the United States possess one or more images (including still images and/or videos)

[29] USSG §2G2.1(b).

[30] 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5).

[31] USSG §2G2.2(a)(1). In addition, defendants convicted of a child pornography "morphing" offense under 18 U.S.C. § 2252A(a)(7), or of certain obscenity offenses in which the obscene images depicted children, *see, e.g.*, 18 U.S.C. § 1466A(b), also have a base offense level of 18 under the guideline. USSG §2G2.2(a)(1).

[32] USSG §2G2.2(a)(2).

[33] USSG §2G2.2(b)(1).

[34] USSG §2G2.2(b)(2)-(7).

[35] *See* Chapter 4 at 86–87.

depicting the sexual abuse of a child under six years old and approximately one-quarter of offenders possess one or more images depicting the sexual abuse of a child two years old or younger.[36]

- Child pornography victims are harmed initially during the production of images, and the perpetual nature of child pornography distribution on the Internet causes significant additional harm to victims. Many victims live with persistent concern over who has seen images of their sexual abuse and suffer by knowing that their images are being used by offenders for sexual gratification and potentially for "grooming" new victims of child sexual abuse.[37]

- Child pornography offenses are international crimes. Images depicting the abuse of children are transmitted both domestically and internationally to offenders across the world, each of whom may continue to redistribute the same images. Once an image is distributed via the Internet, it is impossible to eradicate all copies of it.[38] The harm to victims thus is lifelong.

- The ready availability of child pornography on the Internet, the existence of online child pornography "communities" that validate child sexual exploitation, and a growing but largely non-commercial "market" for new images all contribute to the further production of child pornography and, in the process, to the sexual abuse of children.[39]

- Although child pornography validates and normalizes the sexual abuse of children, social science research has not established that viewing child pornography "causes" the typical offender to progress to other sex offending against minors. For some offenders, however, obtaining sexual gratification through the use of child pornography is a risk factor for other sex offending against minors, as child pornography may strengthen existing tendencies in ways that may create a "tipping-point effect" if other risk factors are also present.[40]

2. *Child pornography offenders engage in a variety of behaviors reflecting different degrees of culpability and sexual dangerousness.*

- Typical offenders maintain collections of still and video images numbering in the hundreds or thousands. Such images often depict

[36] *See id.* at 87.

[37] *See* Chapter 5 at 107–14.

[38] *See* Chapter 3 at 41, 64.

[39] *See* Chapter 4 at 97–99.

[40] *See id.* at 102–03.

prepubescent children engaging in graphic sexual acts with adults. A minority of offenders acquire enormous and often well-organized collections containing tens of thousands or occasionally even hundreds of thousands of images. Some offenders also intentionally collect child pornography depicting the sexual torture of children, including infants and toddlers.[41]

- There have been dramatic technological changes related to computers and the Internet in the past decade, such as the ascendance of P2P file-sharing programs, which have changed the way that typical offenders today receive and distribute child pornography.[42] The Commission's special research project of 1,654 fiscal year 2010 §2G2.2 cases found that nearly two-thirds of offenders (65.4%) distributed child pornography to others. The most common manner of distribution was a P2P file-sharing program.

- Child pornography offenders vary widely in their technological sophistication. Many are relatively unsophisticated "entry-level" offenders who use readily available technologies such as "open" P2P file-sharing programs to receive and/or distribute child pornography in an indiscriminate manner. Other offenders, however, use their technological expertise to create private and secure trading "communities" and to evade, and help others evade, detection by law enforcement.[43]

- Technological advances in Internet and computer technologies have resulted in the growth of Internet-based child pornography communities, which not only operate as a forum for offenders to receive and distribute images but also serve to validate and normalize the sexual exploitation of children. Such communities thrive in Internet chat-rooms and bulletin board systems and also through the use of "closed" P2P file-sharing programs in which offenders directly communicate with each other.[44] Not all child pornography offenders join such communities, and those who do vary in the level of their engagement. The Commission's data suggest that a significant minority of offenders (approximately one-fourth) have some level of involvement in such communities.[45]

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[41] *See id.* at 84–92.

[42] *See* Chapter 3 at 41–56; *see also* Chapter 6 at 153–55 (noting the Commission's study of large samples of federal child pornography cases from fiscal year 2002 and fiscal year 2012 revealed that no presentence reports ("PSRs") mentioned the use of P2P file-sharing programs by offenders sentenced in fiscal year 2002, while PSRs in the majority of cases of offenders sentenced in fiscal year 2012 mentioned their use of P2P file-sharing programs).

[43] *See* Chapter 3 at 61–62.

[44] *See* Chapter 4 at 92–99.

[45] *See* Chapter 6 at 151 & n.70 (finding that 445 of the 1,654 non-production offenders sentenced in fiscal year 2010, or 26.9% of offenders, engaged in "personal" distribution of child pornography to other adult offenders using modes of distribution such as email, which suggests at least some degree of involvement in child pornography communities).

- Some federal offenders who commit non-production child pornography offenses also have engaged in sexually dangerous behavior, either prior to or concomitantly with their instant child pornography offenses. Existing studies, which have employed different methodologies and examined different offender populations — including some offenders outside the United States — have yielded inconsistent findings concerning the prevalence rate of other sex offending by non-production offenders.[46] The Commission thus engaged in a special research project that reviewed virtually all federal non-production child pornography cases from fiscal year 1999, 2000, and 2010, as well as a sample of such cases from fiscal year 2012, to provide reliable data concerning the percentage of federal offenders sentenced under the non-production child pornography guidelines who have known histories of criminal sexually dangerous behavior ("CSDB").

- For purposes of this report, CSDB comprises three different types of criminal sexual conduct: (1) actual or attempted "contact" sex offenses occurring before or concomitantly with offenders' commission of non-production child pornography offenses; (2) "non-contact" sex offenses occurring before or concomitantly with offenders' commission of non-production child pornography offenses;[47] and (3) prior non-production child pornography offenses (if the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender).

- After examining the presentence reports ("PSRs") in a total of 2,696 non-production child pornography cases, the Commission found that approximately one in three[48] offenders had engaged in one or more types of CSDB predating their prosecutions for their non-production offenses.[49]

- The Commission's study had certain limitations that resulted in its being underinclusive in certain important respects. The study did not include

[46] *See* Chapter 7 at 171–74 (discussing the existing studies); *see also* Michael Seto et al., *Contact Sex Offending by Men With Online Sexual Offenses*, 23 SEXUAL ABUSE 124 (2011) (meta-analysis of 24 international studies, which found that approximately one in eight "online offenders" – the majority of whom were child pornography offenders – had an "officially known contact sex offense history," but estimating that a much higher percentage, approximately one in two, in fact had committed prior contact sexual offenses based on offenders' "self-report" data in six studies).

[47] Contact offenses include sexual molestation offenses (rape and sexual assault). Non-contact offenses include enticing a minor to engage in sexual conduct via the Internet (*e.g.*, "cybersex" via a webcam), knowingly distributing child pornography to a real or perceived minor, and sexual voyeurism and exhibitionism offenses. *See* Chapter 7 at 174–78.

[48] The rate of CSDB reflected in prior convictions or findings in PSRs was 33.9% for offenders sentenced in fiscal years 1999-2000, 31.4% for offenders sentenced in fiscal year 2010, and 33.0% for offenders sentenced in the first quarter of fiscal year 2012.

[49] *See* Chapter 7 at 181, 201–02.

CSDB that was not reported to or detected by the authorities or otherwise not recounted in PSRs. The Commission coded offenders' CSDB only as reflected in: (1) convictions for sex offenses; (2) findings in PSRs that offenders had engaged in CSDB (which did not result in convictions); and (3) unresolved allegations of CSDB in PSRs.[50] It is well established that the *actual* rate of offenders' CSDB is higher than the *known* rate because official records of known sex offenses by child pornography offenders fail to account for all such sex offenses.[51] In addition, the Commission's study is underinclusive of all conduct reflecting offenders' sexual dangerousness insofar as the study was limited to prior sexually dangerous behavior that amounted to a *criminal offense* and did not include *non-criminal* acts of sexually deviant behavior.[52] The Commission's review of PSRs revealed a variety of non-criminal but sexually deviant conduct (*e.g.*, an offender's collection of children's underwear associated with his collection of child pornography or an offender's "diary" containing graphic descriptions of his sexual fantasies concerning children).[53]

3. *Guideline penalty ranges, average sentences of imprisonment, and average terms of supervised release have substantially increased in significant part because of the statutory and guideline amendments resulting from the PROTECT Act of 2003.*

- The average guideline minimum for non-production child pornography offenses in fiscal year 2004 — the last full fiscal year when the guidelines were mandatory and the first full fiscal year after the enactment of the PROTECT Act — was 50.1 months of imprisonment, and the average sentence imposed was 53.7 months. By fiscal year 2010, as a larger percentage of cases was affected by the provisions of the PROTECT Act that increased penalty levels, the average guideline minimum was 117.5 months of imprisonment, and the average sentence imposed was 95.0 months.[54]

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[50] *See id.* at 179. The Commission was limited to coding such information from PSRs because the Commission does not receive other documents that may contain relevant information concerning CSDB (*e.g.*, transcripts of court proceedings). The Commission's study reports unresolved allegations separately from CSDB reflected in prior convictions and findings in PSRs. *See* Chapter 7 at 181-82.

[51] *See id.* at 179–80.

[52] The Commission could not code non-criminal sexually dangerous behavior in reviewing PSRs as a result of difficulties in classifying such varied behavior without a bright-line standard such as criminality. Existing social science research has only undertaken to determine the prevalence of *criminal* sexually dangerous behavior among child pornography offenders. *See generally* Seto et al., *supra* note 46.

[53] *See* Chapter 7 at 176. Such sexual deviance, even if not criminal, is a risk factor for sexual recidivism. *See* Chapter 10 at 286.

[54] *See* Chapter 1 at 8; *see also id.* at 4 (discussing the PROTECT Act).

- Typical guideline penalty ranges and average sentences of imprisonment have increased since fiscal year 2004 not only because of a growth in the number and severity of enhancements following the PROTECT Act amendments but also because of an increase in the incidence of the underlying conduct and circumstances triggering such enhancements, particularly in the technology used.[55] In particular, four of the six enhancements in §2G2.2(b) — together accounting for 13 offense levels — now apply to the typical non-production offender.[56] In fiscal year 2010, §2G2.2(b)(2) (images depicting pre-pubescent minors) applied in 96.1 percent of cases; §2G2.2(b)(4) (sado-masochistic images) applied in 74.2 percent of cases; §2G2.2(b)(6) (use of a computer) applied in 96.2 percent of cases; and §2G2.2(b)(7) (images table) applied in 96.9 percent of cases.[57] Thus, sentencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now routinely apply to the vast majority of offenders. Higher penalty ranges and average sentences also have resulted from the statutory mandatory minimum penalties created by the PROTECT Act, which apply in approximately half of all §2G2.2 cases today and which result in higher base offense levels under the guidelines for offenders convicted of offenses carrying such mandatory minimum penalties.[58]

- Supervised release terms in child pornography cases have increased significantly since the PROTECT Act. The PROTECT Act raised the maximum statutory term of supervised release from three years for most child pornography offenders to a lifetime term for all child pornography offenders and also created a statutory mandatory minimum term of five years for all such offenders. In fiscal year 2010, the average term of supervised release for non-production offenders was approximately 20 years (220.3 months for offenders convicted of possession and 273.7 months for offenders convicted of R/T/D offenses); the average term of supervised release for offenders sentenced under the production guideline was nearly 27 years.[59] The sentencing guidelines currently recommend the statutory maximum term of lifetime supervision for all child pornography offenders.[60]

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[55] *See* Chapter 6 at 123–25; *see also* Chapter 8 at 208–12.

[56] *See* Chapter 8 at 209 (Table 8-1).

[57] The images table contains incremental enhancements depending on the number of images. The majority of offenders receiving an enhancement based on the images table (69.6%) received the maximum enhancement of 5 levels based on their possession of 600 or more images. *See* Chapter 6 at 141.

[58] *See* Chapter 2 at 32; Chapter 6 at 146.

[59] *See* Chapter 10 at 271–76.

[60] *See id.* at 272.

4. *Increasing numbers of courts and parties in non-production cases have engaged in charging and sentencing practices that have had the effect of limiting the sentencing exposure for many offenders as a result of the view that the current non-production sentencing scheme is outmoded, fails to distinguish adequately among offenders based on their levels of culpability and dangerousness, and is overly severe in some cases. Growing sentencing disparities have resulted from these practices.*

- A variety of stakeholders in the federal criminal justice system, including the Department of Justice, the defense bar, and many in the federal judiciary, are critical of the current non-production penalty scheme. Although these stakeholders are not unanimous concerning the perceived flaws in the penalty scheme, many believe that it fails to adequately differentiate among offenders based on their culpability and sexual dangerousness, needs to be updated to reflect recent changes in typical offense conduct associated with the evolution of computer and Internet technologies, and is too severe for some offenders.[61] As a result, courts and parties increasingly have engaged in charging and sentencing practices that have limited many offenders' sentencing exposure. Such inconsistent application of the existing guideline and statutory penalty provisions has led to growing sentencing disparities among similarly situated offenders.[62]

- The Commission's special research project of fiscal year 2010 §2G2.2 cases revealed four common practices used to limit non-production offenders' sentencing exposure: (1) charging practices that permitted offenders to be convicted only of simple possession despite having committed R/T/D offenses (46.6% of cases); (2) plea agreements containing guideline stipulations regarding sentencing enhancements that limited offenders' sentencing exposure under the guidelines (11.4% of cases); (3) government sponsored downward departures and variances for reasons other than for an offender's substantial assistance to the authorities (10.3% of cases); and (4) non-government sponsored downward departures and variances (44.3% of cases).[63] In fiscal year 2010, approximately four out of five (78.8%) §2G2.2 offenders benefited from one or more of the above-mentioned four practices. The Commission's analysis also showed that no offender or offense characteristics (*e.g.*, an offender's military service record, history of criminal sexually dangerous behavior, or distribution of child pornography) appeared to account for these practices in most cases. Rather, geographical differences in charging, plea bargaining, and sentencing practices among the 94 districts

[61] *See* Chapter 1 at 10–14.

[62] *See generally* Chapter 8.

[63] *See id.* at 219–25. Because multiple practices occurred in some cases, the percentages mentioned above add up to more than 100%.

appear to be the strongest factor explaining whether an offender benefitted from one or more of these practices.[64]

- The Commission's special coding project of fiscal year 2010 cases revealed that slightly over half of §2G2.2 offenders were convicted solely of possession, which subjected them to no statutory mandatory minimum sentence and a statutory maximum sentence of ten years (assuming they had no predicate conviction for a sex offense). According to their PSRs and/or plea agreements, however, well over 90 percent of these offenders committed one or more R/T/D offenses.[65] Had these offenders been convicted of an R/T/D offense, they would have been subject to significantly higher statutory penalty ranges as well as a higher base offense level under §2G2.2 than offenders convicted only of possession.[66]

- The Commission's study of a large sample of similarly situated §2G2.2 offenders with no criminal history who were sentenced in fiscal year 2010 revealed substantial sentencing disparities resulting from how they were charged and sentenced under the guidelines. On average, offenders convicted of possession but who knowingly received child pornography were sentenced to a term of 52 months of imprisonment, while on average similarly situated offenders convicted of receipt were sentenced to a term of 81 months of imprisonment. On average, offenders convicted of possession but who distributed child pornography in exchange for other child pornography received a sentence of 78 months, while similarly situated offenders convicted of distribution received an average sentence of 132 months.[67]

- Appellate review of sentences in non-production cases since *Booker* has not reduced the growing disparities. Indeed, differing approaches among the circuit courts have contributed to the sentencing disparities.[68]

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[64] *See id.* at 227–38.

[65] *See* Chapter 6 at 145–48. As noted in *supra* note 27, the statutory maximum sentence for possession offenses was ten years (for offenders who did not have a predicate conviction for a sex offense) in fiscal year 2010. In late 2012, Congress raised the statutory maximum to 20 years for offenders who possess images depicting prepubescent minors or minors under 12 years of age.

[66] *See* Chapter 8 at 213, 218. Offenders without a predicate sex conviction would have been subject to a statutory mandatory minimum sentence of five years and a statutory maximum sentence of 15 years if convicted of an R/T/D offense. Such offenders with a predicate conviction for a sex offense would have faced a statutory mandatory minimum of 15 years and a statutory maximum sentence of 40 years. *See id.*

[67] *See id.* at 215.

[68] *See id.* at 238–44.

5. *Emerging research indicates that child pornography offenders with clinical sexual disorders may respond favorably to psycho-sexual treatment, particularly if administered pursuant to the "containment model."*

- Experts disagree on what percentage of child pornography offenders have clinical sexual disorders such as pedophilia. Some experts believe most or even virtually all child pornography offenders are pedophiles, while other experts believe that most child pornography offenders are not pedophiles.[69]

- Many experts believe that sex offenders, including child pornography offenders, with clinical sexual disorders such as pedophilia cannot be "cured." Nevertheless, some recent studies indicate that psycho-sexual treatment may be effective in reducing recidivism for many sex offenders. Emerging research on the effectiveness of psycho-sexual treatment administered as part of the "containment model" is especially promising and warrants further study. The containment model involves close cooperation among the treatment provider, a polygraph examiner, and a qualified probation officer or other supervising officer. The containment model is now widely considered to be a "best practice" to be implemented in supervising sex offenders, including federal child pornography offenders. The success of the containment model depends on adequate resources and proper training of the professionals who administer it.[70]

- Polygraph testing is an important part of the treatment of child pornography offenders. Polygraph testing encourages offenders in treatment to be truthful, which can advance the goals of treatment.[71]

- Researchers are beginning to develop actuarial risk assessments to gauge child pornography offenders' risk of sexual recidivism. Two primary factors that appear to be correlated with criminal sexually dangerous behavior are an offender's antisociality and his sexual deviance.[72]

- Psycho-sexual treatment providers report that the accuracy of their risk assessments of offenders and the efficacy of their treatment could be increased if they had better access to information about offense and offender characteristics (*e.g.*, access to the results of forensic analyses of offenders' computers and knowledge of offenders' histories of sexually dangerous behavior discussed in their PSRs).[73]

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[69] *See* Chapter 4 at 75.

[70] *See* Chapter 10 at 277–78, 283–84.

[71] *See id.* at 282.

[72] *See id.* at 285–87.

[73] *See id.* at 281.

6. *The Commission's study of 610 offenders sentenced under the non-production guidelines in fiscal years 1999 and 2000 found that their rate of known general recidivism was 30.0 percent and their rate of known sexual recidivism (a subset of general recidivism) was 7.4 percent.*

- The Commission conducted a study of the rate of known recidivism by 610 federal offenders sentenced under the non-production guidelines during fiscal years 1999 and 2000. In evaluating any recidivism study, particularly one involving sex offenders, caution should be exercised because the known recidivism rate is lower than the actual recidivism rate.[74] Using Federal Bureau of Investigation Record of Arrest and Prosecution ("RAP") sheets, the Commission tracked the 610 offenders during an average eight-and-one-half year follow-up period after their reentry into the community and found a rate of known general recidivism of 30.0 percent (183 of the 610 offenders). Consistent with many other recidivism studies, general recidivism was measured by offenders' arrests for or convictions of any felony or serious misdemeanor offense (including sex offender registration violations) as well as "technical" violations of the conditions of supervision resulting in an arrest or revocation. The Commission found that the offenders' rate of sexual recidivism, which is a subset of general recidivism, was 7.4 percent (45 of the 610 offenders). Likewise consistent with many other recidivism studies, sexual recidivism was measured by offenders' arrests for or convictions of a sexual offense (including a new child pornography offense but excluding a sex offender registration violation). Twenty-two of those 45 offenders (or 3.6% of the 610 offenders) were arrested for or convicted of sexual "contact" offenses.[75]

- The Commission's findings concerning offenders' general and sexual recidivism rates are similar to the findings of two recent child pornography offender recidivism studies by other researchers (one study of federal offenders and the other of Canadian offenders).[76] In addition, the rate of known general recidivism by the Commission's study group is similar to the rate of known general recidivism by a comparable segment of the entire federal offender population (*i.e.*, white male United States citizen offenders), and the study group's general recidivism rate and sexual "contact" offense recidivism rate were lower than the equivalent rates of state "contact" sex offenders.[77]

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[74] *See* Chapter 11 at 295.

[75] *See id.* at 299–301.

[76] *See id.* at 306–07.

[77] *See id.* at 307–08 (noting that the sexual contact offense recidivism rate of the state sex offenders was 5.3% over a three-year follow-up period, while the sexual contact recidivism rate of the federal child pornography offenders was 2.6% over a comparable three-year follow-up period).

7. *Current federal laws regarding victim notification and restitution present unique challenges for victims of federal non-production child pornography offenses.*

- Under the Crime Victims' Rights Act (CVRA),[78] codified at 18 U.S.C. § 3771, federal law enforcement officials must notify a child pornography victim (or his or her guardian if the victim is still a minor) each time the officials charge an offender with a child pornography offense related to an image depicting the victim. Because images circulate widely on the Internet, it is not unusual for some victims to receive multiple official notifications each week. Such notifications can be emotionally traumatic because they serve to remind the victims that the images of their sexual abuse are indelible and increasingly widespread. Although under the CVRA victims may opt out of receiving such notice, doing so may prevent them from obtaining restitution and otherwise exercising their rights as victims. Thus, even as the victims' rights laws have empowered child pornography victims and enabled them to be involved in the criminal justice process, the notification process itself has had the unintended and incidental effect of exacerbating the harms associated with the ongoing distribution of the images for some victims.[79]

- In recent years, some victims of child pornography offenses have started to attempt to enforce their statutory right to restitution in 18 U.S.C. § 2259 against non-production offenders who have had no connection to the victims other than in the possession, receipt, or distribution of their images. Federal courts have struggled with calculating restitution for these victims and have reached different outcomes. Courts uniformly have found that child pornography victims are "victims" of the offenses under § 2259 and have suffered harm. Many district courts have refused to order restitution, however, because they have concluded either that a non-production child pornography offense was not the "proximate cause" of the victim's injury or that it would be impossible to apportion a specific amount of restitution owed by an individual defendant. Other district courts either have not required proximate cause or have found proximate cause and then attempted to calculate an appropriate restitution award. This division among federal courts has now extended to the appellate level where a split in the federal circuit courts has developed regarding the process of awarding restitution for child pornography victims.[80]

[78] *See* Justice for All Act of 2004, Pub. L. No. 108–405, tit. I, § 102, 118 Stat. 2260, 2261-64 (Oct. 30, 2004).

[79] *See* Chapter 5 at 115–17.

[80] *See id.* at 117–18.

8. *The Commission will continue to study sentencing practices in child pornography production cases, which in the past decade have shown both significant increases in average guideline minimums and average sentence lengths as well as significant decreases in the rate of sentences within the applicable guideline ranges.*

- Average prison sentences for §2G2.1 offenders steadily increased from fiscal year 2004 to fiscal year 2009 (from 153.4 months to 282.9 months), as increasing percentages of offenders were subject to the PROTECT Act's provisions raising penalty ranges. However, the average sentence lengths decreased slightly in fiscal year 2010 (to 267.1 months) and remained essentially stable in fiscal year 2011 (at 274.0 months).[81]

- The annual rates of sentences imposed within the applicable guideline ranges for production offenders have steadily decreased since fiscal year 2004. By fiscal year 2011, the within range rate had decreased to 50.4 percent of cases from a within range rate of 84.0 percent in fiscal year 2004.[82]

D. RECOMMENDATIONS TO CONGRESS

The Commission concludes that the non-production child pornography sentencing scheme should be revised to account for recent technological changes in offense conduct and emerging social science research about offenders' behaviors and histories, and also to better promote the purposes of punishment by accounting for the variations in offenders' culpability and sexual dangerousness.

1. *Potential Amendments to the Sentencing Guidelines*

As reflected in the report, the Commission believes that the following three categories of offender behavior encompass the primary factors that should be considered in imposing sentences in §2G2.2 cases:

(i) the content of an offender's child pornography collection and the nature of an offender's collecting behavior (in terms of volume, the types of sexual conduct depicted in the images, the age of the victims depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technologies);

(ii) the degree of an offender's involvement with other offenders — in particular, in an Internet "community" devoted to child pornography and child sexual exploitation; and

[81] *See* Chapter 9 at 252–53.

[82] *See id.* at 254–57.

(iii) whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense.

The current sentencing scheme in §2G2.2 places a disproportionate emphasis on outdated measures of culpability regarding offenders' collecting behavior and insufficient emphases on offenders' community involvement and sexual dangerousness. As a result, penalty ranges are too severe for some offenders and too lenient for other offenders. The guideline thus should be revised to more fully account for these three factors and thereby provide for more proportionate punishments.

Consistent with the position of the Department of Justice,[83] the Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines.[84] If such legislation were enacted, the Commission would proceed to draft a comprehensive revision of the child pornography guidelines according to the Commission's regular procedures for amendment pursuant to 28 U.S.C. § 994(o). Public comment would be sought, a public hearing would be held, and the proposed revision would be submitted for congressional review prior to becoming effective, pursuant to 28 U.S.C. § 994(p).

Without congressional action, the Commission is able nevertheless to amend the child pornography guidelines in a more limited manner that better reflects the three sentencing factors discussed above. As shown in Appendix E of this report, which contains an analysis of the provenance of each section of the current version of §2G2.2, a number of its provisions were promulgated on the Commission's own initiative — not as a result of a specific congressional directive or by direct statutory amendment — and, thus, could be amended pursuant to 28 U.S.C. § 994(o) (subject to congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p)).

Potential amendments to the guideline would update specific offense characteristics in §2G2.2(b) in order to reflect:

- recent changes in typical offense behavior (*e.g.*, revisions of the enhancements in §2G2.2(b)(2), (4), and (7) related to the types and volume of images possessed to better reflect the current spectrum of offender culpability);

- recent changes in technology (*e.g.*, revisions of the enhancements in §2G2.2(b)(3) and (6), which concern distribution and use of a computer, to

[83] *See* Letter from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice, to Hon. William K. Sessions III, Chair, United States Sentencing Commission, at 6 (June 28, 2010) ("We think the report to Congress ought to recommend legislation that permits the Sentencing Commission to revise the sentencing guidelines for child pornography offenses.").

[84] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 11-49 (discussing how the current guidelines have been influenced by both a series of congressional directives since 1991 and also the direct amendments to the guidelines in the PROTECT Act of 2003).

reflect offenders' use of modern computer and Internet technologies such as P2P file-sharing programs); and

- emerging knowledge about offenders' histories and behaviors gained from social science research (*e.g.*, modifying the "pattern of activity" enhancement §2G2.2(b)(5) to better account for offenders' sexually dangerous behavior and possibly creating a new enhancement for offenders' involvement in child pornography "communities").

While a comprehensive revision of the guideline addressing production offenses, §2G2.1, is not necessary at this time, certain conforming amendments may be appropriate if the corresponding provisions in §2G2.2 were to be amended.[85]

Finally, the Commission will continue to study subsection (b) of USSG §5D1.2 (Term of Supervised Release), which recommends that courts impose "the statutory maximum term of supervised release" for all offenders convicted of a sex offense, including any child pornography offense. That guideline effectively recommends a lifetime term of supervision for all child pornography offenders because the current statutory maximum term of supervision for any offender convicted of a child pornography offense is "any term of years not less than 5, or life."[86] The recommendation in §5D1.2(b) was made before the enactment of the PROTECT Act of 2003, which raised the statutory maximum term of supervision from three years for most child pornography offenders to a lifetime term for all child pornography offenders.[87] The Commission is considering amending the guideline in a manner that provides guidance to judges to impose a term of supervised release within the statutory range of five years to a lifetime term that is tailored to individual offender's risk and corresponding need for supervision.

2. *Potential Amendments to the Statutory Scheme*

The Commission also believes that Congress should amend the statutory scheme to align the penalties for receipt and possession offenses. Since possession was first criminalized by Congress in 1990, receipt has carried more severe statutory penalties.[88] The limited legislative history from the early 1990s indicates that Congress had two primary reasons for punishing

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[85] The guideline for production offenses contains certain enhancements that are similar to enhancements in the guideline for non-production offenses. *See* USSG §2G2.1(b)(2) (providing for 4-level enhancement for production of images depicting children under 12 years of age and a 2-level enhancement for children under 16 years of age), (b)(3) (providing for a 2-level enhancement for distribution of images), & (b)(4) (providing for a 4-level enhancement for production of images that depict sado-masochistic sexual conduct or other violence).

[86] 18 U.S.C. § 3583(k).

[87] *See* Chapter 10 at 272.

[88] Currently, if they have no predicate convictions for sex offenses, offenders convicted of possession face a statutory range of punishment of zero to ten or 20 years (depending on the age and sexual maturity of the minors depicted in the child pornography), while offenders convicted of receipt face a mandatory minimum five-year term of imprisonment and a 20-year statutory maximum term. If they have predicate convictions for sex offenses, offenders convicted of possession face a statutory range of punishment of ten to 20 years, while offenders convicted of receipt face a mandatory minimum 15-year term of imprisonment and a 40-year statutory maximum term. *See* Chapter 2 at 26.

receipt more harshly than possession: first, that aligning the penalties for receipt with the penalties for distribution rather than with the penalties for possession was important for law enforcement purposes (insofar as it was easier to detect distributors in the act of receiving than in the act of distributing); and, second, that many receipt offenses contributed to the commercial child pornography market. Those reasons no longer apply with the same force because of changes in offense conduct and law enforcement methods to detect offenders on the Internet during the past two decades. Prosecutors can prove distribution as or more easily than receipt in a typical case today. Furthermore, as the result of changes in the child pornography "market" since the early 1990s, *non-commercial* child pornography distribution has overtaken commercial child pornography distribution, and most offenders thus pay nothing to receive child pornography. Both of these developments militate in favor of punishing receipt in an equivalent manner to possession rather than in an equivalent manner to distribution.[89]

Moreover, the Commission's review of over 2,000 non-production cases has demonstrated that the underlying offense conduct in the typical case in which an offender was prosecuted for possession was indistinguishable from the offense conduct in the typical case in which an offender was prosecuted for receipt. Yet the Commission's analysis of §2G2.2 cases from fiscal year 2010 revealed significant unwarranted sentencing disparities among similarly situated offenders based in large part on whether they were charged with possession or receipt.[90] For these reasons, the Commission recommends that Congress align the statutory penalties for receipt and possession. There is a spectrum of views on the Commission, however, as to whether these offenses should be subject to a statutory mandatory minimum penalty and, if so, what any mandatory minimum penalty should be.[91] Nevertheless, the Commission unanimously believes that, if Congress chooses to align the penalties for possession with the penalties for receipt and maintain a statutory mandatory minimum penalty, that statutory minimum should be less than five years.

The Commission's analysis of current offenders' distribution behaviors revealed several different types of common distribution conduct, ranging from "personal" modes of distribution associated with "community" involvement (*e.g.*, emailing images to other offenders or trading images in "closed" P2P file-sharing programs) to "open" P2P file-sharing programs involving impersonal and indiscriminate distribution to strangers.[92] The most common mode of distribution today is "open" P2P file-sharing.[93] The different types of distribution reflect a significant evolution in the technologies used to distribute child pornography, particularly in the past decade.[94] Because the existing statutory provisions prohibiting distribution and the related

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[89] *See* Chapter 12 at 327-28.

[90] *See* Chapter 8 at 214–15 (Figures 8-2 & 8-3).

[91] *Cf.* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM xxxi (2011) (noting that "there is a spectrum of views among members of the Commission regarding mandatory minimum penalties" generally).

[92] *See* Chapter 6 at 149–52.

[93] *See id.* at 150, 154.

[94] *See id.* at 155 & n.77.

act of transportation of child pornography[95] were enacted in earlier technological eras,[96] Congress may wish to revise the penalty structure governing those offenses to differentiate among the various types of distribution.

Finally, the Commission recommends that Congress consider amending the current federal statutes governing notice to and restitution for victims of non-production child pornography offenses. The notice provision has been deemed necessary to protect the victims' rights (including their right to seek restitution) but in some cases has exacerbated victims' emotional harm. The restitution statute has generated confusion and disparate results around the country. Congress may wish to amend those two statutory provisions in order to minimize emotional trauma to victims and also provide specific guidance to sentencing courts to ensure appropriate restitution for victims.

E. CONCLUSION

The Commission's report is intended to provide Congress and the various stakeholders in the federal criminal justice system with relevant and thorough information about child pornography offenses and offenders. As illustrated by the report, child pornography offenses result in substantial and indelible harm to the children who are victimized by both production and non-production offenses. However, there is a growing belief among many interested parties that the existing sentencing scheme in non-production cases no longer distinguishes adequately among offenders based on their degrees of culpability and dangerousness. Numerous stakeholders — including the Department of Justice, the federal defender community, and the Criminal Law Committee of the Judicial Conference of the United States Courts — have urged the Commission and Congress to revise the non-production sentencing scheme to better reflect the growing body of knowledge about offense and offender characteristics and to better account for offenders' varying degrees of culpability and dangerousness.

The Commission believes that the current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to offenders' collecting behavior as well as its failure to account fully for some offenders' involvement in child pornography communities and sexually dangerous behavior. The current guideline produces overly severe sentencing ranges for some offenders, unduly lenient ranges for other offenders, and widespread inconsistent application. A revised guideline that more fully accounts for all three factors in Part D above — the full range of an offender's collecting behavior, the degree of his involvement in a child pornography community, and any history of sexually dangerous behavior — would better promote proportionate sentences and reflect the statutory purposes of sentencing. Such a revised guideline, together with a statutory structure that aligns the penalties for receipt and possession, would reduce the unwarranted sentencing disparities that currently exist. The Commission also

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[95] 18 U.S.C. §§ 2252(a)(1),(2) & 2252A(a)(1), (2). As noted in Chapter 7, the vast majority of offenders convicted of transportation of child pornography in fact knowingly distributed it to other offenders. *See* Chapter 7 at 189 n.72. Transportation charges, which do not require proof of intent to distribute to another, often are brought in lieu of distribution charges. *See* Chapter 2 at 24–25.

[96] Section 2252 originally was enacted in 1977, and § 2252A originally was enacted in 1996. *See* United States v. Polizzi, 549 F. Supp. 2d 308, 341 (E.D.N.Y. 2008), *vacated on other grounds*, 564 F.3d 142 (2d Cir. 2009). *See also* Chapter 1 at 5–6 (discussing the evolution of technology in offense conduct during the past four decades).

suggests that Congress may wish to revise the penalty structure governing distribution offenses in order to differentiate among the wide array of newer and older technologies used by offenders to distribute child pornography. Finally, the Commission also recommends to Congress that it consider amending the notice and restitution statutes for victims of child pornography offenses. The Commission stands ready to work with Congress, the federal judiciary, the executive branch, and others in the federal criminal justice community to improve the sentencing scheme for these extremely serious offenses.

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§2G2.2. **Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor**

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

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

(3) (Apply the greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.

(C) Distribution to a minor, increase by **5** levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other

than illegal activity covered under subdivision (E), increase by **6** levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) Distribution other than distribution described in subdivisions (A) through (E), increase by **2** levels.

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

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

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

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

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

(D) 600 or more images, increase by **5** levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)-(b), 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Distribution" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense.

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Material" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexual abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. *Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.*

3. Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

4. Application of Subsection (b)(7).—

(A) Definition of "Images".—"Images" means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).

(B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):

(i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.

(ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.

5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct.

(B) Definition.—"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

6. Cases Involving Adapted or Modified Depictions.—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term "material involving the sexual exploitation of a minor" includes such material.

7. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 31); November 1, 1990 (see Appendix C, amendment 325); November 1, 1991 (see Appendix C, amendment 372); November 27, 1991 (see Appendix C, amendment 435); November 1, 1996 (see Appendix C, amendment 537); November 1, 1997 (see Appendix C, amendment 575); November 1, 2000 (see Appendix C, amendment 592); November 1, 2001 (see Appendix C, amendment 615); April 30, 2003 (see Appendix C, amendment 649); November 1, 2003 (see Appendix C, amendment 661); November 1, 2004 (see Appendix C, amendment 664); November 1, 2009 (see Appendix C, amendments 733 and 736).

Chapter 1

THE PURPOSES AND METHODOLOGY OF THIS REPORT

A. INTRODUCTION

Pursuant to its statutory authority,[1] the United States Sentencing Commission ["the Commission"] submits this report to Congress on child pornography offenses and sentencing practices. The Commission has made the study of child pornography offenses and sentencing practices a priority on its policy agenda in recent years for several reasons.[2] First, during the past two decades, cases in which offenders have been sentenced under the child pornography guidelines, while only a small percentage of the overall federal caseload, have grown substantially both in total numbers and as a percentage of the total federal caseload.[3] Second, the rate of sentences imposed below the applicable guideline ranges for offenders convicted of non-production child pornography offenses such as possession, receipt, and distribution[4] has increased substantially during the past decade. The current rate of sentences imposed within the applicable non-production guideline is the lowest of any major offense type.[5] An increasing number of courts believe that penalties are overly severe for at least some non-production offenders.[6] Third, there has been a growing disconnect between the existing sentencing scheme and the continuing evolution in the technology used by offenders.[7] Finally, emerging social

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[1] The Commission submits this report pursuant to its general authority under 28 U.S.C. §§ 994 and 995 and its specific responsibilities enumerated at 28 U.S.C. § 995(a)(14), (15) and (20), which authorize the Commission [1] to publish data concerning the sentencing process, [2] to collect systematically and disseminate information concerning sentences actually imposed and the relationship of such sentences to the factors set forth in 18 U.S.C. § 3553(a), and [3] to make recommendations to Congress concerning modification or enactment of statutes relating to sentencing, penal, and correctional matters that the Commission finds to be necessary and advisable to carry out an effective, humane, and rational sentencing policy.

[2] *See, e.g.*, U.S. SENT'G COMM'N, *Notice of Final Priorities*, 76 Fed. Reg. 58564–01 (September 21, 2011) ("Continuation of its review of child pornography offenses and report to Congress as a result of such review. It is anticipated that any such report would include (A) a review of the incidence of, and reasons for, departures and variances from the guideline sentence; (B) a compilation of studies on, and analysis of, recidivism by child pornography offenders; and (C) possible recommendations to Congress on any statutory changes that may be appropriate."). The Commission notes that the term "child pornography" is used throughout this report to refer to illegal still images and videos that capture what are typically acts of sexual (and often violent) abuse of children. The term is used in this report consistently with Congress's use of that statutory term in 18 U.S.C. § 2256(8) to refer to such images and videos. Its use is not intended to connote that child "pornography" is in any way equivalent to legal adult pornography, which typically portrays volitional sexual conduct by the persons (adults) portrayed in the images or videos.

[3] *See infra* note 42.

[4] *See* USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).

[5] *See infra* note 44 and accompanying text.

[6] *See infra* note 45 and accompanying text; *see also infra* note 64.

[7] *See* Chapter 12 at 312–13.

science research has provided new insights into child pornography offender and offense characteristics that are relevant to sentencing policy.[8]

Congress and the Commission have amended the provisions governing sentencing of federal child pornography offenders many times during the past three decades.[9] The last time that Congress significantly amended the penal statutes relating to child pornography was in the PROTECT Act of 2003.[10] The Commission last significantly amended the sentencing guidelines for child pornography offenses in 2004, largely in response to the PROTECT Act.[11]

In October 2009, the Commission's report, *History of the Child Pornography Guidelines*, was "the first step in the Commission's work" concerning its policy priority.[12] That report discussed in detail the history of USSG §§2G2.2 and the former 2G2.4,[13] the guidelines applicable to offenders convicted of non-production child pornography offenses (the four most common being distribution, transportation, receipt, and possession).[14] This report includes a comprehensive analysis of data regarding offender and offense characteristics and sentencing practices in federal child pornography cases. It also includes a discussion of relevant information from experts in the social sciences as well as observations from law enforcement officials, practitioners, judges, and others in the field about the operation of the current statutory and guideline penalty structure for child pornography offenses.

It is widely accepted throughout the federal criminal justice community that child pornography "is an evil that preys on humanity's most precious and vulnerable asset, our children."[15] As stated by Ernie Allen, the recently retired president and chief executive officer of

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[8] *See generally* Chapters 3, 4, 6, 7, 9–11.

[9] *See* U.S. SENT'G COMM'N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, at 8–53 (2009) (discussing the changes in the penal statutes and guidelines). The legal definition of "child pornography" and a discussion of the different types of federal child pornography offenses are set forth in Chapter 2 at 21–27.

[10] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today ("PROTECT") Act of 2003, Pub. L. No. 108–21, 117 Stat. 650. As noted below, in late 2012, Congress enacted the Child Protection Act of 2012, which raised the statutory maximum term of imprisonment for possession of child pornography from ten to 20 years for defendants who possessed images of a prepubescent minor or a minor under 12 years of age. *See infra* note 28 and accompanying text.

[11] *See* USSG, App. C, amend. 664 (Nov. 1, 2004).

[12] HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 9, at 1.

[13] For non-production offenses committed before November 1, 2004, defendants convicted only of possession offenses were sentenced under the former USSG §2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), while defendants convicted of receipt, transportation, or distribution ("R/T/D") offenses were sentenced under USSG §2G2.2. Offenders convicted of any type of non-production offense committed on or after November 1, 2004, are all sentenced under the current version of §2G2.2, which governs possession and R/T/D offenses. *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 9, at 25, 48–49.

[14] *See* Chapter 2 at 24 (discussing the primary offense types).

[15] *Report of the American Bar Association in Support of the Need for Review of the Federal Sentencing Guidelines for Child Pornography Offenses*, at 4 (2011), http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105a.authcheckdam.pdf (last visited on December 13, 2012); *see also* 154 CONG. REC. S4588–02, at S4588 (daily ed. May 21, 2008) (statement of Sen. Hatch) ("Everyone agrees this type of crime is the most heinous imaginable."); Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography*

the National Center for Missing and Exploited Children, in his testimony before the Commission in 2009: "Congress, the Supreme Court, issue experts, and this Commission have recognized the extreme harm inflicted upon victims of child pornography."[16] For that reason, according to the Criminal Law Committee of the Judicial Conference of the United States, even those federal judges who are critical of the current sentencing scheme in child pornography cases "would be the first to agree" that child pornography offenses "are gravely serious offenses."[17]

The Commission strongly believes that the statutory and guideline sentencing scheme should appropriately reflect the extremely serious nature of child pornography offenses and harm inflicted upon victims. At the same time, as set forth below in Part D of this chapter, a number of stakeholders in the federal criminal justice system have urged the Commission and Congress to revise the sentencing scheme to reflect both the recent evolution of offense conduct brought about by technological changes and also emerging social science research about child pornography offenders. As discussed in Chapter 12 of this report, the Commission agrees that the statutory and guideline sentencing scheme should be updated both to better reflect the technological changes and new expert knowledge and also to account for current offenders' varying degrees of culpability and dangerousness.[18]

B. BACKGROUND

Three decades ago, child pornography had become a "serious national problem."[19] In the ensuing 30 years, the problem has only worsened and, particularly since the advent of the Internet, increasingly has become a global problem.[20] In recent years, the number of still images and videos memorializing the sexual assault and other sexual exploitation of children, many very young in age, has grown exponentially as the result of changes in technology.[21]

Guidelines, at 38 (unpublished paper, July 3, 2008) ("Child pornography is a pernicious evil."), http://law.fd.org/index_files/child%20porn%20july%20revision.pdf (last visited on December 13, 2012); Prepared Statement of Deirdre D. von Dornum (on behalf of the federal defender community), to the Commission, at 1 (Feb. 15, 2012) ("von Dornum Prepared Statement") (stating that "there is no doubt that children must be protected, and that those who exploit them must be punished" for child pornography offenses).

[16] Prepared Statement of Ernie Allen, President and CEO, National Center for Missing and Exploited Children, to the Commission at 14 (Oct. 20, 2009) ("Allen Prepared Statement").

[17] Testimony of U.S. Chief District Judge Casey Rodgers (Northern District of Florida) (on behalf of the Criminal Law Committee of the Judicial Conference of the United States Courts), to the Commission, at 358–59 (Feb. 15, 2012) ("Rodgers Testimony").

[18] *See* Chapter 12 at 320–29.

[19] Ferber v. New York, 458 U.S. 747, 749 (1982).

[20] In 2009, representatives from the "G8 superpowers" — including the United States — held a symposium on child pornography offenses at the University of North Carolina at Chapel Hill. The G8 ministers issued a public statement at the end of the conference, which stressed "the immediate need for effective and comprehensive action against child pornography in every country." G8 2009 Symposium, *Ministers' Declaration: The Risk to Children Posed by Child Pornography Offenders, G-8 Justice and Home Affairs Ministers* (May 30, 2009), http://www.iprc.unc.edu/G8/MinistersDeclaration.pdf (last visited on Dec. 4, 2012).

[21] *See, e.g.*, Allen Prepared Statement, *supra* note 16, at 8–9 (Oct. 20, 2009) (noting that "the incidents of child pornography . . . continue to expand exponentially").

Federal law first addressed child pornography in 1977, when it initially prohibited both its production and the *commercial* distribution and receipt of child pornography (*i.e.*, in connection with a sale).[22] Thereafter, in the following two decades, Congress removed the requirement that distribution and receipt offenses be part of commercial transactions involving child pornography and added simple possession of child pornography to the list of prohibited acts.[23] Congress also repeatedly has increased the severity of penalties for all child pornography offenses since 1977. As the Commission noted in the *History of the Child Pornography Guidelines*: "Congress has demonstrated its continued interest in deterring and punishing child pornography offenses, prompting the Commission to respond to multiple [statutes] that . . . increased criminal penalties, directly . . . amended the child pornography guidelines [by increasing penalty levels], and required the Commission to consider offender and offense characteristics for the child pornography guidelines [as aggravating factors]."[24] The most significant action by Congress in this regard to date was the PROTECT Act of 2003.

In the PROTECT Act, Congress took the unprecedented step of directly amending the guidelines by increasing the number of sentencing enhancements in the child pornography sentencing guidelines and by limiting sentencing judges' ability to depart below the then-mandatory guideline ranges in child pornography cases.[25] The PROTECT Act also created a new five-year statutory mandatory minimum penalty for receipt, transportation, and distribution offenses, raised the statutory mandatory minimum penalty for production offenses (from ten to 15 years), and raised the statutory maximum penalties for all production and non-production offenses.[26] Finally, the PROTECT Act amended the Bail Reform Act to create a presumption that child pornography defendants, except those charged with simple possession, are dangerous to the community and should be denied bail unless they rebut that presumption.[27] In late 2012,

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[22] *See* Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95–225, 92 Stat. 7 § 2 (1978). This Act outlawed the production, distribution, and receipt of child pornography; distribution and receipt offenses were criminalized only if they related to the commercial sale of child pornography. *See id.*

[23] *See* Child Protection Act of 1984, Pub. L. No. 98–292, § 4(2), 98 Stat. 204 (1984) (outlawing non-commercial receipt, distribution, and production); Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4789, Title III, § 323(a), (b) (1990) (outlawing simple possession).

[24] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 9, at 8–50 (discussing the various statutes related to child pornography that Congress has enacted since 1977). The Supreme Court has upheld the criminalization of the distribution, offering, solicitation, and simple possession of child pornography as being consistent with the First Amendment. New York v. Ferber, 458 U.S. 747 (1982); *see also* Osborne v. Ohio, 495 U.S. 103 (1990) (holding that the criminalization of the simple possession of child pornography does not violate the First Amendment); United States v. Williams, 553 U.S. 285 (2008) (holding that the criminalization of the pandering and solicitation of child pornography does not violate the First Amendment).

[25] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 9, at 38–40 (discussing the PROTECT Act's direct amendment of the child pornography guidelines); *see also* 18 U.S.C. § 3553(b)(2)(A) (limiting downward departures in child pornography cases).

[26] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 9, at 38. The PROTECT Act increased the statutory maximum penalties for possession (from five to ten years), receipt, transportation, and distribution (from 15 to 20 years), and production (from 20 to 30 years), and also increased the previously existing mandatory minimum and maximum penalties for child pornography offenders with one or more predicate convictions for sex offenses. *See* PROTECT Act §§ 103(b)(1)(D)–(F).

[27] *See* PROTECT Act of 2003, Pub. L. No. 108–21, Title II, § 203 (codified at 18 U.S.C. § 3142(e)(3)(E)) (provision of Bail Reform Act presuming that child pornography defendants charged with receipt, transportation,

Congress enacted the Child Protection Act of 2012, which raised the statutory maximum term of imprisonment for possession offenses from ten to 20 years if an offender possessed child pornography depicting a prepubescent minor or a minor under 12 years of age.[28]

At the same time that significant statutory and guideline changes in child pornography cases were occurring, technological advances — in digital photography and videography, personal computers and related devices, and the Internet — fundamentally changed the manner in which child pornography offenses are committed.[29] Whereas in the 1980s, offenses often involved commercially produced child pornography and occasional "homemade" images produced with non-digital cameras,[30] offenses in the past two decades increasingly have involved non-commercial child pornography produced with digital cameras or video recording devices.[31] Furthermore, unlike in the past, when photographs or videotapes of child pornography often were distributed by commercial providers through use of the United States Postal Service,[32] distribution now typically involves non-commercial transmission of digital images and videos via the Internet.[33] Dramatic changes in the speed of home Internet access and the amount of storage space available on personal computers and related devices have greatly facilitated the commission of child pornography crimes.[34] In particular, "peer-to-peer" ("P2P") file-sharing via the Internet has resulted in significant changes in the manner in which offenses are committed in just the past decade.[35] P2P file-sharing, which can be done in an anonymous manner and without any financial cost to users, has made distribution conduct typical of child pornography offenses

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distribution, advertising, or production offenses are dangerous to the community; to obtain bail, such offenders must rebut that presumption in their particular cases); *see also* J. Elizabeth McBath, *A Case Study in Achieving the Purpose of Incapacitation-Based Statutes: The Bail Reform Act of 1984 and the Possession of Child Pornography*, 17 WM. & MARY J. WOMEN & L. 37, 51–52 (2010).

[28] P. L. No. 112–206, 126 Stat. 1490 (Dec. 7, 2012).

[29] Chapter 3 at 41–60. The Internet has resulted in tremendous proliferation in child pornography because of its "'Triple A engine' of anonymity, availability, and affordability." Melissa Hamilton, *The Child Pornography Crusade and Its Net Widening Effect*, 33 CARDOZO L. REV. 1679, 1681 (2012) (citing Al Cooper, *Sexuality and the Internet: Surfing Into the New Millennium*, 1 CYBERPSYCHOLOGY & BEHAVIOR 187 (1998)). Anonymity refers to an offender's sense of security in accessing images without fear of exposure. Availability and affordability refer to the easy access offenders have to images (often free of charge) from computers at home, work, or other locations. *See id.*

[30] *See* ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT, at 7.2 (1986) (commonly called the "MEESE REPORT" based on the name of the Attorney General) (discussing the predominant manner in which child pornography was produced and distributed as of the mid–1980s).

[31] *See* Chapter 3 at 42.

[32] *See, e.g.*, United States v. Jacobsen, 503 U.S. 540 (1992) (defendant ordered commercially produced magazines containing child pornography images through the U.S. mails); *see also* MEESE REPORT, *supra* note 30, at 7.2 (observing that only "recently" child pornography was being distributed through "computer networks" in addition to the U.S. postal system); *see also* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 29 (June 1996) (noting that only 35 of 112 federal child pornography cases sentenced in 1994 and 1995 involved use of a computer in the commission of the offense).

[33] *See* Chapter 3 at 41–43.

[34] *See id.* at 43–46.

[35] *See id.* at 48–53.

today.[36] All of these technological changes have resulted in exponential increases in the volume and ready accessibility of child pornography, including many graphic sexual images involving very young victims, a genre of child pornography that previously was not widely circulated.[37]

Several provisions in the current sentencing guideline for non-production offenses were promulgated before these technological changes occurred.[38] Indeed, most of the existing enhancements, in their current or predecessor versions, were promulgated when offenders typically received or distributed child pornography in "hard copy" form using the United States mails.[39]

C. GENERAL TRENDS IN SENTENCING DATA

As the Supreme Court has observed, the Commission's obligation to collect and examine sentencing data directly relates to its statutory duty to consider whether the guidelines are in need of revision in light of feedback from judges in their sentencing decisions.[40] Although subsequent

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[36] *See* Chapter 6 at 149–50, 154–55 (showing that approximately half of USSG §2G2.2 offenders in fiscal year 2010 used P2P file-sharing programs to distribute child pornography and an even larger percentage of §2G2.2 offenders sentenced during the first quarter of fiscal year 2012 used P2P file-sharing programs to distribute child pornography).

[37] Testimony of James Fottrell, Child Exploitation and Obscenity Section, U.S. Department of Justice, to the Commission at 83 (Feb. 15, 2012) ("[T]he large number of images [depicting the sexual abuse of infants and toddlers] that I'm seeing today… is extremely large compared to what it was even five years ago or ten years ago. Now with the advances in technology, the advances of being able to move these pictures, they are circulating much easier today."); *see also* Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE 22, 37 (2011) (noting that P2P file-sharing use by offenders is associated with more graphic images of younger victims and larger collections). According to the Department of Justice, by "the mid-1980's," before such modern technological innovations became common, "the trafficking of [all] child pornography within the United States was almost completely eradicated through a series of successful campaigns waged by law enforcement. Producing and reproducing child sexual abuse images was difficult and expensive. Anonymous distribution and receipt was not possible, and it was difficult for pedophiles to find and interact with each other. For these reasons, child pornographers became lonely and hunted individuals because the purchasing and trading of such images was extremely risky. Unfortunately, the child pornography market exploded [with] the advent of the Internet and advanced digital technology." Child Exploitation and Obscenity Unit, U.S. Dep't of Justice, *Child Pornography*, http://www.justice.gov/criminal/ceos/subjectareas/childporn.html (last visited on December 4, 2012).

[38] *See* USSG §2G2.2(b)(2), (3), (4), (6), & (7) (enhancements for the nature and volume of the images possessed, an offender's use of a computer, and distribution of images); *see also* Chapter 6 at 125 (Table 6–2) (noting that the enhancements were created a decade or more ago).

[39] *See* Chapter 6 at 125 (Table 6–2) (noting that the current or predecessor versions of five of the six enhancements in the non-production guidelines were originally promulgated between 1987 and 1991); *see also* Testimony of Assistant United States Attorney Steve DeBrota, Assistant United States Attorney (Southern District of Indiana) to the Commission to the Commission, at 234 (Feb. 15, 2012) (noting that, in the early 1990s, most child pornography defendants were detected by U.S. Postal Inspectors). The sixth enhancement — for use of a computer — was promulgated in 1996. Although some offenders used computers to commit child pornography offenses in the mid-1990s, most offenders then still used the U.S. mail to receive or distribute child pornography. *See* SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES, *supra* note 32, at 29 (after reviewing 112 federal child pornography cases from fiscal years 1994 and 1995, finding that 35, or 31.2%, involved offenders' use of a computer to commit the offense).

[40] Rita v. United States, 551 U.S. 338, 350 (2007).

chapters in this report contain extensive analyses of federal sentencing data in child pornography cases, this introductory section provides a basic overview of such data in cases in which offenders were sentenced under the non-production guidelines, which constitute nearly nine out of ten federal child pornography prosecutions today.[41]

Child pornography offenses remain only a small percentage of the total federal criminal docket today.[42] Nevertheless, the number of federal prosecutions for child pornography offenses has grown significantly during the past three decades, particularly in recent years. For example, the caseload of non-production offenses increased from 624 cases in fiscal year 2004 — the first year after the PROTECT Act — to 1,649 cases in fiscal year 2011.[43]

In recent years, defendants sentenced under the non-production child pornography guidelines have received sentences outside of the applicable guideline ranges more frequently than defendants in all other major types of federal criminal cases.[44] In fiscal year 2011, 32.7 percent of offenders sentenced under §2G2.2 received within range sentences, 48.2 percent of offenders received non-government sponsored downward departures or variances, and 14.6 percent received government sponsored departures or variances (other than for offenders' substantial assistance to the authorities).[45]

Less than a decade ago, sentencing patterns were quite different. In fiscal year 2004, offenders sentenced under the non-production guidelines were sentenced within the applicable guideline ranges in 83.2 percent of cases, and courts imposed sentences resulting from non-government sponsored downward departures in only 9.1 percent of cases.[46] Three factors resulted in a high within range rate in fiscal year 2004 cases: (1) the guidelines were then mandatory;[47] (2) by enacting 18 U.S.C. § 3553(b)(2)(A)[48] and other provisions in the PROTECT

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[41] Sentencing data in production cases are discussed in Chapter 9.

[42] *See* Chapter 6 at 126 (noting that non-production offenses in fiscal year 2010 were 2.0% of the federal criminal docket); Chapter 9 at 247 (noting that production offenses in fiscal year 2010 were 0.25% of the federal criminal docket). Production cases, which are discussed in Chapter 9, are sentenced under USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production).

[43] U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80 (2011) (Table 28); U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 81, 287 (2004) (Table 28). During that same period, the annual number of production cases rose from 94 cases in fiscal year 2004 to 231 cases in fiscal year 2011. *See id.*

[44] U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 312 & n. 776, 365 (2011).

[45] U.S. SENT'G COMM'N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS 80 (2011) (Table 28). The remaining 4.5% of offenders received sentences resulting from government sponsored downward departures under USSG §5K1.1 (Substantial Assistance to Authorities) or from upward departures or variances. *Id.*

[46] U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 81, 287 (2004) (Table 28). The statistic referred to above reflects sentencing data regarding both USSG §§2G2.2 (then applicable to receipt, transportation, distribution offenses) and 2G2.4 (then applicable to possession offenses). The remaining 7.7% of cases were ones in which the government sponsored a downward departure or in which the courts upwardly departed. *Id.*

[47] *See* Booker v. United States, 543 U.S. 220 (2005) (invalidating the mandatory nature of the guidelines as a constitutional violation and, as a remedy, rendering the guidelines "effectively advisory" in nature).

Act of 2003,[49] Congress restricted the availability of downward departures in child pornography cases; and (3) defendants then typically faced significantly lower penalty ranges because the more severe guideline and statutory penalty provisions in the PROTECT Act only became applicable to most federal child pornography offenders beginning in fiscal year 2005.[50] As noted above, among those changes in the PROTECT Act were new statutory mandatory minimum penalties for offenders convicted of receipt, transportation, or distribution ("R/T/D") offenses.[51]

As increasing numbers of offenders were sentenced under the post-PROTECT Act versions of the non-production guideline and corresponding penal statutes, the applicable guideline ranges and average sentences imposed increased rapidly. The average guideline minimum for non-production child pornography offenses in fiscal year 2004 was 50.1 months and the average sentence imposed was 53.7 months; by fiscal year 2010, the average guideline minimum was 117.5 months and the average sentence imposed was 95.0 months. Some of the increase in average sentence lengths has been attributable to the statutory mandatory minimum

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[48] Section 3553(b)(2)(A) limited judges' ability to downwardly depart in child pornography cases. It provided that, "[i]n sentencing a defendant convicted of an offense under . . . Chapter 110 [of Title 18, United States Code], the court shall impose a sentence of the kind, and within a range, referred to in subsection (a)(4) [of 18 U.S.C. § 3553(a), which refers to the sentencing guidelines] unless . . . the court finds that there exists a mitigating circumstance to a kind or to a degree that — (I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements . . . (II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and (III) should result in a sentence different from that described." 18 U.S.C. § 3553(b)(2)(A)(ii)(I)–(III). The effect of that statute was to prohibit downward departures under USSG §5K2.0 (Grounds for Departure) in child pornography cases and thereby limit downward departures to "[t]he grounds enumerated in . . . Part K of Chapter Five" of the *Guidelines Manual.* USSG §5K2.0(b). As the Fourth Circuit has observed, this statutory provision "embodied . . . Congress' policy judgment . . . that child pornography crimes are grave offenses warranting significant sentences." United States v. Morace, 594 F.3d 340, 347 (4th Cir. 2010) (citation and internal quotation marks omitted). Section 3553(b)(2)(A) appeared to have achieved Congress's intent to some degree. In the last full fiscal year before this provision of the PROTECT Act was enacted, judges imposed within range sentences in child pornography cases sentenced under USSG §§2G2.2 and 2G2.4 in 70.5% of cases. *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 57 (2002) (Table 28). As noted above, that percentage increased to 83.2% of cases in fiscal year 2004. *Id.*

[49] Other provisions of the PROTECT Act required the Chief Judge from each district and the Commission to report to Congress, and upon request to the Attorney General, on downward departures and include the identities of the sentencing judges who departed. *See* PROTECT Act of 2003, Pub. L. No. 108–21, 117 Stat. 650, 674 (2003); *see also* Susan R. Klein & Sandra Guerra Thompson, *DOJ's Attack on Federal Judicial "Leniency," the Supreme Court's Response, and the Future of Criminal Sentencing*, 44 TULSA L. REV. 519, 530 (2009).

[50] Provisions of the PROTECT Act that increased penalties could not be retroactively applied to offenses committed before the effective date of the Act. *See, e.g.*, United States v. Smith, 311 F. Supp. 2d 801, 806 (E.D. Wis. 2004). Because of the typical delays between commission of a child pornography offense and prosecution and sentencing for the offense, most offenders sentenced in fiscal year 2004 were sentenced under the pre-PROTECT Act versions of the guidelines and penal statutes, which had significantly lower penalty levels, particularly for defendants only convicted of possession. *See* USSG §§2G2.2 & 2G2.4 (Nov. 1, 2002). The Commission datafile of fiscal year 2004 cases reveals that 515 of 637 (80.8%) offenders sentenced under §§2G2.2 and 2G2.4 were sentenced under the 2002 or earlier versions of the *Guidelines Manuals*. Conversely, in fiscal year 2005, 565 of 919 (61.5%) offenders sentenced under the non-production guidelines were sentenced under post-PROTECT Act versions of the non-production guidelines.

[51] *See supra* note 26 and accompanying text.

sentences created by the PROTECT Act. In fiscal year 2010, approximately half of the non-production cases were subject to such statutory mandatory minimum penalties.[52]

During the same period of time, legal developments in federal sentencing jurisprudence afforded judges more discretion to impose sentences below the applicable guideline ranges. The Supreme Court's 2005 decision in *Booker* rendered the sentencing guidelines "effectively advisory" and vested a significant amount of discretion in sentencing courts to "vary" from the guideline ranges based on offense and offender characteristics. The decision also had the effect of removing the specific limits of section 3553(b)(2)(A) on sentences imposed below the applicable guideline ranges in child pornography cases.[53] In addition, the Court's subsequent 2007 decision in *Kimbrough v. United States*,[54] which permitted sentencing judges categorically to vary below the crack cocaine guideline based on a "policy" disagreement,[55] has been interpreted by some lower courts to permit similar "policy disagreement" variances from the guideline ranges resulting from the application of §2G2.2.[56]

The new discretion under the post-*Booker* advisory scheme coupled with the significant increase in penalty ranges resulting from the PROTECT Act have had the combined effect of steadily decreasing rates of within range sentences for offenders sentenced for non-production offenses. The Commission's sentencing data reflect that, since fiscal year 2006, the first full year after *Booker*, the within range rate for sentences for non-production offenses has steadily

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[52] *See* Chapter 6 at 146 (Figure 6–14) (showing that 50.5% of non-production cases in fiscal year 2010 were subject to mandatory minimum penalties).

[53] *See, e.g.*, *Morace*, 594 F.3d at 347 n.5 ("Congress' attempt to limit sentencing discretion in child pornography cases by enacting § 3553(b)(2)(A) is invalid under the *Booker* rationale.") (citation and internal quotation marks omitted); United States v. Selioutsky, 409 F.3d 114, 117 (2d Cir. 2005) (same); United States v. Hadash, 408 F.3d 1080, 1083 (8th Cir. 2005) (same).

[54] 552 U.S. 85 (2007).

[55] *See* Spears v. United States, 555 U.S. 261, 269 (2009) (discussing effect of *Kimbrough* in crack cocaine cases).

[56] *See e.g.*, United States v. Henderson, 649 F.3d 955, 963–64 (9th Cir. 2011) ("[T]he history of the child pornography Guidelines reveals that, like the crack-cocaine Guidelines at issue in *Kimbrough*, the child pornography Guidelines were not developed in a manner 'exemplify[ing] the [Sentencing] Commission's exercise of its characteristic institutional role,' so district judges must enjoy the same liberty to [vary] from them based on reasonable policy disagreement as they do from the crack-cocaine Guidelines discussed in *Kimbrough*.") (quoting *Kimbrough*, 552 U.S. at 109); United States v. Beiermann, 599 F. Supp. 2d 1087, 1100 (N.D. Iowa 2009) (noting that "numerous district courts ha[ve] 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 its characteristic institutional role and empirical analysis, but was the result of congressional mandates, often passed by Congress with little debate or analysis"; citing cases); *but see* United States v. Mohr, 418 F. App'x 902, 908–09 (11th Cir. 2011) ("Mohr essentially makes a *Kimbrough*-style argument that U.S.S.G. § 2G2.2 should be disregarded because it is based on flawed policy considerations. . . . This Court has already concluded that the provisions of U.S.S.G. § 2G2.2 'do not exhibit the deficiencies the Supreme Court identified in *Kimbrough*.'") (quoting United States v. Pugh, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008)); United States Miller, 665 F.3d 114, 120–21 (5th Cir. 2011) ("Our circuit has not followed the course . . . with respect to sentencing Guidelines that are not based on empirical data [discussing USSG §2G2.2]. Empirically based or not, the Guidelines remain the Guidelines. . . . [W]e will not reject a Guidelines provision as 'unreasonable' or 'irrational' simply because it is not based on empirical data and even if it leads to some disparities in sentencing. The advisory Guidelines sentencing range remains a factor for district courts to consider in arriving upon a sentence.").

fallen from 65.1 percent to 53.6 percent in fiscal year 2008 (the first full year after *Kimbrough*), to 40.0 percent in fiscal year 2010, and to 32.7 percent in fiscal year 2011.[57]

D. CRITICISMS OF THE EXISTING NON-PRODUCTION PENALTY SCHEME AND A WIDESPREAD BELIEF THAT CHANGES ARE NECESSARY

As discussed below, the Commission has received input from a variety of sources — including the Department of Justice, the defense bar, and an apparent majority of the federal judiciary[58] — that §2G2.2 and corresponding penal statutes should be reexamined and ultimately revised.[59] Although they are not of one mind about all of the perceived problems with the current penalty scheme, different stakeholders have voiced numerous specific criticisms of it, which are summarized below. Several stakeholders have couched their criticisms in the contention that the current guideline is neither "empirically based" nor a reflection of the Commission's normal institutional expertise and, instead, reflects outmoded congressional directives.[60] These critiques often take aim at the form and operation of the non-production guideline, including:

- **Criticism #1.** The specific offense characteristics in §2G2.2(b) do not reflect the changes in technology and typical offense conduct that have occurred in recent

[57] *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 83 (2006) (Table 28) (65.1% within range rate compared with a 23.5% non-government sponsored downward departure/variance rate); U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 79 (2008) (Table 28) (53.6% within range rate compared with a 35.6% non-government sponsored downward departure/variance rate); U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80 (2010) (Table 28) (40.0% within range rate compared with a 44.6% non-government sponsored downward departure/variance rate); U.S. SENT'G COMM'N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS 80 (2011) (Table 28) (32.7% within-range rate compared to a 48.2% non-government sponsored downward departure/variance rate).

[58] *See generally* Rodgers Testimony, *supra* note 17, at 358 ("[T]here is an overwhelming percentage of district judges who are dissatisfied with these Guidelines, particularly the Guidelines in the area of possession and receipt."); *see also* U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010, Questions 1 & 8 (noting that a majority of federal district judges who were surveyed opined that the guideline penalty levels in child pornography cases were excessive for receipt and possession offenses and also that the statutory penalty levels were excessive for receipt offenses).

[59] By comparison, there appears to be less criticism of the penalty scheme governing production offenses. *See* Chapter 9 at 247 n.2.

[60] *See, e.g.*, United States v. Dorvee, 616 F.3d 174, 184 (2d Cir. 2010) ("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 Sentencing Commission has amended the Guidelines under USSG §2G2.2 several times since their introduction in 1987, each time recommending harsher penalties."); *see also* Rodgers Testimony, *supra* note 17, at 358–60 ("[T]here is an overwhelming percentage of district judges who are dissatisfied with [§2G2.2]" because it has "not produced measured and proportionate sentences" as a result of "Congressional directive[s] . . . aimed at increasing penalties, eliminating Judicial flexibility, and often without any evidence-based input from the Commission."); *Report of the American Bar Association in Support of the Need for Review of the Federal Sentencing Guidelines for Child Pornography Offenses*, *supra* note 15, at 4 ("Many of these more severe penalties are the result of Congressionally mandated sentencing enhancements that may not have received the benefit of in depth analysis of empirical data that the Sentencing Commission often engages in when determining whether to increase guideline ranges. As a result, the child pornography guidelines frequently do not punish criminals congruently with their culpability.").

years.[61] As a result, several of the enhancements apply to the vast majority of offenders today[62] and result in overly severe penalty ranges for typical offenders[63] — particularly those convicted of receipt or possession offenses[64] — and also fail to meaningfully distinguish among offenders in terms of their culpability and dangerousness.[65]

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[61] *See* Letter from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 6 (June 28, 2010) (urging the Commission to "update [USSG §2G2.2] to address changing technology and realities surrounding these offenses"); *see also* Joint Statement of James M. Fottrell, Steve DeBrota, and Francey Hakes, Department of Justice, to the Commission, at 8 (Feb. 15, 2012) ("DOJ Joint Statement") (contending that "the guideline has not kept pace with technological advancements in both computer media and [I]nternet and software technologies" [and] "there is a range of aggravating conduct that we see today that is not captured in the current guideline").

[62] United States v. Grober, 624 F.3d 592, 608 (3d Cir. 2010) (stating that "the enhancements 'cobbled together . . . routinely result in Guidelines projections near or exceeding the statutory maximum, even in run-of-the-mill cases'") (quoting *Dorvee*, 616 F.3d at 186); United States v. Diaz, 720 F. Supp. 2d 1039, 1042 (E.D. Wis. 2010) (stating that "the guideline requires significant enhancements for conduct present in virtually all cases") (citing Commission data).

[63] United States v. Stone, 575 F.3d 83, 97 (1st Cir. 2009) (opining that USSG §2G2.2 is "in our judgment harsher than necessary" for many offenders); *see also* Prepared Statement of U.S. Chief District Judge Casey Rodgers (Northern District of Florida), to the Commission at 3–4, 7, 17, 21–22, 29 (Feb. 15, 2012) ("There is a common sentiment among many trial judges that [§2G2.2] fail[s] to provide an appropriate baseline or starting point for child pornography offenses which, combined with numerous offense characteristics, restrictions on departures, and congressionally mandated provisions not fully supported by the Commission's empirical study, produce guideline ranges that are too high compared to the statutory range, particularly in the area of possession and receipt."); Rodgers Testimony, *supra* note 17, at 361 (contending that, because of high base offense levels and also because several specific offender characteristics apply to the vast majority of USSG §2G2.2 offenders, first-time possession or receipt offenders with no criminal history or history of sexual abuse of minors do not "get the benefit of the low end of the statutory range"); Testimony of U.S. District Court Judge Richard J. Arcara (Western District of New York), to the Commission, at 113–14, 142–43 (July 2009) ("Arcara Testimony") (expressing criticism of §2G2.2 because the typical application of the various specific offense characteristics results in "child pornography sentences . . . at or near the statutory maximum"); Letter from Probation Officers Advisory Group to Hon. William K. Sessions III, Chair, United States Sentencing Commission, at 2–3 (Aug. 9, 2010) (the "cumulative effect of the specific offense characteristics (SOCs) associated with . . . §2G2.2 . . . [results in] disproportionately high sentences" in some child pornography cases, particularly simple possession cases); Arlen Specter & Linda Dale Hoffa, *A Quiet But Growing Judicial Rebellion Against Harsh Sentences for Child Pornographers — Should the Laws Be Changed?*, THE CHAMPION, at 13–14 (Oct. 2011) ("[T]he public and lawmakers need to know the facts; they need to know . . . how Congress' best intentions [in directing the Commission to amend the guideline to account for certain offense characteristics] now mandate unduly severe punishments.").

[64] In a 2010 survey of district judges conducted by the Commission, 69% of the 639 judges who responded to questions regarding child pornography offenses stated that the guideline penalty ranges for receipt offenses generally were too high, and 70% of the respondents believed that the guideline ranges for possession offenses generally were too high. However, only 30% of judges believed that the guideline ranges for distribution offenses generally were too high. *See* U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010, Question 8. With respect to mandatory minimum penalties for defendants convicted of receipt and distribution offenses, 71% of judges who responded stated that the mandatory minimum penalty for receipt was too high, while only 37% of judges believed that the mandatory minimum penalty for distribution was too high. *See id.*, Question 1.

[65] *See, e.g.*, United States v. Beiermann, 599 F. Supp. 2d 1087, 1105 (N.D. Iowa 2009) ("This guideline . . . blurs logical differences between least and worst offenders, contrary to the goal of producing a sentence no greater than necessary to provide just punishment. *See* 18 U.S.C. § 3553(a)."); *see also* Testimony of Chief U.S. Fifth Circuit Judge Edith Jones to the Commission, Austin, TX Regional Public Hearing, at 221 (Nov. 2009) (stating that "it's

- **Criticism #2.** In some cases, the penalty scheme entirely fails to account for certain types of aggravated conduct that may be worthy of targeted, incremental punishment (*e.g.*, an offender's possession of child pornography depicting sexual abuse of very young victims, including infants and toddlers; an offender's involvement in a child pornography Internet "community").[66]

- **Criticism #3.** The current guideline does not adequately assist sentencing judges in differentiating among offenders with respect to their past and future sexual dangerousness.[67] Furthermore, the severe penalty ranges appear to assume that the typical offender both has engaged in sexual abuse of children in the past (before being arrested for a child pornography offense) and likely will engage in sexual recidivism in the future (after reentering the community) — an assumption

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not clear to me that we have enough background in those prosecutions, at this point in time, to really identify culpability in terms of, especially with these sophisticated cyber crimes in terms of the number of images" and other specific offense characteristics in USSG §2G2.2; also noting the "marked propensity of our district judges to deliver sentences not within the [child pornography] guidelines" and concluding that "whether that's good or ill . . . [the high variance rate] suggests that there's something wrong with the guideline, something seriously wrong"); Letter of David Debold and Todd Bussert (on behalf of the Commission's Practitioners Advisory Group) to Hon. William K. Sessions III, Chair, United States Sentencing Commission, at 7–8 (Aug. 18, 2010) (urging the Commission to "consider either eliminating or revising the current §2G2.2 enhancements and design a sentencing scheme that provides sentencing courts with meaningful distinctions among defendants.").

[66] DOJ Joint Statement, *supra* note 61, to the Commission, at 17 (urging the Commission to create, *inter alia*, new specific offense characteristics that: (1) address "images of bestiality as well as images of infants and toddlers"; (2) account for "offenders who communicate with one another and[,] in so doing, facilitate and encourage the sexual abuse of children and production of more child pornography"; and (3) address "the length of time the offender has committed the offense to distinguish those offenders" who have committed their offense for a significant period of time from those who have only engaged in such criminal behavior for a relatively short amount of time); Alexandra R. Gelber, Assistant Deputy Chief, Child Exploitation and Obscenity Section, U.S. Department of Justice, *Beyond Child Pornography Sentencing Guidelines: Strategies for Success at Sentencing*, 59 UNITED STATES ATTORNEYS' BULLETIN 76, 77–84 (Sept. 2011) (contending that "the current sentencing guidelines . . . do an inadequate job of capturing all the aggravating factors that may exist in a case" by focusing too much on the nature and number of images possessed by a defendant and not focusing more on the defendant's culpable conduct (*e.g.*, a defendant's efforts to avoid detection using sophisticated technology, the extended duration of his illegal conduct, and his association with other persons in an on-line "community" that "normalizes" child sexual exploitation and abuse) (available at http://www.justice.gov/usao/eousa/foia_reading_room/usab5905.pdf) (last visited on Dec. 13, 2012).

[67] *See, e.g.*, Prepared Statement of U.S. Chief District Judge Casey Rodgers (on behalf of the Criminal Law Committee), *supra* note 63, to the Commission, at 17, 21 ("A common concern among many district judges is that [USSG §2G2.2] do[es] not assist them in identifying which offenders pose a danger of child sexual abuse. . . . We recommend that the Commission provide sentencing judges with empirical data and research to assist them in devising a sentence in these cases that best addresses the sentencing goal of protecting the public."); Arcara Testimony, at 113–14, 142–43 (July 2009) (expressing criticism of §2G2.2 because it fails to assist judges in determining which "defendants pose a real danger to the community and a risk to children"); Testimony of U.S. District Court Judge Jay C. Zainey (Eastern District of Louisiana) to the Commission, at 32 (Jan. 2010) (contending that §2G2.2 should do a better job of recognizing the difference between a "user[/]viewer" of child pornography and a "person who actually exploits children" by sexual contact); Testimony of U.S. District Court Judge Robin J. Cauthron (Western District of Oklahoma) to the Commission, at 14–15 (Jan. 2010) (stating that "the guideline sentences for child pornography cases are often too harsh where the defendant's crime is solely possession, unaccompanied by any indication of acting out behavior on the part of the defendant").

that is called into question by emerging social science research.[68]

- **Criticism #4.** In some §2G2.2 cases, there is a lack of proportionality in sentence length compared to typical sentences for many "contact" sex offenders. Some child pornography offenders with no history of sexually abusing a child receive prison sentences equal to or greater than the sentences received by "contact" sex offenders prosecuted and sentenced in federal court.[69]

- **Criticism #5.** There is no rational basis to treat receipt offenses (which carry a mandatory minimum five-year term of imprisonment) and possession offenses (which do not carry a mandatory minimum term of imprisonment) differently under the guidelines or penal statutes. Virtually all offenders who possess child pornography previously knowingly received it.[70]

Some stakeholders also have stated that the problems with the current sentencing scheme have caused increasing numbers of parties and courts to eschew application of the existing statutory and guideline sentencing schemes, which has resulted in widespread sentencing disparities among similarly situated offenders. Such disparities are attributable to disparate charging practices,[71] the high rate of downward variances from the applicable guideline ranges,[72]

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[68] *See, e.g.*, United States v. Apodaca, 641 F.3d 1077, 1083 (9th Cir. 2011) (noting "a growing body of empirical literature indicating that there are significant, § 3553(a)-relevant differences between . . . contact and possession-only [child pornography] offenders "); United States v. C.R., 792 F. Supp. 2d 343, 376 (E.D.N.Y. 2011) ("Scientifically acceptable empirical analyses have thus far failed to establish a causal link between the mere passive viewing of child pornography . . . and the likelihood of future contact offenses."); von Dornum Prepared Statement, *supra* note 15, at 23–32 (contending that "the available evidence does not support the conclusion that a sizeable percentage of federal child pornography offenders have committed a 'contact' offense" in the past and also that "the evidence does not support the common belief that online child pornography offenders present a high risk of committing contact offenses or otherwise engaging in 'sexually dangerous behavior'").

[69] *See, e.g.*, United States v. Dorvee, 616 F.3d 174, 187 (2d Cir. 2010) (contending that "[t]he irrationality in [USSG] §2G2.2 is easily illustrated [by the fact that] [h]ad Dorvee actually engaged in sexual conduct with a minor, his applicable Guidelines range could have been considerably lower"); United States v. Cruikshank, 667 F. Supp. 2d 697, 702 (S.D. W.Va. 2009) ("In an instance of troubling irony, an individual who, sitting alone, obtained images of sexually exploited children on his computer, could receive a higher sentence than the Guidelines would recommend for an offender who actually rapes a child.").

[70] *See, e.g.*, United States v. Richardson, 238 F.3d 837, 839–40 (7th Cir. 2001) (Posner, J.) (finding the distinction between receipt and possession offenses to be "tenuous" and "puzzl[ing]" because "possessors, unless they fabricate their own [child] pornography, are also receivers [at some earlier point in time]"); *see also* Rodgers Testimony, *supra* note 17, at 367, 370 ("I would urge the Commission to seek repeal of the [m]andatory [m]inimum sentence for receipt offenders.").

[71] *See, e.g.*, United States v. Syzmanski, No. 08–417, 2009 WL 1212252, at *5 (N.D. Ohio Apr. 30, 2009) ("[The prosecution has] the ability to determine the defendant's sentence, a role reserved for the judiciary. . . . [A] prosecutor through a charging decision controls the sentencing range in cases involving the possession and/or receipt of child pornography."); United States v. Goldberg, No. 05–0922, 2008 WL 4542957, at *2 (N.D. Ill. Apr. 30, 2008) ("The court has . . . considered the sentences imposed in comparable cases in its sister courts. The court recognizes, of course, that no two cases are identical and reported cases may not describe all salient facts. However, it is struck by the inconsistency in the way apparently similar cases are charged and sentenced.") (discussing cases); Troy Stabenow, *A Method of Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G RPTR. 108, 111 (2011) ("In my experience, most child pornography cases are susceptible of being charged as receipt, possession, or distribution . . . . [C]harge bargaining normally involves the prosecutor charging, or threatening to charge, receipt or distribution or both [which, unlike possession, carry mandatory minimum

and inconsistent approaches by the circuit courts in appellate review of sentences in child pornography cases.[73]

Although the various stakeholders are not unanimous concerning how the current penalty structure in child pornography cases should be revised, most believe that some changes are necessary to better promote the statutory purposes of sentencing,[74] reflect changes in offense conduct (particularly the technology employed by offenders) and emerging social science research about offense and offender characteristics,[75] and reduce unwarranted disparities.[76]

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penalties], unless a defendant pleads guilty to possession. . . . . In effect, the prosecutor becomes the final sentencing authority.”).

[72] *See, e.g.*, United States v. Cameron, No. 09–00024, 2011 WL 890502, at *19 (D. Me. Mar. 11, 2011) (“The guidelines under [USSG] §2G2.2 are at risk of practical irrelevance and defendants will increasingly be left to the disparate sense of justice among federal judges, which is what led to the guidelines in the first place. . . In imposing a non-guideline sentence, . . . some similarly situated defendants will be treated more severely; others will be treated much more leniently.”); United States v. Cunningham, 680 F. Supp. 2d 844, 862 (N.D. Ohio 2010) (“With a growing number of district judges finding that the Guidelines in this area are entitled to no deference, sentencing disparities are bound to grow exponentially.”); United States v. Stern, 590 F. Supp. 2d 945, 961 (N.D. Ohio 2008) (“[O]ne would be hard pressed to find a consistent set of principles to explain exactly why some federal child porn defendants face decades in federal prison, some face many years in federal prison, while others only end up facing months. . . . [T]he national sentencing landscape presents a picture of injustice. In the absence of coherent and defensible Guidelines, district courts are left without a meaningful baseline from which they can apply sentencing principles. The resulting vacuum has created a sentencing procedure that sometimes can appear to reflect the policy views of a given court rather than the application of a coherent set of principles to an individual situation.”) (examining cases) (internal quotation marks and citation omitted); *Report of the American Bar Association in Support of the Need for Review of the Federal Sentencing Guidelines for Child Pornography Offenses*, *supra* note 15, at 10 (contending that “unwarranted disparity” in sentencing is occurring because “[j]udges in many districts across the [country] are finding a need to depart or vary from these guidelines to achieve justice”), http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105a.authcheckdam.pdf (last visited on Dec. 4, 2012).

[73] Much like sentencing courts, appellate courts have taken inconsistent approaches in child pornography cases. Compare, *e.g.*, United States v. Bistline, 665 F.3d 758 (6th Cir. 2012) (holding that a sentencing court cannot reject USSG §2G2.2(b) as a “policy” matter solely based on congressional directives); United States v. Miller, 665 F.3d 114 (5th Cir. 2011) (same), *with* United States v. Henderson, 649 F.3d 955 (9th Cir. 2011) (permitting sentencing court to reject §2G2.2(b) as a “policy” matter based on congressional directives); United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010) (same).

[74] *See* Tapia v. United States, 131 S. Ct. 2382, 2387 (2011) (“The … four considerations [in 18 U.S.C. § 3553(a)(2)(A)–(D)] — retribution, deterrence, incapacitation, and rehabilitation — are the four purposes of sentencing generally, and a court must fashion a sentence ‘to achieve the[se] purposes . . . to the extent that they are applicable’ in a given case. [18 U.S.C.] § 3551(a).”); *see also* 28 U.S.C. § 991(b)(1)(A) (directing the Sentencing Commission to “establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in” § 3553(a)(2)(A)–(D)).

[75] 28 U.S.C. § 991(b)(1)(C) (providing that, in formulating sentencing policy that implements the purposes of punishment, the Commission must promulgate guidelines that “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”).

[76] One of the primary purposes of the Sentencing Reform Act of 1984 was to avoid “unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.” 28 U.S.C. § 991(b)(1)(B) (instructing the Commission to avoid such disparities); *see also* 18 U.S.C. § 3553(a)(6) (instructing sentencing courts to do the same).

In accord with the general consensus among stakeholders, the Commission believes that child pornography offenses are extremely serious. The Commission, however, also concurs with the many stakeholders who contend that the sentencing scheme should be revised to better reflect both technological changes in offense conduct and emerging social science research and also better account for the variations in offenders' culpability and their sexual dangerousness. This report is intended to provide a basis for beginning the process of revising the sentencing scheme. The Commission's general recommendations for changes in the statutory and guideline sentencing scheme are contained in Chapter 12.[77] The Commission stands ready to work with Congress and the various stakeholders in the federal criminal justice system in order to revise the penalty structure.

E. OVERVIEW OF REPORT

1. *Methodology*

In preparation for this report, the Commission considered the legislation and legislative history related to child exploitation and sexual abuse offenses, analyzed sentencing data,[78] and comprehensively reviewed both relevant social science research and legal scholarship.[79] The Commission also sought the views of stakeholders in the criminal justice system in a variety of ways, including by conducting seven regional public hearings on sentencing generally,[80]one public hearing devoted solely to child pornography offenses,[81] and a survey of federal district

[77] *See* Chapter 12 at 320–29.

[78] The Commission maintains a comprehensive, computerized data collection system and acts as the clearinghouse of federal sentencing information pursuant to 28 U.S.C. §§ 995(a)(14), (15). The Commission relies on this database for its ongoing monitoring and evaluation of the guidelines, many of its reports and research projects, and for responding to hundreds of data requests received from Congress and stakeholders in the criminal justice system each year. Pursuant to 28 U.S.C. § 994(w), within 30 days of entry of judgment in every felony and class A misdemeanor case, the Commission receives: (1) the judgment and commitment order; (2) the statement of reasons imposed; (3) the plea agreement, if any; (4) the indictment or other charging instrument; and (5) the presentence report (unless waived by the court). For each such case, the Commission routinely collects hundreds of pieces of information, including defendant demographics, statute(s) of conviction, application of any statutory mandatory minimum penalty, application of any relief from an applicable statutory mandatory minimum penalty, sentencing guideline calculations, and sentences imposed.

[79] *See* Appendix G (bibliography of relevant literature reviewed for this report).

[80] The Commission held seven regional public hearings to coincide with the 25th anniversary of the enactment of the Sentencing Reform Act of 1984 to solicit the views of judges, prosecutors, defense attorneys, probation officers, academics, and others on a variety of federal sentencing and criminal justice topics, including child pornography penalties. These hearings were held in Atlanta, GA (Feb. 10–11, 2009), Palo Alto, CA (May 27–28, 2009), New York, NY (July 9–10, 2009), Chicago, IL (Sept. 9–10, 2009), Denver, CO (Oct. 20–21, 2009), Austin, TX (Nov. 19–20, 2009), and Phoenix, AZ (Jan. 20–21, 2010). Witness statements and transcripts for the public hearings are available on the Commission's website at www.ussc.gov. Summaries of the testimony relating to child pornography penalties can be found in Appendix C of this report.

[81] On February 15, 2012, in Washington, D.C., the Commission held a public hearing on the topic of child pornography offenses, offenders, and victims. Witness statements and transcripts for the public hearing are available on the Commission's website at www.ussc.gov. Summaries of the testimony can be found in Appendix D of this report.

judges.[82] In addition, the Commission consulted with its standing advisory groups,[83] representatives from all three branches of the federal government, and the National Center for Missing and Exploited Children (NCMEC), as well as a large number of experts in the social sciences — in particular, the behavioral sciences — related to child pornography and other sex offenses. As discussed immediately below, the Commission reviewed the presentence reports ("PSRs") and other sentencing documents in virtually all cases in which federal offenders were sentenced under the child pornography guidelines in fiscal year 2010 (both production and non-production cases) and all cases in which federal offenders were sentenced under the non-production guidelines in fiscal years 1999 and 2000. The Commission also reviewed the sentencing documents in federal non-production cases from the first quarter of fiscal year 2012. Finally, the Commission studied the recidivism rates of non-production offenders sentenced in fiscal years 1999 and 2000.

2. *Child Pornography Special Coding Project: The Commission's Contribution to the Emerging Social Science Research About Offense Conduct and Offender Characteristics*

Under the Sentencing Reform Act of 1984, the Commission is obligated to "establish sentencing policies and practices that . . . reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."[84] The Commission has reviewed social science literature on child pornography offenders and offense characteristics and has sought the input of some of the world's leading behavioral science experts on child pornography offenders.

The experts agree that existing social science research on child pornography offenses and offenders is nascent. As noted above, federal child pornography offenses are relatively new (first criminalized by Congress in 1977) and, until the last decade, the number of federal prosecutions for such offenses has been small. As a result, there is relatively little research on the subject, and much of what exists is new.[85] In addition, restrictions on access to relevant data about offender and offense characteristics have contributed to the lack of extensive social science research.[86]

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[82] In early 2010, the Commission conducted a survey of federal district judges to solicit their views on a variety of sentencing topics, including child pornography penalties. *See* U.S. SENT'G COMM'N., RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 (June 2010), which is available on the Commission's website at www.ussc.gov.

[83] The Commission has three standing advisory groups: the Practitioners Advisory Group, the Probation Officers Advisory Group, and the Victims Advisory Group. Information on each of these advisory groups can be found on the Commission's website at www.ussc.gov.

[84] 28 U.S.C. § 991(b)(1)(C).

[85] *See* United States v. Klug, 670 F.3d 797, 802–03 (7th Cir. 2012) (Cudahy, J., concurring) (stating that "the [child pornography] guidelines and other sources of authority provide little guidance" about whether the "violation of the child pornography statutes predict actual physical child abuse," observing that "there is almost inevitable speculation [concerning that issue] but facts or solid conclusions are hard to come by," and noting that increasing number of courts are "call[ing] for more research"); United States v. C.R., 792 F. Supp. 2d 343, 364 (E.D.N.Y. 2011) (finding that "[l]ittle systematic scientific research has been published" on child pornography offense conduct and offender characteristics, including the "motivations of viewers, relationship of viewing to acting out, or impact of the material on . . . the viewer") (citing KERRY SHELDON & DENNIS HOWITT, SEX OFFENDERS AND THE INTERNET (2007) (noting

In part because social science research on child pornography is sparse and further because a significant portion of the existing research concerns foreign offenders, the opinions of experts vary widely on some of the most important issues relevant to sentencing policy in this area. One area in particular that has resulted in differing positions concerns the association between viewing child pornography and engaging in child molestation and other criminal sexually dangerous behavior.[87]

To help fill the void in social science research, the Commission collected and analyzed data about many offense and offender characteristics beyond what is regularly reported in the Commission's annual *Sourcebook of Federal Sentencing Statistics*. For this special coding project,[88] the Commission analyzed nearly 2,000 child pornography cases in which offenders were sentenced during fiscal year 2010 under either §2G2.1 (for production offenses) or §2G2.2 (for non-production offenses) for which there was sufficient sentencing documentation submitted to the Commission.[89] The Commission also reviewed 382 cases in which offenders were sentenced under §2G2.2 during the first quarter of fiscal year 2012. Finally, the Commission reviewed all 660 cases sentenced under the guidelines applicable to non-production offenses in fiscal years 1999 and 2000 in order to allow for a comparison of cases over time.[90] Additional

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lack of reliable data on these issues), and RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICE SERVICES, CHILD PORNOGRAPHY ON THE INTERNET 12 (2006) (same); MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 27 (2003) (same); EVA J. KLAIN ET AL., ABA CTR. ON CHILDREN & THE LAW, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, CHILD PORNOGRAPHY: THE CRIMINAL JUSTICE SYSTEM RESPONSE 2–3 (2001) (same)).

[86] In the vast majority of child pornography cases: (1) virtually all the evidence of the offense conduct and relevant conduct (*i.e.*, not simply the illegal images or videos but also relevant conduct such as an offender's communication with minors for sexual purposes or communication with other child pornography offenders via the Internet) is contained on a computer hard drive seized by law enforcement and not made available to researchers; (2) offenders are not subject to a psycho-sexual examination (including the use of a polygraph and other methods of ascertaining the truth about an offender's sexual history and proclivities), and the results of the examinations that are done are not made available to researchers; and (3) PSRs, which often are rich sources of data on offender characteristics and offense conduct, are not made available to researchers.

[87] *See* Chapter 7 at 171–74 (discussing the social science research).

[88] The Commission routinely collects and analyzes a large amount of data concerning sentencing, offense characteristics, and offender characteristics from the sentencing documents submitted to the Commission by district courts in all types of cases pursuant to 28 U.S.C. § 994(w). In addition, the Commission undertakes special coding projects concerning particular offense types to supplement the data routinely collected and analyzed by the Commission. Such "special coding projects" examine PSRs and other sentencing documents for data that is not routinely coded by the Commission. *See, e.g.*, U.S. SENT'G COMM'N, COCAINE AND FEDERAL SENTENCING POLICY 17–24 (2007) (reporting findings of Commission's special coding project of "offender functions" in crack cocaine cases).

[89] The Commission's analysis of fiscal year 2010 non-production cases excluded a small number of cases with offenders who were sentenced under the applicable penal statutes and guideline provisions in effect before the PROTECT Act. Thus, all 1,654 non-production cases that were studied involved offenders who were sentenced under a version of USSG §2G2.2 in effect on or after November 1, 2004, and under provisions of 18 U.S.C. §§ 2252, 2252A, or 2260 effective after the passage of the PROTECT Act.

[90] With respect to the fiscal years 1999–2000 study, the Commission analyzed cases sentenced under the versions of the non-production guidelines then in effect — USSG §§2G2.2 (receipt, transportation, and distribution offenses) and 2G2.4 (possession offenses). The number of production cases in fiscal years 1999 and 2000 (in which offenders were sentenced under USSG §2G2.1) was too small in number to permit meaningful data analysis.

information about the specific methodologies used in Commission's special coding project and recidivism study are contained in Chapters 6, 7, 8, 9, and 11 of this report.

Among the issues explored in the special coding project was whether the offenders also engaged in any criminal sexually dangerous behavior, including contact and non-contact sex offenses, before their arrests and prosecutions for their federal child pornography offenses.[91] In addition, with respect to the 660 cases sentenced in fiscal years 1999 and 2000, the Commission also engaged in a recidivism study to determine whether offenders either committed new criminal offenses (including sex crimes) or committed "technical" violations of the conditions of their court supervision (*e.g.*, failure to participate in court-ordered sex offender treatment) following reentry into the community, as coded from FBI RAP sheets.

The results of the Commission's special coding project of non-production and production cases and its recidivism study are discussed in Chapters 6, 7, 8, 9, and 11 of this report. The Commission's special coding project and recidivism study have certain limitations and, thus, the Commission's findings should be viewed as a conservative estimate of the prevalence of many offense and offender characteristics (including criminal sexually dangerous behavior by offenders).[92] Nonetheless, they provide significant insights about child pornography cases.

3. *Organization*

The remainder of this report is organized as follows:

Chapter 2 discusses the statutory and guidelines framework governing child pornography cases (both production and non-production cases). It also briefly discusses state penal statutes proscribing child pornography offenses.

Chapter 3 discusses the role of technology in the commission of child pornography offenses, including how offenders possess and distribute child pornography. It also addresses law enforcement efforts to combat child pornography.

Chapter 4 addresses child pornography offenders and offense conduct, including types of offenders; offenders' motivations to collect child pornography and their collecting behavior; child pornography "communities" and the child pornography "market"; and the relationship between child pornography offending and other sex offending.

Chapter 5 addresses issues related to the victims of child pornography offenses and the types of harm suffered by such victims. The issue of restitution to victims of non-production offenses also is addressed.

Chapter 6 analyzes federal sentencing data in §2G2.2 cases using both the Commission's annual datafiles since 1992 as well as the Commission's special coding project of §2G2.2 cases

[91] Such criminal sexually dangerous behavior ("CSDB") is defined and discussed in detail in Chapter 7 at 174–80.

[92] *See* Chapter 6 at 144 n.50 (discussing limitations of coding from presentence reports); Chapter 11 at 295 (discussing limitations of coding from Federal Bureau of Investigation Record of Arrest and Prosecution ("FBI RAP") sheets).

from fiscal year 2010 and the first quarter of fiscal year 2012.[93] It includes a discussion of trends in offense and offender characteristics and other sentencing data during the past two decades. The coding project provides a more complete profile of offender and offense characteristics than appears in the Commission's regular annual datafiles of child pornography cases.

Chapter 7 presents the findings of the Commission's special coding project with respect to offenders' histories of criminal sexually dangerous behavior ("CSDB").

Chapter 8 addresses sentencing disparities in §2G2.2 cases and the reasons for such disparities (*i.e.*, the manners in which many courts and parties have reduced defendants' sentencing exposure under statutory and guideline provisions). It analyzes data from the Commission's regular fiscal year 2010 datafile as well as data from the Commission's special coding project of fiscal year 2010 non-production cases. It also discusses differences in circuit courts' appellate review of sentences imposed in child pornography cases in recent years.

Chapter 9 analyzes cases in which offenders were sentenced under §2G2.1 for producing child pornography. It includes analyses of offender and offense characteristics and sentencing trends in such cases using both the Commission's annual datafiles since fiscal year 1992 as well as the Commission's special coding project of fiscal year 2010 production cases.

Chapter 10 discusses a variety of post-conviction issues, including supervised release in child pornography cases; assessment and treatment of offenders' sexual disorders (in prison and on supervision); and collateral issues related to sex offender registration and civil commitment.

Chapter 11 addresses recidivism by child pornography offenders, including the Commission's study of known recidivism by a cohort of offenders sentenced under §§2G2.2 and 2G2.4 in fiscal years 1999 and 2000 and followed for an average of eight-and-a-half years after their reentry into the community.

Chapter 12, the concluding chapter of this report, includes the major findings of the Commission and offers recommendations to Congress.

Appendices to this report comprise: (A) a glossary of relevant terminology used in this report; (B) current versions of the primary child pornography sentencing guidelines, USSG §§ 2G2.1 and 2G2.2, as well as the Sentencing Table (USSG, Chpt. 5, Pt. A); (C) & (D) summaries of relevant testimony concerning child pornography offenses from witnesses at the Commission's regional public hearings and child pornography hearing; (E) a chart summarizing the provenance of all provisions in the sentencing guideline for non-production child pornography offenses; (F) a collection of state penal statutes proscribing child pornography offenses; and (G) a selected bibliography of relevant social science and legal literature concerning child pornography offenses.

[93] The Commission also examined 345 cases from fiscal year 2002 for a limited purpose of determining whether offenders then used P2P file-sharing programs in committing their non-production child pornography offenses.

Chapter 2

STATUTORY AND GUIDELINE PROVISIONS IN CHILD PORNOGRAPHY CASES

This chapter provides an overview of penal statutes, the applicable sentencing guideline provisions, and relevant case law concerning the statutes and guidelines in child pornography cases. As discussed below, the current sentencing scheme in child pornography cases generally divides offenders into two groups for sentencing purposes: (1) those offenders who produced child pornography or engaged in acts directly related to production, such as advertising for minors to appear in child pornography (hereafter "production" offenses), and (2) those offenders who possessed, distributed, or engaged in other acts related to the collection of child pornography but who did not produce it (hereafter "non-production" offenses). The current sentencing scheme usually punishes offenders who committed production offenses more severely than offenders who committed non-production offenses.[1] The penalty ranges for child pornography offenders depend on the statutory range of punishment (including any mandatory minimum penalties that may be applicable) as well as the guideline ranges. This chapter will first address penal statutes related to child pornography offenses and next address the sentencing guidelines concerning such offenses.

A. FEDERAL STATUTES CONCERNING CHILD PORNOGRAPHY

1. *Overview of Federal Child Pornography Penal Statutes*

Several statutory provisions in chapter 110 of title 18 of the United States Code proscribe a variety of acts related to the production,[2] advertising,[3] distribution,[4] transportation (including

[1] *See* Chapter 9 at 253 (Figure 9–3) (comparing average sentences over time in production and non-production cases).

[2] 18 U.S.C. §§ 2251(a), (b), (c), (d)(1)(B) & (e) and 2260(a). Unless otherwise stated, all statutory citations in this report are to the current version of the statutes included in WEST'S FEDERAL CRIMINAL CODE AND RULES (2012).

[3] Section 2251 prohibits two types of advertising related to child pornography. Section 2251(d)(1)(B) makes it unlawful to advertise for minors to *participate in* child pornography, while section 2251(d)(1)(A) makes it unlawful to advertise child pornography itself. The guidelines treat the former as a production offense and the latter a non-production offense. *See* USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), comment. (backg'd) ("Statutory Provisions," including 18 U.S.C. § 2251(d)(1)(B)); USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor), comment. (backg'd) ("Statutory Provisions," including 18 U.S.C. § 2251(d)(1)(A)). Section 2252A(a)(3) also prohibits the "advertis[ing]" or "promot[ing]" of child pornography. 18 U.S.C. § 2252A(a)(3).

[4] 18 U.S.C. §§ 2252(a)(2) & (a)(3), 2252A(a)(2), (a)(3), (a)(4) & (a)(6) and 2260(b). Sections 2252 and 2252A also prohibit the *sale* of child pornography, thus broadly encompassing any type of distribution, whether commercial or non-commercial. In addition, §§ 2252, 2252A and 2260(b) each prohibit the possession of child pornography with the intent to distribute it (in different circumstances). *See* 18 U.S.C. §§ 2252(a)(3)(B), 2252A(a)(4)(B), & 2260(b). The sentencing guideline provisions related to child pornography use the terms "trafficking" and "distribution" interchangeably. *See, e.g.*, USSG §2G2.2(b)(1). For simplicity's sake, this report uses the term "distribute" to refer

by shipping or mailing),[5] importation,[6] receipt,[7] solicitation,[8] and possession[9] of child pornography, as well as related "morphing"[10] offenses, including attempted acts and conspiracies to commit all such acts.[11] An additional statute in chapter 71 of title 18, § 1466A, prohibits possession, receipt, distribution, and production of "obscene visual representations of the sexual abuse of children"; its violation is considered a child pornography offense for sentencing purposes.[12] There is a significant amount of overlap among these statutory provisions in chapters 71 and 110.[13]

A further discussion of these various offenses, including a discussion of their applicable statutory penalty ranges — divided into production and non-production offenses — appears below. Initially, the next section discusses the statutory definition of "child pornography."

2. *Definition of "Child Pornography"*

"Child pornography" is defined by statute as any "visual depiction" of an actual minor or a computer-generated image that "is indistinguishable from[] that of a minor" who is "engaging in sexually explicit conduct," "including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means."[14] "Sexually explicit conduct" includes vaginal and anal intercourse, oral sex,

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to all types of distribution, commercial and non-commercial, as well as possession with the intent to distribute. *Cf.* 21 U.S.C. § 841(a)(2) (treating distribution of drugs and possession with intent to distribute drugs as equivalent offenses).

[5] 18 U.S.C. §§ 2252(a)(1) and 2252A(a)(1).

[6] 18 U.S.C. § 2260(b).

[7] 18 U.S.C. §§ 2252(a)(2) and 2252A(a)(2).

[8] 18 U.S.C. § 2252A(a)(3).

[9] 18 U.S.C. §§ 2252(a)(4) and 2252A(a)(5). An offender also violates § 2252A(a)(5) by "knowingly accessing" an image of child pornography on the Internet with "intent to view" it. *See* United States v. Shiver, 305 F. App'x 640, 642 n.4 (11th Cir. 2008) (discussing the October 2008 amendment to § 2252A(a)(5), which expanded the concept of "possession" beyond physical possession).

[10] 18 U.S.C. § 2252A(a)(7). This statutory provision proscribes the production with intent to distribute or distribution of "child pornography that is an adapted or modified depiction of an identifiable minor." *Id.*

[11] *See* 18 U.S.C. §§ 2251(d)(1)(A) & (e), 2252(a) & (b), 2252A(a) & (b), and 2260(b) & (c).

[12] *See* USSG App. A (referencing violations of 18 U.S.C. § 1466A to USSG §2G2.2). Prosecutors also occasionally bring obscenity charges under other statutory provisions in chapter 71 when the offenses in fact involved images that would qualify as child pornography. *See* 18 U.S.C. §§ 1461 *et seq.* Such offenses, if they involved the obscene depiction of minors, are subject to the guidelines' child pornography provisions rather than the guideline applicable to obscenity depicting adults. *See, e.g.*, USSG §2G3.1(c) (cross-reference from obscenity guideline to child pornography guideline). In fiscal year 2010, no cases that were sentenced under §2G2.2 involved convictions under § 1466A, while a total of five cases sentenced under §2G2.2 involved convictions under other obscenity statutes (18 U.S.C. §§ 1462, 1465, or 1470). *See* Chapter 6 at 146 n.58.

[13] *Compare*, *e.g.*, 18 U.S.C. § 2252(a)(4) (making it an offense to "knowingly possess" any matter that contains a "visual depiction" of a minor engaging in "sexually explicit conduct"), *with* 18 U.S.C. § 2252A(a)(5) (making it an offense to "knowingly possess . . . an image of child pornography").

[14] 18 U.S.C. § 2256(8). This definition of "child pornography" is limited to offenses in 18 U.S.C. § 2252A, although a comparable definition appears in § 2252, the other major child pornography statute. The definition

masturbation, bestiality, "sadistic or masochistic abuse," and the "lascivious exhibition of the genitals or pubic area."[15] "Lascivious exhibition" is not defined by statute, but "virtually all"[16] of the federal courts to have addressed the issue have applied a well-established six-prong legal standard in deciding whether a particular image of a minor qualifies as "lascivious."[17]

3. *Production Offenses*[18]

Congress has criminalized the production of child pornography (including aiding and abetting production, such as providing one's child to another to use in production) and the related act of advertising for minors to participate in the production of child pornography.[19] An offender violates the production statute regardless of whether he intended to profit from or distribute the

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applicable to § 2252A goes beyond § 2252 by including a "visual depiction [that] has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(C). Thus, the only material difference is that § 2252A encompasses "morphed" computer-generated sexually explicit images that involve an actual minor, while § 2252 is limited to unaltered images of actual minors. *See* Holly H. Krohel, *Dangerous Discretion: Protecting Children By Amending the Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Noncustodial Sentences*, 48 SAN DIEGO L. REV. 623, 631 n.45 (2011); *see also* Stephen L. Bacon, *A Distinction Without a Difference: "Receipt" and "Possession" of Child Pornography and the Double Jeopardy Problem*, 65 U. MIAMI L. REV. 1027, 1042 n.84 (2011); United States v. Miller, 527 F.3d 54, 64 n.10 (3d Cir. 2008) (quoting United States v. Malik, 385 F.3d 758, 760 (7th Cir. 2004); observing that §§ 2252 and 2252A are "materially identical" in terms of their prohibitions on receipt and possession of child pornography). Prosecutions based on such "morphed" child pornography are rare. *See* Chapter 6 at 146 n.58.

[15] 18 U.S.C. § 2256(2). As noted above, federal law also prohibits certain acts related to "obscene" photographic and non-photographic visual representations of minors engaged in sexually explicit conduct. *See, e.g.*, 18 U.S.C. § 1466A(a)(2)(A) (outlawing possession, receipt, or distribution of a "visual depiction . . . that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex").

[16] United States v. Williams, 444 F.3d 1286, 1299 n.62 (11th Cir. 2006) ("Virtually all lower courts that have addressed the meaning of 'lascivious exhibition' have embraced the widely followed '*Dost*' test . . . ."), *rev'd on other grounds*, 553 U.S. 285 (2008).

[17] The six-prong standard was first announced in United States v. Dost, 636 F. Supp. 828 (S.D. Cal. 1986), *aff'd sub nom.* United States v. Wiegand, 812 F.2d 1239 (9th Cir.), *cert denied*, 484 U.S. 856 (1987). The "*Dost* factors" are: "(1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, *i.e.*, in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Dost*, 636 F. Supp. at 832.

[18] In the Commission's recent report to Congress on mandatory minimum statutory penalties, the Commission explained that, for purposes of data analysis in that report, the Commission treated child pornography production offenses as "sexual abuse" offenses rather than "child pornography" offenses. *See* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 295 (Oct. 2011) ("Such bifurcation is appropriate because . . . [production offenses] involve actual or intended sexual *contact* with a victim, while [what are commonly known as] child pornography offenses concern the possession, receipt, transportation, or distribution of sexually-oriented *images* of children.") (emphasis in original). However, in this report, production and non-production offenses both are referred to as "child pornography" offenses, although throughout this report the two larger types of child pornography offenses usually are examined separately.

[19] 18 U.S.C. § 2251(a), (b), (d)(1)(B) & (e).

child pornography that he produced; the statute is violated even if an offender produced child pornography solely for "personal use."[20]

Upon conviction of any of these production offenses, an offender faces a mandatory minimum term of 15 years of imprisonment and a maximum of 30 years.[21] Defendants with predicate state or federal convictions for prior sex offenses[22] face higher minimums and maximums (25-year mandatory minimum penalty and 50-year maximum penalty if the defendant has one prior conviction for a sex offense; 35-year mandatory minimum penalty and maximum of life imprisonment if the offender has two or more prior convictions for a sex offense).[23] In addition to the recidivist enhancement provisions in § 2251(e), a defendant convicted of production of child pornography involving a victim 16 years of age or younger who committed the production offense after having been convicted of a prior sex offense also involving a victim 16 years or younger faces a mandatory sentence of life imprisonment under 18 U.S.C. § 3559(e).[24]

4. *Non-Production Offenses*

The four primary non-production offense types are distribution, transportation (including shipping or mailing), receipt, and possession of child pornography.[25]

a. Distribution and Transportation

Sections 2252 and 2252A prohibit distribution or transportation of child pornography regardless of whether the defendant had a commercial or non-commercial purpose (*e.g.*, a distribution offense occurred if a defendant knowingly used a "peer-to-peer" file-sharing program[26] and thereby provided others access to his child pornography files without an expectation of anything in return).[27] The offense of transportation (including shipping or

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[20] *See, e.g.*, United States v. Poulin, 631 F.3d 17, 20–21 (1st Cir. 2011).

[21] 18 U.S.C. § 2251(a), (d)(1)(B) & (e).

[22] Such enumerated predicate sex offenses include prior convictions for sex trafficking of children, obscenity offenses, sexual abuse of adults or children, and child pornography offenses. 18 U.S.C. § 2251(e).

[23] 18 U.S.C. § 2251(e). Notably, in contrast to the statutory enhancements for drug-trafficking offenders who have prior felony drug convictions, *see* 28 U.S.C. § 851, the enhancement provision for recidivist sex offenders who are convicted of child pornography offenses in chapter 110 of title 18 of the United States Code does not require the prosecution to file an information alleging the existence of a defendant's prior conviction for a sex offense. Rather, the statutes require courts to sentence a defendant within the enhanced statutory ranges if there is adequate proof of a predicate conviction for a sex offense. *See, e.g.*, United States v. Schmeltzer, 960 F.2d 405, 408 (5th Cir. 1992) (holding that the statutory enhancement in § 2252(b) is mandatory and does not require any action by the prosecutor to be effective upon proof of a defendant's predicate conviction for a sex offense).

[24] *See* United States v. Gallenardo, 579 F.3d 1076, 1082–83 (9th Cir. 2009) (holding that enhancement under § 3559(e), where applicable, trumps the lesser enhancement under § 2251(e)); United States v. Moore, 567 F.3d 187, 190–91 (6th Cir. 2009) (same).

[25] *See* Chapter 6 at 146 (Figure 6-14).

[26] Peer-to-peer ("P2P") file-sharing programs are discussed in Chapter 3 at 48–53.

[27] *See* United States v. Holston, 343 F.3d 83, 85–86 (2d Cir. 2003); *see also* United States v. Williams, 553 U.S. 285, 296 (2008) ("[I]n much Internet file sharing of child pornography each participant makes his files available for free to other participants.").

mailing) of child pornography does not require that the defendant intended to distribute it to another person.[28] Nevertheless, the vast majority of offenders convicted of transportation in fact distributed to another person.[29]

b. Receipt and Possession

"[P]ossessors, unless they fabricate their own [child] pornography, are also receivers" at some earlier point in time.[30] A conviction for receipt, however, requires proof beyond a reasonable doubt that a defendant *knowingly* came into possession of child pornography at the time that the image or video was received.[31] Courts have held that a defendant's knowing possession of child pornography does not by itself establish that the defendant previously knowingly received it.[32] Nevertheless, in the vast majority of non-production child pornography cases today, as a reflection of the manner in which offenders typically receive child pornography using their computers (*e.g.*, with P2P file-sharing programs or from commercial websites), legally sufficient proof exists that offenders knowingly received the child pornography found in their possession.[33]

c. Penalties for Non-Production Offenses

The statutory penalty ranges for non-production offenses vary in severity depending on both the act involved and the defendant's prior criminal record. Advertising child pornography carries a mandatory minimum penalty of 15 years of imprisonment unless a defendant has one or

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[28] *See, e.g.*, United States v. Fore, 507 F.3d 412, 415 (6th Cir. 2007); United States v. Burgess, 576 F.3d 1078, 1102 (10th Cir. 2009). As explained below, unlike simple possession, transportation of child pornography is punished with a five-year mandatory minimum prison sentence.

[29] *See* Chapter 7 at 189 n.72.

[30] *See* United States v. Richardson, 238 F.3d 837, 839 (7th Cir. 2001) (Posner, J.).

[31] *See* United States v. Myers, 355 F.3d 1040, 1042 (7th Cir. 2004).

[32] *See* United States v. Miller, 527 F.3d 54, 63 (3d Cir. 2008) (observing that a "person may come to knowingly possess a computer file without ever knowingly receiving it"); *see also* United States v. Ehle, 640 F.3d 689, 698 (6th Cir. 2011) ("Congress viewed an individual's 'knowingly possessing' child pornography as a separately punishable offense where the same individual had not also 'knowingly received' the same child pornography"). Knowing receipt is typically proved with direct evidence (*e.g.*, using a credit card and email address directly linked to his name, a defendant purchased a subscription to a website that exclusively provided videos or images of child pornography or ordered child pornography through the mail). *See, e.g.*, United States v. Wilder, 526 F.3d 1, 7–9 (1st Cir. 2008). Occasionally, the prosecution will be required to prove knowing receipt with circumstantial evidence when there is no admission by the defendant or forensic evidence that he knowingly downloaded child pornography from the Internet or knowingly received the images via email or regular mail or through a peer-to-peer file-sharing program. "[C]ourts, confronting this question, have deemed at least four factors relevant to this inquiry: (1) whether images were found on the defendant's computer [or otherwise in his residence or place of employment] . . . ; (2) the number of images of child pornography that were found . . . ; (3) whether the content of the images was evident from their file names, . . .; and (4) defendant's knowledge of and ability to access the storage area for the images . . . ." *Miller*, 527 F.3d at 67 (citations and internal quotation marks omitted).

[33] *See* Chapter 6 at 145–46, 147 n.60. If the defendant did knowingly receive the child pornography, then his possession of the images is a lesser-included offense of receipt. *See Ehle*, 640 F.3d at 698–99 (holding that, when the defendant has knowingly received child pornography, his possession of the same images is a "lesser-included offense" of receipt for purposes of the Double Jeopardy Clause) (citing Third and Ninth Circuit cases in support of this proposition); *cf.* Ball v. United States, 470 U.S. 856 (1985) (holding that possession of drugs is a lesser-included offense of knowingly receiving the same drugs for purposes of double jeopardy analysis).

more predicate convictions for a sex offense (which would raise the mandatory minimum penalty to 25 years in the case of one prior sex conviction or 35 years in the case of two or more prior sex convictions).[34] The offenses of receipt (or solicitation), transportation (including mailing or shipping), distribution, and possession with the intent to distribute or sell child pornography each carry a mandatory minimum term of five years of imprisonment and a maximum term of 20 years.[35] If a defendant has a prior federal or state conviction for one or more enumerated sex offenses,[36] the penalty range increases to a mandatory minimum term of 15 years and a maximum term of 40 years of imprisonment.[37] There is a separate punishment range for distribution of (as well as production with intent to distribute) a "morphed" image of an actual, identifiable minor appearing to engage in sexually explicit conduct. Such "morphing" offenses carry a statutory maximum punishment of 15 years of imprisonment but carry no statutory mandatory minimum penalty.[38]

The current statutory range of imprisonment for possession is zero to ten years of imprisonment if an offender possessed child pornography depicting a minor 12 years of age or older who was not then prepubescent and zero to 20 years of imprisonment if an offender possessed child pornography depicting a prepubescent minor or a minor under 12 years of age.[39] Defendants with predicate convictions for sex offenses face a statutory imprisonment range of ten to 20 years for a possession offense (whatever the age or sexual development of the minors depicted).[40]

Statutory ranges of punishment for the obscenity offenses in chapter 71 of title 18 of the United States Code, which are occasionally applied to defendants who possess, receive, transport, or distribute sexually child pornography, vary. Offenses involving possession, receipt, or distribution of "obscene visual representations of the sexual abuse of children" carry the same "penalties provided in section 2252A(b)" for equivalent offenses involving child pornography.[41] Other obscenity offenses in chapter 71 do not carry a mandatory minimum penalty and have a

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[34] 18 U.S.C. § 2251(d)(1)(A), (e).

[35] 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1), 2260(c)(2).

[36] Essentially the same list of enumerated predicate sex offenses applies for enhancement in non-production cases as in production cases — including prior convictions for child pornography and sexual abuse of a child. *See, e.g.*, 18 U.S.C. § 2252(b)(1) & (2).

[37] *See id.*

[38] 18 U.S.C. § 2252A(a)(7), (b)(3).

[39] 18 U.S.C. §§ 2252(b)(2) & 2252A(b)(2). Until late 2012, the statutory maximum penalty for all possession offenses was ten years (for offenders without a predicate conviction for a sex offense). *See* Chapter 1 at 4–5. Because the fact that a minor was prepubescent or under 12 years of age raises the statutory maximum sentence, that fact must be proved to a jury beyond a reasonable doubt (or admitted by a defendant in pleading guilty) in order for a court to impose a sentence of imprisonment in excess of ten years. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000).

[40] *See id*.

[41] 18 U.S.C. § 1466A(a) & (b). Violations of § 1466A are also thus subject to the same enhancements provided in § 2252A for defendants with predicate convictions for sex offenses.

statutory maximum penalty of five or ten years of imprisonment depending on which statute applies.[42]

5. *Summary of Statutory Penalty Ranges*

Table 2–1 summarizes the statutory penalty ranges for the most common types of offenses involving child pornography or sexually obscene images of children.

Table 2–1
Child Pornography Statutory Penalty Ranges

Production			Receipt/Distribution/ Transportation		Possession		Obscenity	
No Prior Sex Conviction	**Prior Sex Conviction**	**> 1 Prior Sex Conviction**	**No Prior Sex Conviction**	**Prior Sex Conviction**	**No Prior Sex Conviction**	**Prior Sex Conviction**	**18 U.S.C. § 1466A**	**18 U.S.C. §§ 1461 *et seq.***
15 to 30 years	25 to 50 years	35 years to life	5 to 20 years	15 to 40 years	0 to 10 years or 0 to 20 years (depending on age of victim)	10 to 20 years	Mirrors penalties in CP statutes	0 to 5 years or 0 to 10 years (varies by statute)

6. *Differing Penalties for Receipt and Possession*

In 1977, Congress originally enacted legislation solely targeting commercial trafficking of child pornography. That statute prohibited distribution and receipt in connection with the *sale* of child pornography and provided the same penalty range for both offenses.[43] The statute did not prohibit simple possession of child pornography, apparently due to Congress's concern that the First Amendment might protect such simple possession (at least in one's home).[44] In 1984, Congress amended the statute to remove the requirement that the distribution or receipt occur in connection with a commercial transaction.[45] In 1988, based on the growing popularity of the personal computer and its increasing use in the trafficking of child pornography, Congress amended the statute to specifically address an offender's use of a computer in the distribution, transportation, or receipt of child pornography.[46]

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[42] *See* 18 U.S.C. §§ 1461, 1462, 1463, 1465, 1466, & 1470.

[43] *See* Chapter 1 at 4 & n.22.

[44] *See* United States v. Williams, 444 F.3d 1286, 1291 (11th Cir. 2006) ("In Stanley v. Georgia, [394 U.S. 557 (1969),] the Court held that privacy interests protect the right to possess obscene materials in one's own home, but subsequently clarified [in United States v. Orito, 413 U.S. 139, 141 (1973)] that this sanction does not extend to the distribution or receipt of obscenity, which may be regulated on interstate commerce grounds even if the transportation is for the recipient's personal use. Against this backdrop, Congress passed its first child pornography legislation, the Protection of Children against Sexual Exploitation Act, in 1977."), *overruled on other grounds*, 553 U.S. 285 (2008).

[45] *See* Chapter 1 at 4 & n.23.

[46] *Williams*, 444 F.3d at 1291 ("Congress first addressed the connection between child pornography and emerging computer technology in the Child Protection and Obscenity Enforcement Act of 1988, which prohibited the use of

Shortly after the Supreme Court held that the First Amendment does not prohibit the criminalization of simple possession of child pornography in 1990,[47] Congress added simple possession to the list of prohibited activities.[48] Congress punished possession less severely than the other offenses listed in the 1990 version of the statute; the statutory penalty range for receipt remained the same as the penalty range for distribution.[49] In the PROTECT Act of 2003, Congress increased the statutory penalty ranges for all types of child pornography offenses and also created new five-year mandatory minimum penalties for receipt and distribution offenses; however, Congress did not add a mandatory minimum penalty for possession offenses (except for defendants with predicate convictions for a sex offense).[50] Finally, in the Child Protection Act of 2012, Congress raised the statutory maximum term of imprisonment for possession from ten to 20 years if an offender possessed child pornography depicting a minor under 12 years of age or who was prepubescent.[51] Congress, however, did not add a mandatory minimum penalty.

The legislative history concerning Congress's decision to punish possession less severely than the closely related offense of receipt[52] is sparse. No legislative findings, committee reports, or relevant floor statements by sponsors clearly reflect Congress's reasons for the different penalties for receipt and possession in either the 1990 legislation initially criminalizing possession (as a separate act from receipt) or the PROTECT Act of 2003 (which added a mandatory minimum for receipt and distribution but not possession).[53] The history of related legislation issuing a directive to the Commission concerning guideline penalties for receipt and

computers to transport, distribute, or receive child pornography."), *overruled on other grounds*, 553 U.S. 285 (2008).

[47] *See* Osborne v. Ohio, 495 U.S. 103 (1990).

[48] Free Speech Coalition v. Reno, 198 F.3d 1083, 1088 (9th Cir. 1999) ("In 1990 the Supreme Court decided *Osborne v. Ohio* . . . . Soon thereafter, the Child Protection Restoration and Penalties Enhancement Act of 1990 was passed . . . [which] criminalized the possession of . . . child pornography.") (internal citations omitted).

[49] *See* Chapter 1at 4 & n.26 (originally providing a statutory range of imprisonment of zero to 15 years for receipt and distribution and zero to five years for possession).

[50] *See id.* (creating a five to 20 year statutory range for receipt and distribution and a zero to ten year range for possession).

[51] P. L. 112–206, 126 Stat. 1490 (Dec. 7, 2012).

[52] *See* United States v. Richardson, 238 F.3d 837, 839–40 (7th Cir. 2001) (Posner, J.)(finding the distinction between child pornography receipt and possession offenses to be "tenuous" and "puzzl[ing]" because "possessors, unless they fabricate their own [child] pornography, are also receivers [at some earlier point in time]"). As the Supreme Court has recognized in an analogous context, "proof of illegal receipt of a firearm *necessarily* includes proof of illegal possession of that weapon." Ball v. United States, 470 U.S. 856, 862 (1985) (emphasis in original).

[53] A key sponsor of the 1990 legislation in the Senate, Senator Thurmond, stated that: "Under current law, it is a crime to knowingly transport, distribute, receive or reproduce any child pornography which has traveled in interstate or foreign commerce. Unfortunately, those who simply possess or view this material are not covered by current law. This bill addresses this insufficiency because those who possess and view child pornography encourage its continual production and distribution." 136 CONG. REC. S4728–02, S4730 (daily ed. Apr. 10, 1990) (statement of Sen. Thurmond). In reviewing this legislative history, the Sixth Circuit concluded that "the crime of 'knowingly possessing' child pornography was meant as a gap-filling provision, targeting those who 'possessed' child pornography without having also [knowingly] 'received' the same child pornography." United States v. Ehle, 640 F.3d 689, 699 (6th Cir. 2011); *see also id.* at 698 (noting that the lesser penalty range for possession "may reflect Congress's determination that merely 'knowingly possessing' certain child pornography is less blameworthy than 'knowingly receiving' (and along with it, 'knowingly possessing') other child pornography").

possession, however, offers some insight into Congress's intent for punishing receipt more severely (*i.e.*, on par with distribution) than simple possession.

After Congress's creation of the offense of possession of child pornography in 1990, the Commission created a new sentencing guideline for possession (USSG §2G2.4) with a lower penalty range than the existing guideline (USSG §2G2.2) that, until then, had covered both receipt and distribution. The Commission also moved receipt offenses from §2G2.2 to the new §2G2.4 (which generally had lower penalty ranges) based on the Commission's belief that receipt was more akin to possession than distribution.[54] Congress soon thereafter responded by enacting legislation — in the form of an amendment to a postal appropriations bill — that directed the Commission to remove receipt offenses from §2G2.4 and again refer receipt offenses to §2G2.2. Senator Helms from North Carolina, who along with Senator Thurmond from South Carolina had offered the amendment to the appropriations bill in the Senate, voiced his criticism of the Commission's decision to include receipt offenses in the new §2G2.4:

> [T]he receipt offense should not be classified with the possession offense. Prosecutors usually obtain convictions for receipt of child porn based on reverse-stings [using the U.S. mails[55]]. And experts say it is very difficult to prove trafficking and therefore they use the receipt offense more often. Furthermore, a person who purchases and receives child porn is actively supporting the child porn industry. The Department of Justice concurs that receipt should [be punished more severely than possession].[56]

The Department's letter, which Senator Helms offered into the record, stated in relevant part that: "The Department strongly believes that receipt of child pornography should be grouped with trafficking violations and not with the new possession offense. Reducing sanctions for receiving child pornography would send the wrong message to those who may consider violating the law."[57]

Representative Wolf, the amendment's chief sponsor in the House, called attention to a congressional staff memorandum in support of the amendment that echoed some of Senator Helms's remarks concerning why receipt should be punished more severely than possession. In particular, that memorandum contended that, in view of the law enforcement practices then prevailing in child pornography investigations (*i.e.*, "reverse-stings" using the U.S. mails), it

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[54] *See* USSG, App. C, amend. 372 (Nov. 1, 1991); *see also* U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 18–19 (2009).

[55] Such a "reverse-sting" operation typically involved an undercover law enforcement official's mailing an advertisement for child pornography to a suspect, who responded with a request for child pornography (which was delivered to the suspect in a "controlled delivery"). *See, e.g.*, United States v. Weber, 923 F.2d 1338 (9th Cir. 1990) (describing such a "reverse sting" operation in a child pornography case); United States v. Gifford, 17 F.3d 462 (1st Cir. 1994) (same).

[56] 137 CONG. REC. S10323 (daily ed. July 18, 1991) (statement of Senator Helms).

[57] *Id.* at S10330.

often was easier for law enforcement to catch child pornography distributors in the act of receipt rather than in the act of distribution.[58] Congress enacted the appropriations bill with the amendment that required the Commission to remove receipt offenses from §2G2.4.[59]

7. *Related Sex Crimes: "Enticement" and "Travel" Offenses*

Two other federal sex offenses, which typically involve offenders' use of the Internet to facilitate or attempt to facilitate illegal sexual activity with real or perceived minors (including undercover law enforcement officers pretending to be minors), warrant a brief discussion, as they occur concomitantly with the commission of many child pornography offenses.[60] First, if an offender used the Internet to "entice" or attempt to entice a person under 18 years of age to engage in sexual activity for which the defendant could be charged with a sex crime under federal or state law (including, but not limited to, rape or statutory rape), the offender is subject to a mandatory minimum penalty of ten years of imprisonment and a maximum term of life imprisonment.[61] Second, if an offender traveled across state lines with the intent to have sex with a child under 12 years of age, the offender is subject to a mandatory minimum prison sentence of 30 years and maximum term of life imprisonment.[62] If an offender traveled in interstate or foreign commerce with the intent to have "any illicit sexual contact" with a minor under 18 years of age but over 12 years of age, the offender is not subject to a mandatory minimum penalty but is subject to a maximum term of imprisonment of 30 years.[63]

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[58] 137 CONG. REC. H6740 (daily ed. Sept. 24, 1991) (statement of Rep. Wolf) ("Virtually all enforcement [of the child pornography laws] is accomplished through sting operations conducted through the mails. As a result, most offenders (even active distributors) are caught in the act of receiving child pornography out of their mail box. . . . [D]istributors [who are apprehended] are likely to be caught in the act of receipt.") (quoting staff memorandum).

[59] *See* P.L. 102–141, § 632, 105 Stat. 834, 876 (Oct. 28, 1991); *see also* USSG, App. C, amend. 436 (Nov. 27, 1991).

[60] *See* Chapter 7 at 181 (Table 7–1) (noting that, in fiscal year 2010, 102 child pornography offenders committed concomitant "travel" offenses and 124 committed concomitant "enticement" offenses).

[61] 18 U.S.C. § 2422(b).

[62] 18 U.S.C. § 2241(c)

[63] 18 U.S.C. § 2423(b) & (e).

B. CHILD PORNOGRAPHY SENTENCING GUIDELINES

1. *Sections 2G2.1 and 2G2.2*

Sentencing guidelines for child pornography offenses are found in Chapter Two, Part G, Subpart 2 (Sexual Exploitation of a Minor) of the *Guidelines Manual*. This report focuses on §2G2.1, which addresses offenses related to production of child pornography,[64] and §2G2.2, which addresses non-production child pornography offenses (including receipt, transportation, and distribution (R/T/D) offenses and possession).[65] The evolving nature of the non-production child pornography guidelines during the past three decades is recounted in detail in the Commission's 2009 report, *The History of the Child Pornography Guidelines*.[66] The current versions of §§2G2.1 and 2G2.2, including their commentary, are reproduced in Appendix B of this report.

Section 2G2.1 has a base offense level of 32 and six enhancements for different aggravating factors primarily related to the nature of the images produced (the type of sexual acts perpetrated upon victims and the ages of the victims depicted in the images), whether defendants distributed the images, and the relationship between the defendants and victims.[67] Under the guidelines, defendants convicted of non-production offenses such as possession, receipt, and distribution of child pornography offenses are cross-referenced to §2G2.1 if their actual conduct involved production and if the sentencing range resulting from the application of §2G2.1 exceeds the range resulting from application of §2G2.2.[68]

Section 2G2.2, which covers non-production offenses, has a two-tiered system for assigning a base offense level to a defendant based on the nature of the most serious statute of conviction. If a defendant is convicted of simple possession of child pornography,[69] a

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[64] Section 2G2.1 covers child pornography production offenses, *see* 18 U.S.C. §§ 2251(a)–(c) and 2260(a), as well as offenses related to the commercial sex trafficking of minors (*e.g.*, child prostitution). *See* 18 U.S.C. § 1591. *See* USSG §2G2.1, comment. (backg'd) (Statutory Provisions). The latter is considered a "child pornography" offense only if the defendant convicted under § 1591 also photographed or videotaped a minor in a sexually explicit manner (*e.g.*, for advertising purposes in a child sex trafficking ring). In fiscal year 2010, there were four such § 1591 cases sentenced under §2G2.1. *See* Chapter 9 at 251.

[65] As noted in Chapter 1, for non-production offenses committed before November 1, 2004, defendants convicted only of possession offenses were sentenced under the former USSG §2G2.4, while defendants convicted of R/T/D offenses were sentenced under the prior version of USSG §2G2.2. Offenders convicted of any type of non-production offense committed on or after November 1, 2004, are sentenced under the current version of §2G2.2. *See* Chapter 1 at 2 n.13.

The other guidelines in Subpart 2 are USSG §§2G2.3 (Selling or Buying Children for Use in the Production of Pornography); 2G2.5 (Recordkeeping Offenses Involving the Production of Sexually Explicit Materials; Failure to Provide Required Marks in Commercial Electronic Mail); and 2G2.6 (Child Exploitation Enterprises). No cases were sentenced under any of these three guidelines in fiscal year 2010. Section 2G2.6 is briefly discussed below.

[66] That report traces the history of the guidelines for distribution, transportation, receipt, and possession offenses, noting the nine different times that those guidelines have been amended since they first went into effect in 1987. *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 54, at 7–54.

[67] *See* USSG §2G2.1(b). The enhancements are discussed in Chapter 9 at 261–62.

[68] *See* USSG §2G2.2(c)(1).

[69] 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5).

"morphing" offense,[70] or possession of an "obscene" image of a minor engaged in sexually explicit conduct under 18 U.S.C. § 1466A(b), the defendant's base offense level is 18.[71] A defendant convicted of receipt, transportation (including shipping or mailing), importation, or distribution has a base offense level of 22.[72] The offense level of a defendant convicted of receipt will be reduced by 2 levels if the court finds that the defendant's actual conduct was limited to receipt or solicitation of child pornography and that he "did not intend to traffic in, or distribute" any child pornography.[73]

Section 2G2.2 thus differentiates offenders' starting points in calculating their offense levels by dividing them into three primary groups: (1) those convicted of simple possession (offense level 18);[74] (2) those convicted of receipt who did not intend to distribute (offense level 20); and (3) those convicted of receipt but who intended to distribute as well as all those convicted of distribution or transportation (offense level 22).[75] When an offender is convicted only of simple possession, his relevant conduct[76] does not play a role in increasing his base offense level from level 18 to level 20 or 22, even if the court finds that the defendant in fact knowingly received or distributed child pornography. A court's findings concerning the defendant's relevant conduct does play a role in increasing an offender's offense level based on the specific offense characteristics set forth in §2G2.2(b)(2)–(b)(7) and in reducing some defendants convicted of receipt from base offense level 22 to level 20 under §2G2.2(b)(1).

Section 2G2.2 contains six enhancements based on aggravating circumstances related to the nature of the images possessed (the age of the victims depicted and whether the sexual acts depicted involved sadistic or masochistic acts or violence), the number of images possessed, whether a defendant used a computer, whether the defendant distributed child pornography, and whether the defendant previously engaged in a "pattern of activity" involving the "sexual abuse or exploitation of a minor."[77] Those enhancements are discussed further in Chapter 6.[78]

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[70] 18 U.S.C. § 2252A(a)(7).

[71] USSG §2G2.2(a)(1).

[72] USSG §2G2.2(a)(2).

[73] USSG §2G2.2(b)(1). Such a defendant's "base offense level" is 22 and the 2-level reduction under §2G2.2(b)(1) is a "specific offense characteristic." Nevertheless, judges and attorneys who handle child pornography cases often refer to three different base offense levels (22, 20, and 18). In this report, the Commission instead will refer to the three different "starting points" of 22, 20, or 18.

[74] If a defendant is convicted of a "morphing" offense, he also will receive a base offense level of 18 under USSG §2G2.2(a)(1), just as if he had been convicted of possession. No defendants in fiscal year 2010 were convicted of morphing offenses. *See* Chapter 6 at 146 n.58.

[75] If a defendant is convicted of importation, he also will receive a base offense level of 22 under USSG §2G2.2(a)(2), just as if he had been convicted of transportation or distribution. No defendants in fiscal year 2010 were convicted of importation. *See* Chapter 6 at 146 n.58.

[76] *See* USSG §1B1.3 (Relevant Conduct (Factors that Determine the Guideline Range)) (discussing "relevant conduct" under the guidelines' sentencing scheme).

[77] *See* USSG §2G2.2(b).

[78] *See* Chapter 6 at 137–41.

2. *Recurring Legal Issues Concerning Enhancements in Child Pornography Cases*

In applying §2G2.2, courts have addressed certain recurring legal issues concerning enhancements that actually or potentially apply in a significant percentage of child pornography cases. Two major interpretative issues concerning enhancements in §2G2.1(b) and §2G2.2(b), which are relevant to topics discussed in subsequent parts of this report, are addressed here. In addition, a third potentially relevant enhancement in a subsequent part of the *Guidelines Manual*, USSG §3A1.1(b), also is briefly discussed below.

The first issue is whether, and to what extent, an offender's use of a "peer-to-peer" ("P2P") file-sharing program to share child pornography with others qualifies as "distribution" under §§2G2.1(b)(3) or 2G2.2(b)(3).[79] Guideline commentary defines "distribution" as meaning "any act, including possession with the intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor[,] . . . includ[ing] posting [such] material . . . on a website for public viewing but [] not includ[ing] the mere solicitation of such material by a defendant."[80] Consistent with this definition, every court of appeals that has addressed the issue has held that a defendant's knowing use of a P2P file-sharing program that allows others to have access to child pornography files on the defendant's computer qualifies as "distribution" even if the defendant only made his illegal files available to strangers on the P2P network.[81] Put another way, the distribution enhancement applies even if a defendant did not *intend* to distribute so long as he possessed *knowledge* that, by participating in a P2P file-sharing program whereby he could access others' files, he was making his child pornography files accessible to others in the P2P network.[82] The Eighth Circuit explicitly has presumed that a defendant who used a P2P program that made his illegal files accessible to others in the P2P network *knowingly* did so, absent "concrete evidence of ignorance" on the defendant's part.[83] The Tenth Circuit has held that the 2-level enhancement in §2G2.2(b)(3)(F) for simple distribution applies to a defendant who used a P2P program that made his child pornography files accessible to others in the network even when there was no evidence that the defendant *knowingly* shared his files with others.[84]

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[79] P2P programs are discussed in Chapter 3 at 48–53.

[80] USSG §2G2.1 (comment.) (n.1); USSG §2G2.2 (comment.) (n.1).

[81] *See, e.g.*, United States v. Bolton, 669 F.3d 780, 782–83 (6th Cir. 2012); United States v. Spriggs, 666 F.3d 1284, 1287 (11th Cir. 2012); United States v. Layton, 564 F.3d 330, 335 (4th Cir. 2009); United States v. Geiner, 498 F.3d 1104, 1111 (10th 2007); United States v. Carani, 492 F.3d 867, 876 (7th Cir. 2007); *cf.* United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012) (holding that a defendant's "passive" file-sharing of child pornography images via a LimeWire P2P file-sharing program was sufficient to establish "knowing distribution" under 18 U.S.C. § 2252(a)(2)); United States v. Budziak, 697 F.3d 1105, 1109 (9th Cir. 2012) (same).

[82] United States v. Ramos, 695 F.3d 1035, 1041(10th Cir. 2012).

[83] United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010); United States v. Glassgow, 682 F.3d 1107, 1110 (8th Cir. 2012) (same); *see also* United States v. Durham, 618 F.3d 921 (8th Cir. 2010) (holding that, because the defendant proved that he did not knowingly make his child pornography accessible to others in the P2P group and, instead did so inadvertently, the distribution enhancement was improper).

[84] *See* United States v. Ray, 699 F.3d 1172, 1177–78 (10th Cir. 2012) (holding that the guideline enhancement, unlike the penal statutes outlawing distribution of child pornography, is a "strict liability" provision and does not require proof of any *mens rea* to apply).

The Eighth, Tenth, and Eleventh Circuits have taken inconsistent positions concerning the related issue of whether a defendant's knowing use of a P2P file-sharing program by itself qualifies for the 5-level enhancement under §2G2.2(b)(3)(B) as distribution "for the receipt, or expectation of receipt, of a thing of value" (other than for "pecuniary gain") or, instead, only qualifies for the 2-level enhancement under §2G2.2(b)(3)(F) for simple distribution.[85] The Tenth Circuit has held (and no other circuit has disagreed) that, if a defendant knowingly "opts in" to a P2P file-sharing program in order to gain access to more files or receive faster downloads than he would if he had not "opted in" to the file-sharing feature of the program, such a defendant warrants the 5-level enhancement.[86]

The second recurring issue is what qualifies as "sadistic or masochistic conduct or other depictions of violence" within the meaning of §§2G2.1(b)(4) and 2G2.2(b)(4) — a phrase not specifically defined within the guidelines. Courts have applied this phrase to a variety of conduct. In addition to sexual bondage of minors and use of weapons in a sexual context,[87] certain sexual acts themselves are deemed "inherently" sadistic by most courts. The 11 federal circuit courts to have addressed the issue to date have held that an image or video that portrays the vaginal or anal penetration of a prepubescent minor by an adult male or with an object for sexual purposes is sufficient evidence by itself for the enhancement. Most such courts have reasoned that such sexual penetration is "*per se*" sadistic or violent and that a court does not need expert medical testimony to support its conclusion that the enhancement applies in such a case.[88]

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[85] *Compare* United States v. Griffin, 482 F.3d 1008, 1013 (8th Cir. 2007) ("Griffin admitted that he downloaded child pornography files from Kazaa, knew that Kazaa was a [P2P] file-sharing network, and knew that, by using Kazaa, other Kazaa users could download files from him. By introducing these admissions into evidence, the government met its burden of establishing that Griffin expected to receive a thing of value — child pornography — when he used the file-sharing network to distribute and access child pornography files."), *with Geiner*, 498 F.3d at 1111 ("We agree that Mr. Geiner did not expect to access images and other files in exchange for allowing other network users to access his files. Although other courts have held that, by sharing files on a file-sharing network, a defendant necessarily expects to receive a 'thing of value' (*i.e.*, access to other users' files), [citing *Griffin*, *supra*], we do not think the language of U.S.S.G. §2G2.2(b)(3)(B) permits such a broad interpretation."); United States v. Vadnais, 667 F.3d 1206, 1209–10 (11th Cir. 2012) (same); *but cf.* United States v. Ultsch, 578 F.3d 827 (8th Cir. 2009) ("[W]hether a defendant qualifies for the five-level enhancement must be decided on a case-by-case basis, with the government bearing the burden of proving that the defendant expected to receive a thing of value [*e.g.*, another participant's files] when he used the file-sharing software.").

[86] *Geiner*, 498 F.3d at 1111.

[87] *See, e.g.*, United States v. Hoey, 508 F.3d 687, 692 n.3 (1st Cir. 2007).

[88] *See* United States v. Groenendal, 557 F.3d 419, 425–26 (6th Cir. 2009) ("[T]he First, Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have found that images involving penetrative sex between a prepubescent child and an adult male are *per se* sadistic. . . . "[W]e hold today that penetration of a prepubescent child by an adult male constitutes inherently sadistic conduct that justifies the application of [USSG]§ 2G2.2(b)[(4).") (emphasis in original); *Hoey*, 508 F.3d at 691 ("We agree with the many circuits which have found that images depicting the sexual penetration of young and prepubescent children by adult males represent conduct sufficiently likely to involve pain such as to support a finding that it is inherently 'sadistic' or similarly 'violent' under the terms of section 2G2.2(b)(4).") (citing decisions of the Second, Fifth, Eighth, Tenth, and Eleventh Circuits) (citations omitted); United States v. Bellflower, 390 F.3d 560, 562 (8th Cir. 2004) (holding that "images involving the sexual penetration of a minor girl by an adult male and images of an adult male performing anal sex on a minor girl or boy are *per se* sadistic or violent within the meaning of U.S.S.G. § 2G2.2(b)[4]") (emphasis in original); *accord* United States v. Maurer, 639 F.3d 72, 78–81 & n.5 (3d Cir. 2011); United States v. Holt, 510 F.3d 1007, 1011 (9th Cir. 2007); United States v. Myers, 355 F.3d 1040, 1043–44 (7th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1143–44 (10th Cir. 2003); United States v. Osborn, 35 F. App'x 61, 62 (4th Cir. 2002); *cf.*

Application Note 2 following §2G2.2 expressly provides that: "Subsection (b)(4) applies . . . regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute [sadistic, masochistic, or sexually violent] images."[89] Thus, all circuit courts that have addressed the issue since the application note was added in 2004[90] have concluded that the enhancement is a "strict liability" provision; a defendant's ignorance that he possessed such images does not prevent application of the enhancement.[91]

Although not a specific offense characteristic in §§2G2.1 or 2G2.2, the 2-level "vulnerable victim" enhancement in §3A1.1(b), according to the Ninth Circuit, applies to child pornography cases — both cases sentenced pursuant to §2G2.1 and cases sentenced pursuant to §2G2.2 — when there is sexual abuse of "very young children" depicted in the child pornography at issue.[92] The Ninth Circuit has rejected arguments that application of the vulnerable victim enhancement is impermissible "double counting" in cases that also receive the "sadistic" enhancement or the enhancement for a victim who is prepubescent or under 12 years of age.[93] Neither any other circuit court nor the Commission has addressed this specific issue. In view of the significant number of extremely young victims depicted in child pornography today,[94] this issue may arise in other circuits in the future.

United States v. Lyckman, 235 F.3d 234, 238–39 (5th Cir. 2000) ("[T]he sexual penetration of a young girl by an adult male is certainly no less painful, either physically or emotionally, to such a young child than the insertion of a foreign object. That being so, it was certainly reasonable for the district court to infer that the conduct depicted by the photographs caused the children pain, physical or emotional or both, and therefore constitutes sadism or violence within the meaning of the guideline."). The D.C. Circuit is the only circuit court not to have addressed the issue to date. The Commission examined the ten child pornography cases in the District of the District of Columbia from fiscal year 2010 which applied §2G2.2(b)(4). Several such decisions applied §2G2.2(b)(4) in cases where the only possible sadistic or violent images in the case that were mentioned in the presentence report were ones that portrayed an adult male's sexual penetration of a pre-pubescent minor. No case involved a court's refusal to apply the enhancement to such an image.

[89] USSG §2G2.2, comment. (n.2).

[90] *See* USSG App. C, amend. 664 (Nov. 1, 2004).

[91] *See, e.g.*, *Maurer*, 639 F.3d at 80; United States v. Freeman, 578 F.3d 142, 146 (2d Cir. 2009); *see also* United States v. Richardson, 238 F.3d 837, 840 (7th Cir. 2001) (reaching the same conclusion before the 2004 amendment).

[92] *See, e.g.*, United States v. Lynn, 636 F.3d 1127, 1138–39 (9th Cir. 2011).

[93] United States v. Wright, 373 F.3d 935, 943 (9th Cir. 2004) ("Most children under 12 are well beyond the infancy and toddler stages of childhood during which they are the most vulnerable. The guideline adjusting for victims under 12 does not take these especially vulnerable stages of childhood into account, so there is no double-counting of age in considering infancy or the toddler stage as an additional vulnerability. Though the characteristics of being an infant or toddler tend to correlate with age, they can exist independently of age, and are not the same thing as merely not having 'attained the age of twelve years' . . . ."); *Holt*, 510 F.3d at 1012 ("[T]he sadistic conduct enhancement accounts for the pleasure necessarily experienced by the perpetrator, while the vulnerable victim enhancement accounts for the inability of the victim to resist sexual abuse. Because the two enhancements account for these distinct wrongs, it was proper, and no abuse of discretion, for the district court to apply both to the challenged criminal conduct.").

[94] *See* Chapter 4 at 85–87; Chapter 9 at 266.

C. ADDITIONAL SENTENCING ENHANCEMENTS FOR CERTAIN CHILD PORNOGRAPHY OFFENDERS

In addition to providing for recidivist enhancements in the above-mentioned statutes[95] and guidelines,[96] both Congress and the Commission have provided for further enhanced penalties for certain other child pornography offenders — with respect to both the scope of the child pornography offense and the offender's history of committing sexual offenses prior to committing the offense of conviction.

In 18 U.S.C. § 2252A(g), Congress has provided for enhanced penalties for a "child exploitation enterprise," an offense that, upon conviction, carries a mandatory minimum of 20 years and a maximum term of life imprisonment.[97] That statute defines that type of criminal enterprise as including violations of the child pornography penal statutes in chapter 110 (except for record-keeping offenses) "as part of a series of felony violations constituting three or more separate incidents and involving more than one victim" when the defendant "commits those offenses in concert with three or more other persons."[98] Although rarely applied,[99] that statute appears to apply broadly to a person engaging in at least three separate acts of advertising, distribution, transportation, or receipt of child pornography in concert with at least three others, without regard to whether those acts resulted in a prior conviction.[100]

The corresponding sentencing guideline for violations of § 2252A(g) is USSG §2G2.6 (Child Exploitation Enterprises). It has a base offense level of 35 and includes some specific offense characteristics similar to those that appear in §§2G2.1 and 2G2.2.[101] Assuming two common specific offense characteristics in child pornography cases were to apply — a victim under 12 years old and the defendant's use of a computer, resulting in a combined 6-level

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[95] *See, e.g.*, 18 U.S.C. § 2252(b)(1) & (2) (increased mandatory minimum penalties for child pornography offenders with predicate convictions for sex offenses).

[96] *See, e.g.*, USSG §2G2.2(b)(5) (providing for a 5-level increase in an offender's base offense level for a "pattern of activity involving the sexual abuse or exploitation of a minor"); *see also id.*, comment. (n.1) (defining "pattern of activity" as including "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the [child pornography] offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.").

[97] 18 U.S.C. § 2252A(g)(1).

[98] 18 U.S.C. § 2252A(g)(2).

[99] In fiscal year 2010, no defendants were convicted of an offense under this statute.

[100] *See* United States v. Wayerski, 624 F.3d 1342, 1348 (11th Cir. 2010) ("The defendants' activity here satisfied the predicate offenses for § 2252A(g) because it violated at a minimum the prohibitions of 18 U.S.C. § 2251(d)(1), concerning the advertisement of child pornography, and 18 U.S.C. § 2252A(a)(1) and (2), concerning the transportation and receipt of child pornography, which are Chapter 110 offenses covered in the child exploitation enterprise statute. The offenses involved much more than three separate instances and more than one victim, and they occurred in concert with more than three people. Indeed, the defendants do not suggest that their own conduct falls outside the reach of § 2252A(g)."); *see also* United States v. McGarity, 669 F.3d 1218 (11th Cir. 2012) (appeal of conspirators of defendants in *Wayerksi*).

[101] *See* USSG §2G2.6(b)(1)–(4).

increase[102] — a defendant's offense level would be 41 (38 after full credit for acceptance of responsibility under §3E1.1). Further assuming Criminal History Category I (the typical Criminal History Category for child pornography offenders),[103] the corresponding sentencing range would be 235–293 months,[104] although, as noted above, the statutory minimum penalty is 240 months (20 years).

Section 4B1.5 of the sentencing guidelines (Repeat and Dangerous Sex Offenders) applies to certain defendants convicted of production of child pornography who have at least one predicate sex conviction[105] or who engaged in a "pattern of activity involving prohibited sexual conduct" (but need not have been convicted of such conduct). Subsection (a) of this guideline, which covers recidivist sex offenders, provides for an offense level of either 34 or 37 depending on whether the producer has one or two predicate sex convictions.[106] Such an offender also receives a minimum Criminal History Category of V.[107] With full credit for acceptance of responsibility, such an offender would have a minimum guidelines range of 180–210 months (offense level 31, Criminal History Category V)[108] or 235–293 months (offense level 34, Criminal History Category V).

Section 4B1.5(b), which applies if subsection (a) does not apply (*e.g.*, the offender was not convicted of the conduct constituting a "pattern of activity"), results in a 5-level enhancement to the otherwise applicable offense level in applying Chapter Two child pornography guidelines. Unlike §4B1.5(b), §4B1.5(a) does not have a separate base offense level and, instead, adds additional levels to a production offender's base offense level if the offender engaged in a "pattern of activity," as defined in §4B1.5(b). For purposes of §4B1.5(b), a "pattern of activity involving prohibited sexual conduct" is defined as sexual abuse of a child (including prior acts of producing child pornography) or distributing child pornography where the defendant also had a prior *conviction* for distributing child pornography.[109] This "pattern of activity" enhancement is broader than the "pattern of activity" enhancement in §2G2.2(b)(5), in that the former includes distribution of child pornography as predicate activity but the latter does not. In cases where a defendant is convicted of both an offense related to the sexual abuse of a

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[102] *See* USSG §2G2.6(b)(1) (4-level increase for minor under 12 years of age) & (b)(4) (2-level increase for use of a computer).

[103] *See* Chapter 6 at 143.

[104] *See* USSG Ch. 5, Pt. A (Sentencing Table).

[105] The predicate sex convictions include a state or federal conviction for sexual abuse of a minor, trafficking of minors for sexual purposes, and production of child pornography (but not child pornography offenses only related to distribution, receipt, or possession). *See* USSG §4B1.5, comment. (n.2).

[106] A producer with one predicate sex conviction faces a statutory maximum of 50 years under 18 U.S.C. § 2251(e) and a corresponding base offense level of 34 under USSG §4B1.5(a)(1)(B)(ii). A producer with two or more predicate sex convictions faces a statutory maximum of life imprisonment under 18 U.S.C. § 2251(e) and a corresponding base offense level of 37 under §4B1.5(a)(1)(B)(i).

[107] USSG §4B1.5(a)(2).

[108] Although the low end of that guideline range is 168 months, the statutory mandatory minimum penalty is 180 months, *see* 18 U.S.C. § 2251(e), which becomes the low end of the guidelines range under USSG §5G1.1(c)(2) (Sentencing on a Single Count of Conviction).

[109] USSG §4B1.5, comment. (n.4).

minor (including production of child pornography) *and* a child pornography offense sentenced under §2G2.2 and the multiple convictions result in an enhanced offense level under USSG §§3D1.4 (Determining the Combined Offense Level), the application of the two different 5-level enhancements under USSG §§2G2.2(b)(5) and 4B1.5(b) is not improper double-counting.[110]

D. STATE CRIMINAL PENALTIES FOR CHILD PORNOGRAPHY OFFENSES

Although this report is concerned with federal child pornography cases, brief mention should be made of criminal offenses and corresponding penalties in the state systems. As a recent commentator has observed:

> States have . . . significantly increased their penalties [for child pornography offenses during the same time period that Congress and the United States Sentencing Commission have done so at the federal level]. All fifty states have specific provisions criminalizing the possession of child pornography, and thirty states have increased the penalties available for possession of child pornography since criminalizing it. The pattern of increasing penalties appears to be getting stronger, as twenty-eight of those increases have occurred since 2000, nineteen have occurred since 2005, and four states have increased the penalties associated with the possession of child pornography multiple times in the past twenty years.[111]

Although some states, like the federal system, provide for harsher statutory penalties for production and distribution of child pornography than for simple possession, other states provide the same statutory ranges of punishment for possession as they do for other child pornography offenses, including production of child pornography.[112]

A summary of all states' current child pornography penal statutes is contained in Appendix F. That appendix shows the differing penalty ranges for child pornography offenses among the states.

E. CONCLUSION

A review of the statutory and guideline penalty provisions in child pornography cases yields the following primary conclusions:

- The three main statutory penalty ranges in federal child pornography cases today are 15 years to life imprisonment for production offenses, five to 15 years for

[110] *See* United States v. Rothenberg, 610 F.3d 621, 623–28 (11th Cir. 2010).

[111] Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 857–60 & nn.12–15 (2011) (citing child pornography statutes from all 50 states). As noted in footnote 12 of this article, virtually all the states now treat simple possession as a felony, some provide for mandatory minimum prison terms even for possession. *See id.* at 857 n.12; *see also* Krohel, *supra* note 14, at 672 n.339 ("Many states have mandatory minimums in place for possession of child pornography.") (citing statutes in Alabama, Arizona, Arkansas, Georgia, Louisiana, and Mississippi).

[112] *See* Hessick, *supra* note 111, at 863–65 & nn.36–39 (citing statutory provisions in several states).

receipt, transportation, and distribution (R/T/D) offenses, and zero to ten or 20 years for possession offenses (depending on the age and sexual maturity of the victims depicted in the images possessed). Higher penalty ranges apply to defendants with predicate convictions for sex offenses.

- The guideline penalty ranges for these three main offense types vary as well. Production offenders are sentenced under §2G2.1 and face a base offense level of 32. R/T/D offenders face a base offense level of 22 (although offenders who only received and had no intent to distribute are eligible for a 2-level reduction). Offenders only convicted of possession have a base offense level of 18. Offenders sentenced under either §§2G2.1 or 2G2.2 also face up to six potential enhancements for a variety of aggravating factors.

- All eleven circuit courts that have addressed the issue have held that an image depicting the sexual penetration of a prepubescent minor is by itself sufficient evidence of sadistic, masochistic, or otherwise violent sexual conduct to warrant a 4-level enhancement under §§2G2.1(b)(4) and 2G2.2(b)(4).

- All federal circuit courts to have addressed the issue have held that a defendant's knowing use of a peer-to-peer (P2P) file-sharing program in a manner that makes his child pornography files accessible to others in the P2P network is sufficient evidence to establish "distribution" for purposes of the 2-level enhancements in §§2G2.1(b)(3) & 2G2.2(b)(3)(F). The federal circuit courts are divided on the issue of whether such knowing P2P file-sharing by itself warrants a 5-level enhancement under §2G2.2(b)(3)(B).

- Penalties in the state courts for child pornography offenses, although they have generally increased in recent years, vary greatly in terms of severity.

Chapter 3

TECHNOLOGY AND INVESTIGATION BY LAW ENFORCEMENT IN CHILD PORNOGRAPHY CASES

This chapter explores the manner in which offenders possess and distribute child pornography and the technology that they utilize in the commission of their offenses. It also addresses law enforcement efforts to combat child pornography.

Federal child pornography prosecutions have increased dramatically over the past 18 years. In 1994 and 1995 combined, only 90 federal child pornography offenders were sentenced for possession offenses and receipt, trafficking, or distribution ("R/T/D") offenses.[1] By fiscal year 2011, the number of federal child pornography possession and R/T/D offenders had increased to 1,649.[2] Some of the growth can be attributed to increased resources dedicated to identifying and prosecuting child pornography offenders, but much of the growth is attributable to technological changes that have decreased the cost of production of child pornography and duplication of images and increased the accessibility of child pornography.[3]

Technology also appears to have affected the types of child pornography images that are in circulation and the extent and severity of revictimization that victims suffer through widespread ongoing distribution.[4] At one time it was theoretically possible for a child pornography image to be completely eradicated if all the hard copies were destroyed. In the Internet Age, that has become impossible for images in circulation, as they may spread to thousands of computers shortly after their initial distribution, and "[o]nce a picture has been copied and distributed over the Internet, its further distribution is wholly out of control . . . ."[5]

A. CHILD PORNOGRAPHY OFFENDERS' USE OF TECHNOLOGY TO COMMIT THE OFFENSE

Offenders can now produce, distribute, and access child pornography more easily than in the past. The vast majority of child pornography offenders today use the Internet or Internet-

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[1] U.S. SENT'G COMM'N, SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES (June 1996) ("1996 Report to Congress") at 29 (citing USSG §§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) & 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct)).

[2] U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 39 (2011) (Table 17).

[3] *See* PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 15 (2001) (arguing that criminal statistics alone cannot "tell us much about the scale or the geography of electronic trafficking" because they "measure official behavior and nothing more"); U.S. DEP'T OF JUSTICE, NAT'L STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION 11–12 (2010) ("NATIONAL STRATEGY").

[4] *See* Chapter 5 at 112–14 (discussing ongoing victimization).

[5] MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 9 (2003).

related technologies to access and distribute child pornography.[6] Until the late 1970s and early 1980s, child pornography was difficult to find, risky to produce, expensive to duplicate, and required a secure and private storage area. Advances in photography, computing, and communications technologies have reduced the barriers to child pornography offending.[7]

With respect to production of new child pornography, the "[e]ase of photographic developing, the ready availability of video cameras, and now digital imaging all have had an impact on the nature and availability of child pornography."[8] Indeed, digital technology now allows the average offender to manipulate photos in a variety of ways.[9]

Child pornography offenders can also view thousands of photos and videos from the privacy of their own homes.[10] Many in the law enforcement and research communities believe that the Internet's anonymity nurtures an environment for child pornography offending to

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[6] The U.S. Department of Justice reports that between 2005 and 2009, U.S. Attorneys prosecuted 8,352 child pornography cases, most of which involved the offenders' use of "digital technologies and the Internet to produce, view, store, advertise, or distribute child pornography." NATIONAL STRATEGY, *supra* note 3, at 11.

[7] *Id.* ("[I]t is evident that technological advances have contributed significantly to the overall increase in the child pornography threat."); Jonathan Clough, *Now You See It, Now You Don't: Digital Images and the Meaning of "Possession,"* 19 CRIMINAL LAW FORUM 205, 206–07 (2008) (digital technology is "relatively cheap, easy to access and use, and portable."). *See also* TAYLOR & QUAYLE, *supra* note 5, at 9 ("Whilst the open commercial sale of child pornography is now no longer tolerated in any Western country, paradoxically the availability of child pornography is easier and in more plentiful supply than ever before. This is because of the Internet."); U.S. GENERAL ACCOUNTING OFFICE, FILE-SHARING PROGRAMS: PEER-TO-PEER NETWORKS PROVIDE READY ACCESS TO CHILD PORNOGRAPHY 2 (2003) ("2003 GAO Report") ("Child pornography is easily accessed and downloaded from peer-to-peer networks."); JENKINS, *supra* note 3, at 3 ("Just how easy it is to find these materials needs to be emphasized. . . . A month or so of free Web surfing could easily accumulate a child porn library of several thousand images."); IAN O'DONNELL & CLAIRE MILNER, CHILD PORNOGRAPHY: CRIME, COMPUTERS AND SOCIETY 36 (2007) ("The Internet brings with it accessibility, affordability and anonymity."); ROBERTA LYNN SINCLAIR & DANIEL SUGAR, INTERNET BASED SEXUAL EXPLOITATION OF CHILDREN AND YOUTH ENVIRONMENTAL SCAN 18 (2005) (same).

[8] TAYLOR & QUAYLE, *supra* note 5, at 43.

[9] Gray Mateo, *The New Face of Child Pornography: Digital Imaging Technology and the Law*, 2008 U. ILL. J.L. TECH. & POL'Y 175, 178 (2008); *cf.* NATIONAL STRATEGY, *supra* note 3, at 11–12 ("Prior to the mid-1990s, Internet access and the availability of digital home recording devices . . . were very limited, thereby confining the production and distribution of child pornography material to relatively few individuals."). The explosion of cheap child pornography can be at least partly attributed to the existence of basic production tools in nearly every Internet-connected household:

> Until recently, the child pornography producer, like any amateur photographer, required a darkroom, chemicals, film, paper, camera equipment, skill, time and privacy. . . . Contrast that with the situation today. For a modest investment, a home PC package contains a computer, scanner, photocopier and printer, often a Webcam and always an internal modem. Software packages for editing photographs and videos come as standard. Add the Internet and access to a child, and the average desktop computer becomes a pornography studio.

O'DONNELL & MILNER, *supra* note 7, at 36.

[10] TAYLOR & QUAYLE, *supra* note 5, at 9 ("The Internet enables the speedy, efficient and above all anonymous distribution of child pornography on a global scale.").

thrive.[11] The "perceived anonymity, the ease of developing social contacts and the capacity to create virtual social groups, [and] its essentially international character and the speed with which digital files can be transmitted creates an environment that challenges conventional notions of social organization and control."[12] Illegal images no longer have to be developed, printed, and shipped; instead, they are digitally recorded and made available for unlimited distribution at virtually no cost.[13]

Before discussing the specific technologies the offenders use, the next section will provide a brief overview of many of the underlying technologies related to the commission of child pornography offenses.

1. *Technology Primer*

The growth of child pornography offending has been facilitated by combined advantages of digital technology and networked computing.[14] Desktop and laptop personal computers, along with many other computerized devices such as smartphones, have several essential features relevant to the discussion of child pornography offending.

a. Internet Connectivity

Digital child pornography is easily shared through Internet-enabled devices.[15] Computer networks have existed (and have been exploited by child pornography offenders) for nearly three

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[11] *See* NATIONAL STRATEGY, *supra* note 3, at 3 ("The anonymity afforded by the Internet makes the offenders more difficult to locate, and makes them bolder in their actions."); *see also* O'DONNELL & MILNER, *supra* note 7, at 45 ("The Internet . . . allows adults with a sexual interest in children instant access to others who share their proclivity, even if they are thousands of miles apart[,] . . . provides a level of inscrutability that is unattainable in the real world[, and] . . . encourages a culture of impunity.").

[12] Max Taylor & Ethel Quayle, *The Internet and Abuse Images of Children: Search, Precriminal Situations and Opportunity,* 19 CRIME PREVENTION STUDIES 169, 170 (2006); see also *id*. at 169 ("The easy availability of abuse images at low or no cost has both exposed and made possible a degree of sexual interest in children expressed through pornography production and possession that seems to be surprising in its extent.").

[13] JENKINS, *supra* note 3, at 4 ("Prices in the child porn world have not just fallen, they have all but been eliminated."). Unlike traditional photography, digital photography and videography permits costless creation of unlimited identical copies. TAYLOR & QUAYLE, *supra* note 5, at 9 ("The information passed over the Internet that constitutes a picture is a perfect copy of an original, which can be reproduced endlessly without loss of definition or any other qualities.").

[14] *See*, *e.g.*, YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY & THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 8 (2008) (citing "[e]ase of access, the partial anonymity provided by the Internet, developments in digital photography, issues surrounding the difficulty of policing international networks, and the limited risk of detection") (footnotes omitted); Clough, *supra* note 7, at 206–07 (concluding digital technology "allows for storage of large amounts of material which would be conspicuous if stored in hard copy[,] . . . may be produced cheaply and with no need for external processing[,] . . . may be copied with no diminution in quality and distributed easily, in large volumes, with minimal cost and relative anonymity.").

[15] *See* MONIQUE FERRARO & EOGHAN CASEY, INVESTIGATING CHILD EXPLOITATION AND PORNOGRAPHY: THE INTERNET, LAW & FORENSIC SCIENCE 9–10 (2004) (describing the adoption of Internet technologies by child pornography offenders to share and collect images).

decades.[16] An early iteration of networked computing called a bulletin board system (BBS) enabled users to connect to a host computer using a computer modem and ordinary telephone line.[17] Once connected, the user could post messages, interact with other BBS users, or download stories and images for viewing on the user's own computer. Some BBSs were public and free; others were private and charged a fee. They also allowed access to Internet newsgroups, and, eventually, to the World Wide Web ("web"). BBS and Internet newsgroups are still used by some technologically savvy child pornography offenders.[18]

The web (which most people think of when they refer to the "Internet") has in less than 20 years become common in American homes.[19] Today, the early online service providers like America Online that originally served as "web portals" have largely transformed into, or been supplanted by, a host of Internet Service Providers ("ISPs"). ISPs provide direct customer access to the Internet via dial-up telephone, digital subscriber line ("DSL"), broadband, or similar means.[20] ISPs include cable and telephone service providers such as Verizon, Comcast, DirectTV, TimeWarner, and AT&T. An individual home or business user connects to the ISP, which then provides the user with access to the Internet.[21] ISPs have the ability to monitor users' access to some kinds of web content, such as specific websites, where allowable by law.[22]

Once connected to the Internet, individuals often use electronic communication service providers to email, instant messaging, and store online content. Such providers include, among many others, Blogger, Yahoo!, Google, and Snapfish. As part of the Providing Resources,

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[16] *See* 2003 GAO Report, *supra* note 7, at 6 ("[P]ornographers have traditionally exploited—and sometimes pioneered—emerging communication technologies—from the dial-in bulletin board systems of the 1970s to the World Wide Web—to access, trade, and distribute pornography, including child pornography."); *see* ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 629–630 (1986) (describing child pornography BBS, newsgroups, and stating that "personal computers have instant communication capabilities and have afforded subscribers the opportunity to establish extensive networks."); JENKINS, *supra* note 3, at 41 ("Perhaps ten years before the Internet became known to the general public, computer databases and bulletin boards were becoming the favored tools of child pornographers, a strikingly precocious use of computer technologies."); *see* AKDENIZ, *supra* note 14, at 5 ("Paedophilia networks have been using computer networks [to disseminate digital child pornography] from as early as 1986."); O'DONNELL & MILNER, *supra* note 7, at 29 ("[T]here is evidence that paedophiles have been using computers to communicate since 1982 in the USA and 1985 in the UK.") (internal citations omitted).

[17] *See* NAT'L INST. JUSTICE, INVESTIGATIONS INVOLVING THE INTERNET AND COMPUTER NETWORKS, SPECIAL REPORT, NCJ 210798 61 (2007) ("Investigations Involving the Internet") (available at https://www.ncjrs.gov/pdffiles1/nij/210798.pdf).

[18] *See, e.g.*, Prepared Presentation of James Fottrell, Child Exploitation and Obscenity Section, Criminal Division Department of Justice, to the Commission (Feb. 15, 2012) (on behalf of the U.S. Department of Justice) ("Fottrell Presentation") (depicting different types of distribution technologies in a three-part triangle of socialization) .

[19] U.S. Census, *Computer and Internet Use*, http://www.census.gov/hhes/computer/ (last visited Nov. 29, 2012) (number of Internet-connected households has climbed from 18% in 1997 to over 70% by 2010).

[20] *See* FERRARO AND CASEY, *supra* note 15, at 86–88.

[21] *Id*.

[22] For example, one UK ISP claimed it "blocked more than 20,000 attempts per day to access child pornography on the Internet" in July 2004. Ethel Quayle & Matthieu Latapy, *Current Situation Regarding Our Knowledge of Paedophile Activity in P2P Networks,* MAPAP — SAFER INTERNET PLUS 1 (2008), http://antipaedo.lip6.fr/Current_situation.pdf (last visited Nov. 29, 2012).

Officers, and Technology to Eradicate Cyber Threats to Our Children Act of 2008,[23] any ISPs offering online storage of content are mandated to report child pornography that they find on their system to the CyberTipline of the National Center for Missing & Exploited Children ("NCMEC").[24]

b. Digital Storage

Digital storage capacity has grown so that much larger volumes of data can be stored on smaller and more easily transportable devices. Many offenders possess child pornography collections numbering in the hundreds of thousands or even millions of images and videos.[25] When child pornography trading moved online, the traditional physical limitations on the collection and distribution of images and videos were alleviated.[26] Every computer or computerized device includes some type of integrated, permanent storage such as an internal hard drive that digitally stores the operating system, programs, and files.[27] The computer may also come equipped or be compatible with one or more forms of removable storage, such as flash drives, zip drives, CD/DVD drives, secure digital cards, and external hard drives.[28]

Storage capacity is measured in units called "bytes" and multiples of bytes: kilobyte (1,000 bytes, known as a kB), megabyte (1,000,000 bytes, or MB), gigabyte (1,000,000,000 bytes, or GB), terabyte (1,000,000,000,000 bytes, or TB), and beyond. Advances in storage technology have driven the price of storage capacity down so that individuals routinely have access to digital storage libraries in the terabytes.[29] Huge volumes of information can now be

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[23] Pub. L. No. 110–401, § 501(a); 122 Stat. 4229 (2008) (codified at 18 U.S.C. § 2258A).

[24] U.S. GENERAL ACCOUNTING OFFICE, COMBATING CHILD PORNOGRAPHY: STEPS ARE NEEDED TO ENSURE THAT TIPS TO LAW ENFORCEMENT ARE USEFUL & FORENSIC EXAMINATIONS EFFECTIVE 3 (2011) ("2011 GAO Report") (citing 18 U.S.C. § 2258A). NCMEC is a private, 501(c)(3) nonprofit organization created in 1984. The mission of the organization "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." NCMEC, *National Mandate & Mission*, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1866 (last visited Nov. 29, 2012). NCMEC provides information and resources to law enforcement, parents, and children including child victims as well as other professionals. NCMEC's exploited children division has several programs that work with law enforcement to track child pornography images and identify and rescue child pornography victims where abuse is ongoing. For more information on NCMEC, *see* http://www.missingkids.com. As mentioned herein, NCMEC operates the CyberTipline and is authorized to receive reports of child pornography.

[25] *See e.g.,* Sentencing Memorandum, United States v. Burr, No. 09-cr-308, (D. Or. July 23, 2010), ECF No. 26 at 3–4 (more than one million images); Sentencing Memorandum, United States v. Worman, 07-cr-40 (E.D. Pa. July 30, 2009), ECF No. 208 at 1 (1.2 million images).

[26] *See* NATIONAL STRATEGY, *supra* note 3, at 12 ("Increased home computer storage capacity has enabled many child pornography offenders to store huge collections of images (some containing 1 million) and numerous video files (often 1 hour in length)" and citing example of a Philadelphia defendant in 2007 found with more than 15,000 videos).

[27] FERRARO & CASEY, *supra* note 15, at 81–83.

[28] *See* NATIONAL STRATEGY, *supra* note 3, at 76 (listing the types of media commonly seized during investigations).

[29] *See id*. at 130.

stored easily on small devices — thus one computer hard drive can contain what might otherwise have constituted vast archives of print photographs, magazines, or film negatives.[30]

Computers and computerized devices are able to display digital child pornography and, once downloaded, users may easily store and manipulate the images. Images can be displayed using free, pre-installed software such as Windows Picture Viewer, Windows Media Player, and Windows Movie Maker. The same programs can also perform basic image manipulation (like enhancing, rotating, or cropping images and trimming videos), while more advanced editing can be accomplished with widely available programs such as Picasa, ACDSee, and Adobe Photoshop.

"Cloud computing" is remote digital storage accessed through Internet connectivity. Files are stored "in the cloud" on remote servers maintained by third-party service providers and accessed by users through the Internet. The "cloud" refers to the ability of individuals or customers to access software, files, and storage, without downloading such files or software to their personal computers or data storage systems.[31] Many cloud services will keep a cache of recently accessed documents. Individuals store pictures, videos, and files in the cloud when they use media hosting web sites such as Flickr, Tumblr, or social networking sites to maintain digital photo libraries.[32] Cloud computing has been called "a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.*, networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."[33] While cloud computing has been adopted for legitimate consumer and business purposes,[34] it is also relied upon by some child pornography offenders to store digital collections of child pornography remotely.[35] Remote storage "in the cloud" presents unique forensic challenges for law enforcement.

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[30] *See* FERRARO AND CASEY, *supra* note 15, at 4 ("Computer storage capacity has increased to the point at which a small personal computer hard drive can hold as much information as the United States Library of Congress."); Clough, *supra* note 7, at 206–07; TAYLOR & QUAYLE, *supra* note 5, at 160 ("Unlike hard copies of photographs, images stored electronically . . . take up very little physical space . . . [and] can even be stored electronically at a location both anonymous and distant from the location of the collector's PC").

[31] Vivek Kundra, *Federal Cloud Computing Strategy*, THE WHITE HOUSE, at 4–5 (Feb. 8, 2011), https://cio.gov/wp-content/uploads/downloads/2012/09/Federal-Cloud-Computing-Strategy.pdf (last visited Nov. 29, 2012).

[32] For more information on these services, *see* http://www.flickr.com/, https://www.tumblr.com/, and http://photobucket.com/.

[33] Wayne Jansen & Timothy Gance, *Guidelines on Security & Privacy in Public Cloud Computing (Special Publication 800-144)*, NAT'L INST. OF STANDARDS AND TECHNOLOGY, at vi (Dec. 2011) (available at http://www.nist.gov/customcf/get_pdf.cfm?pub_id=909494).

[34] *See, e.g.*, Vivek Kundra, *supra* note 31; Steve Lohr, *The Business Market Plays Cloud Computing Catch-Up*, N.Y. TIMES (Apr. 14, 2011) (available at http://www.nytimes.com/2011/04/15/business/15cloud.html?pagewanted=all).

[35] Audrey Rogers, *From Peer-to-Peer Networks to Cloud Computing: How Technology is Redefining Child Pornography Laws* 22 (Feb 16, 2012) (available at http://ssrn.com/abstract=2006664).

c. Hash Values

The content of any digital file (including child pornography) can be summarized as a unique identifier through a process called "hashing."[36] The term "hash value" refers to the use of mathematical hash functions that return a value in the form of a relatively short, single number of about 38 hexadecimal (or base 16 numeral system) digits. These resulting hash values are easily managed by computers and investigators alike for verifying that two copies of a file are, in fact, the same, even if the filename or certain other attributes (such as the date it was last accessed) are changed.[37] This process is akin to the way a bookseller can compare a bar code on two different copies of a book to ensure that they are both the same version even if they have different covers.

NCMEC and law enforcement keep a record of the hash values of known child pornography images. These hash values of known child pornography images may be used to search and identify files on an offender's computer, or other digital storage devices, as child pornography without having to view the images themselves.[38] Hash values can easily be changed to avoid this forensic hashing function by slightly manipulating the digital images, but many child pornography offenders do not change the hash value of child pornography images,[39] in part because the hash value is important to programs that facilitate searches for, and distribution of, child pornography.

2. *Internet Technologies Used to Access Child Pornography*

Some child pornography offenders have been at the forefront of technological advancement in the Internet Age. Although child pornography today "is available through virtually every Internet technology,"[40] the rapidly evolving nature of the Internet renders impossible any definitive attempt to describe the technology used in current child pornography offenses. It is important to note that technologies associated with Internet child pornography continue to develop quickly. Any attempt to describe the current state of technology in child pornography offending may be dated in only a short period of time.[41]

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[36] *See* FERRARO AND CASEY, *supra* note 15, at 197.

[37] *Id.*

[38] *See* Jaap Haitsma, Ton Kalker & Job Oostveen, *Robust Audio Hashing for Content Identification*, CONTENT-BASED MULTIMEDIA INDEXING 1 (2001); FERRARO & CASEY, *supra* note 15, at 197 (describing an algorithm used to conduct a hashing function). All digital files can have hash values.

[39] Robert J. Walls et al., *Effective Digital Forensics is Investigator-Centric*, PROC. USENIX WORKSHOP ON HOT TOPICS IN SECURITY (HotSec), at 4 (Aug. 2011).

[40] 2003 GAO Report, *supra* note 7, at 6–8 (discussing commercial or trading websites, e-mail, Usegroups/newsgroups, FTP, IRC/Chat, Gigatribe, and live streaming); *see* NATIONAL STRATEGY, *supra* note 3, at 11–12.

[41] For example, more child pornography offenders are using their smartphones to access and trade images such that "the tools of the trade are now pocket-sized and the search for child pornography can be carried out anywhere, any time." O'DONNELL & MILNER, *supra* note 7, at 63. Almost half of all Americans own a smartphone that features Internet connectivity. Aaron Smith, *46% of American Adults are Smartphone Owners*, PEW INTERNET PROJECT, at 2

a. Peer-to-Peer File Sharing

Peer-to-peer file sharing, commonly called "P2P," refers to a software program or application that enables computers to share files easily over the Internet. Computers connected through use of the same P2P software are deemed part of the same P2P network. Dozens of P2P networks exist and the software is widely available on the Internet via a simple search or at mainstream downloading websites.[42] P2P networks "allow. . . people across the world to connect directly to each other's machines without having to use a third-party."[43] In other words, rather than posting an image on a website for others to download, P2P file sharing lets two or more users swap files directly with one another. P2P networks came to prominence in the late 1990s with the software Napster, which at its peak allowed 80 million users to swap music files with one another. Napster which maintained centralized servers with lists of connected users and files to facilitate transfers, was enjoined in 2001 from engaging in conduct that would contributorily or vicariously infringe copyrights held by the plaintiff record companies.[44] Other P2P networks faced similar legal challenges and are now by legal decree defunct or have transformed themselves into legitimate business enterprises.[45]

Unlike Napster, today's P2P networks operate without the use of centralized servers to connect users, maintain lists of shared files, or monitor for copyrighted or illegal content. Therefore, no single entity is responsible for the content being shared at any given time.[46] P2P networks share all types of digital content, including software, text, movies, and pictures.[47] The

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Mar. 1, 2012) (available at http://pewinternet.org/~/media//Files/Reports/2012/Smartphone%20ownership %202012.pdf). That is an 11% increase from May 2011 when 35% of Americans reported that they owned a smartphone. That number is even higher for those ages 18–29, of whom 66% own a smartphone. *Id.* Smartphones enable a child pornography user to capture new images, download existing images, and trade images as described below, all from his phone. Additional research suggests that at least among some populations, smartphones are being more frequently used for distribution of newly produced child pornography images. Janis Wolak, David Finkelhor, & Kimberly J. Mitchell, *Trends in Arrests for Child Pornography Production: The Third Nat'l Juv. Online Victimization Study (NJOV-3)*, http://www.unh.edu/ccrc/internet-crimes/papers.html, at 3 (2012) (last visited Nov. 30, 2012).

[42] O'DONNELL & MILNER, *supra* note 7, at 39–40.

[43] *Id*.

[44] *See* A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1099 (9th Cir. 2001) (affirming district court's preliminary injunction and shutdown order).

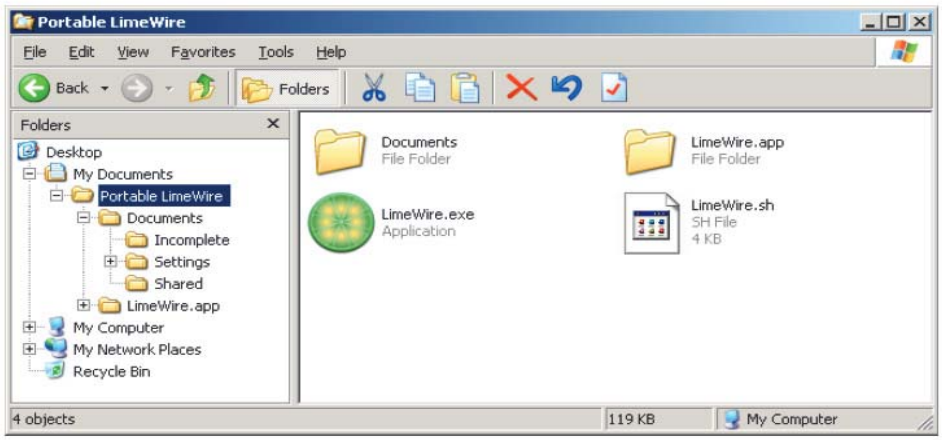
[45] LimeWire, one of the most popular P2P programs used by child pornography offenders in recent years, was ordered shut down in October 2010 pursuant to a stipulated consent order. *See* Arista Records LLC v. LimeWire LLC, No. 06-Civ-05936 (KMW) (S.D.N.Y. Oct. 27, 2010). And several other popular P2P clients like iMesh, BearShare, and KaZaA, have been transformed into legal subscription music sharing services. *See*, *e.g.*, http://www.bearshare.com/ (last visited Oct. 12, 2012); http://www.imesh.com/ (last visited Oct. 12, 2012) (offering "access to over 15 million songs and videos — All legal and free!"); http://www.kazaa.com/ (last visited Oct. 12, 2012) (permitting "download of 15 million songs and videos all legal and free!"). Nevertheless, versions of the LimeWire software remain in use and many individuals continue to share files on LimeWire-enabled networks.

[46] *See* Sgt. Josh Moulin, National District Attorneys Association, *What Every Prosecutor Should Know About Peer-to-Peer Investigations*, UPDATE: CHILD SEXUAL EXPLOITATION PROGRAM 1 (2010).

absence of a central authority and easy accessibility to images have attracted child pornography offenders to P2P networks.

P2P file sharing typically works as follows: initially, the user downloads a software program onto his own computer or Internet-enabled device that permits the individual to share and download files from the P2P network. Upon installation, the software typically creates two folders on the user's computer by default: an "incomplete" folder, which contains pending downloads, and a "shared" folder, which contains fully downloaded files. This is seen below in Figures 3-1 and 3-2, which are screenshots of LimeWire. As indicated by its name, any files downloaded to, or other files placed in, the shared folder are immediately made available for sharing with all other users on the P2P network.[48]

Figure 3-1[49]
Federal Defender Technology Presentation: Screenshot of LimeWire

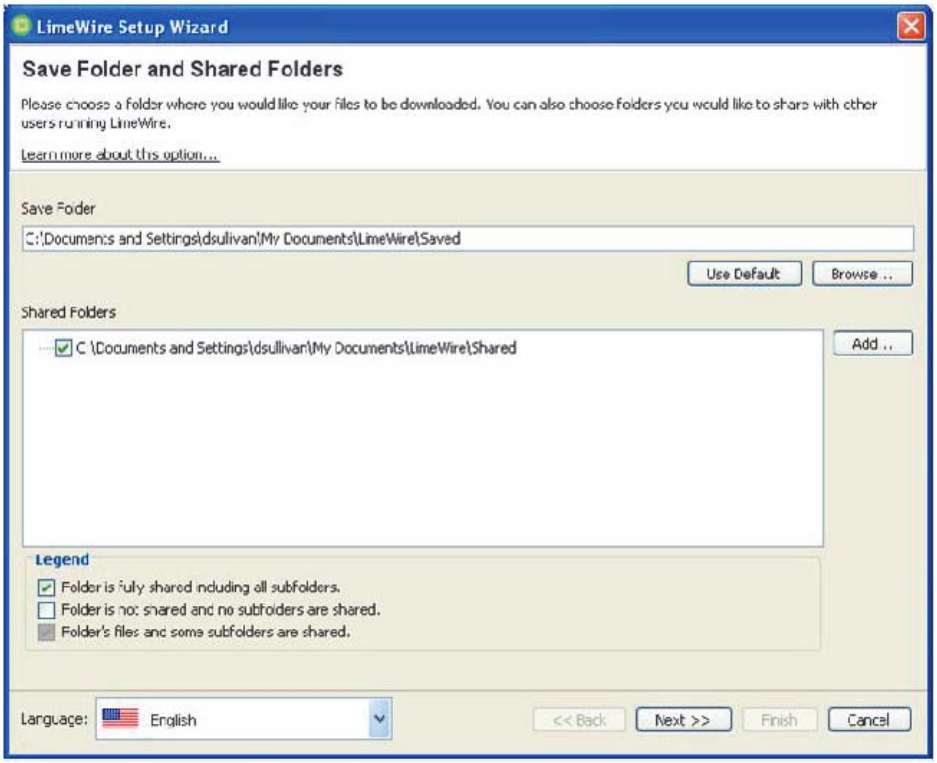


[47] *See* Terrence Berg, *The Changing Face of Cybercrime: New Internet Threats Create Challenges to Law Enforcement*, MICHIGAN BAR JOURNAL 18–19 (June 2007) ("The P2P networks . . . are tailor-made for sharing digital media of any kind; by downloading the P2P client software, each user's designated collection of digital files becomes accessible by every other user, in a privately created network.").

[48] Moulin, *supra* note 46, at 2.

[49] Prepared Presentation of Gerald R. Grant, Digital Forensics Investigator, Office of the Federal Public Defender, Western District of New York, to the Commission (Feb. 15, 2012) ("Grant Presentation").

Figure 3-2[50]
Federal Defender Technology Presentation: Screenshot of LimeWire Shared Folders



In addition to files manually placed in the shared folder, a user is usually asked upon installation to indicate whether he would like to share any files already present on the computer. If the answer is yes (*i.e.*, the user "opts in"), the software automatically scans the user's computer or any designated shared part thereof (often using a hashing function to identify and label files) and then compiles a list of files to share. Open file sharing is typically a default setting; however both downloading locations and sharing options may be changed by users to limit which, if any, files are available for sharing (*i.e.*, users may "opt out" of file-sharing).[51] After downloading and setting up P2P software, the user can begin searching for files shared on the connected network using search keywords associated with child pornography, in the same way one regularly uses a search engine such as Google.[52] In short, a user who downloads a P2P network application typically has an ability to control the extent to which that user's files are shared.

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[50] *Id.*

[51] *See* Darren Gelber, *Cybercrimes: File-Sharing Programs Violating Copyright and Child Pornography Distribution Laws*, 255 N.J. LAWYER 66, 68 (Dec. 2008).

[52] *See* Giannina Marin, *Possession Of Child Pornography: Should You Be Convicted When The Computer Cache Does The Saving For You?*, 60 FLA. L. REV. 1205, 1210–11 (2008) ("Common child pornography-related Internet

P2P networks are common. In 2011, it was estimated that 57 percent of global Internet traffic was P2P traffic.[53] The very existence and purpose of P2P networks is to share digital content, and there is an active academic and community-level discourse criticizing P2P users who download but do not share.[54] Some P2P networks encourage sharing by offering faster download for sharers or even mandate sharing in some circumstances.[55]

Well known P2P networks include FrostWire, LimeWire, KaZaA, eDonkey, and isoHunt. Of P2P networks, LimeWire in particular was utilized in the recent past by a large percentage of federal child pornography offenders to access and distribute child pornography[56] but other research suggests that isoHunt and other networks are now more commonly used.[57] Although data on the number of users in each network is unavailable, many experts agree that P2P file sharing is widely used to download child pornography.[58] Two major enforcement investigations have revealed substantial illegal P2P trading activity in recent years.[59] Using special software, these two initiatives identified over 20 million unique IP addresses offering child pornography

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search terms include 'illegal, preteen, underage, lolita, kiddy, child, and incest.' These terms specifically refer to child pornography and differ from terms associated with adult pornography.") (internal footnotes and quotations omitted and formatting modified).

[53] *See* Jeremy Prichard, Paul A. Watters, & Caroline Spiranovic, *Internet Subcultures & Pathways to the Use of Child Pornography*, 27 COMP. L. & SEC. REV. 585, 589 (2011).

[54] *See* Eytan Adar & Bernardo A. Huberman, *Free Riding on Gnutella*, 5 FIRST MONDAY (2000), http://www.firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/issue/view/124 (last visited Nov. 30, 2012) (noting that individuals who download but do not share "free ride on the efforts of others" which "leads to degradation of the system performance and adds vulnerability to the system").

[55] *See* Bram Cohen, *Incentives Build Robustness in BitTorrent*, May 22, 2003 Workshop on Economics of Peer-to-Peer Systems (2003), http://www2.sims.berkeley.edu/research/conferences/p2pecon/papers/s4-cohen.pdf (last visited Nov. 30, 2012).

[56] *See* Chapter 6, at 154–55 (providing data from the Commission's 2010 coding project regarding use of P2P). Federal lawsuits brought by the recording industry have enjoined LimeWire from distributing software. *See* Arista Records, LLC v. Lime Wire, LLC, No. 06 Civ. 05936 (S.D.N.Y. Oct. 27, 2010). LimeWire settled these lawsuits in 2011 and 2012. *See* Ben Sisario, *Digital Notes: Indies Settle With LimeWire, and Kim Dotcom Speaks Up*, Media Decoder Blog, N.Y. TIMES (Mar. 1, 2012) (available at http://mediadecoder.blogs.nytimes.com/2012/03/01/digital-notes-indies-settle-with-limewire-and-kim-dotcom-speaks-up/); Ben Sisario, *Major Record Labels Settle Suit With LimeWire*, Media Decoder Blog, N.Y. TIMES (May 12, 2011) (available at http://mediadecoder.blogs.nytimes.com/2011/05/12/major-record-labels-settle-suit-with-limewire/). Nevertheless, "pirated" LimeWire software continues to exist and may be downloaded for free from many websites.

[57] Prichard et al., *supra* note 53, at 589.

[58] Ryan Hurley et al., *Measurement & Analysis of Child Pornography Trafficking on Gnutella & eMule*, TECH. REP. UM-CS-2012-016 13 (May 2012) (available at https://web.cs.umass.edu/publication/docs/2012/UM-CS-2012-016.pdf) ("CP trafficking over p2p networks is widespread"); Berg, *supra* note 47, at 19; Quayle & Latapy, *supra* note 22, at 2 ("Many studies show that a large amount of paedophile and harmful contents are distributed using P2P file exchange systems, and that volume of such exchanges is increasing.").

[59] Operation Fairplay was created in 2006 and supported by both the Wyoming Division of Criminal Investigations and the Palm Beach County (FL) State's Attorney's Office; Operation Roundup was developed in 2009 by the University of Massachusetts under a grant from the National Institute of Justice. *See* NATIONAL STRATEGY, *supra* note 3, at 12.

over P2P networks from 2006 to August 2010.[60] The typical offender may make dozens or hundreds of images available.[61]

Other research has largely confirmed the law enforcement findings. A 2011 study found that three terms associated with child pornography ("lolita," "PTHC,"[62] and "teen") were among the top searched terms on the isoHunt P2P network over a six month period in 2010.[63] A study from 2009 found that approximately one percent of queries on the Gnutella network were child-pornography-related, and that the most commonly searched-for term on the network, accounting for 0.2 percent of all searches, was "PTHC".[64] A 2006 study found that every day there were approximately 116,000 requests on the Gnutella P2P network for the term "child pornography."[65]

Traditional open P2P file sharing, as described above, permits "impersonal" sharing of files. Once an individual downloads the software and chooses to permit the network to share his files, he usually exercises no control over to whom the files are shared or how many times they are shared. He is, in effect, leaving a virtual door open on his computer and permitting individuals to copy any files they wish any time the software is running.[66] Impersonal distribution involves "offenders operating alone without direct contact with other[s]"[67] and not requiring specific directed action to share child pornography beyond installing the software, choosing to permit sharing of the user's files, and running the P2P network.[68]

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[60] NATIONAL STRATEGY, *supra* note 3, at 12 (noting Operation Fairplay has 170,000 files on its "watch list" while Operation Roundup has 120,000).

[61] *See id.* at 13.

[62] PTHC stands for "pre-teen hardcore," a term associated with child pornography.

[63] Prichard et al., *supra* note 53, at 593.

[64] *See* Chad M.S. Steel, *Child Pornography in Peer-to-Peer Networks*, 33 CHILD ABUSE & NEGLECT 560, 560–61 (2009) (noting that 1.45% of search results on the network, or 2,770 uniquely named files, constituted child pornography; 7% of all sharing hosts, or 464 computers, shared child pornography; and 3% of all searching hosts, or 564 computers, sought child pornography). While these may seem like a small numbers, bear in mind that an individual could type *any* term into Gnutella based P2P networks searching for any song, software, celebrity image, movie, or television program.

[65] O'DONNELL & MILNER, *supra* note 7, at 40.

[66] The United States Court of Appeals for the Tenth Circuit has analogized such an "open" P2P network to a self-serve gas station, stating that a defendant who used an open P2P program:

> may not have actively pushed pornography on [P2P] users, but he freely allowed them access to his computerized stash of images and videos and openly invited them to take, or download, those items. It is something akin to the owner of a self-serve gas station . . . . Just because the operation is self-serve, or in [the defendant's] parlance, passive, we do not doubt for a moment that the gas station owner is in the business of "distributing," "delivering," "transferring" or "dispersing" gasoline; the *raison d'etre* of owning a gas station is to do just that.

United States v. Shaffer, 472 F.3d 1219, 1223–24 (10th Cir. 2007).

[67] Testimony of James Fottrell, Child Exploitation and Obscenity Section, Criminal Division, Department of Justice, to the Commission, at 25 (Feb. 15, 2012) (on behalf of the U.S. Dep't of Justice) ("Fottrell Testimony").

[68] Testimony of Gerald R. Grant, Digital Forensics Investigator, Office of the Federal Public Defender Western District of New York, to the Commission, at 39–40 (Feb. 15, 2012) ("Grant Testimony"); Testimony of

P2P networks have continued to evolve and newer P2P networks incorporate more sophisticated features, some of which are described below such as "chat" and "social networks." These networks, such as Gigatribe or OneSwarm, can operate as "closed" P2Ps when compared to "open" P2P networks such as the early iterations of LimeWire.[69] Gigatribe and others allow individuals to create their own private networks to which the individual can invite or remove "friends" as well as decide which specific files to share and with whom.[70] As these networks are closed communities of individuals they are sometimes called "friend to friend" or "F2F" as opposed to P2P.[71] Invited users may browse, search for, and download files in their network and chat with other users, all while relying on encryption and relative anonymity to protect themselves from identification.[72] Gigatribe is rapidly growing in popularity and advertises itself as "private, secure, unlimited file sharing software."[73] Gigatribe and its progeny require more personal involvement of the offender who selects which files to distribute and to whom. "Personal" distribution involves some type of directed action — either direct communication (*e.g.*, "closed" P2P technologies Gigatribe, emailing or instant messaging) or sharing images in a specific Internet forum specifically devoted to child pornography (*e.g.*, a child pornography "chat-room").

b. Other Internet Technologies

Another Internet technology used by child pornography offenders are chat rooms, particularly those utilizing "internet relay chat" or IRC. Chat rooms are real-time chatting environments organized into channels — virtual "rooms" — based on specific interests.[74] Some channels may offer services other than text-chatting, such as live video.[75] Chat environments today are largely non-commercial. IRC is one popular example of a non-commercial chat room service that allows users to join one of hundreds of thousands of different group-chat channels.

Brian Levine, Ph.D. Professor of Computer Science, University of Massachusetts, Amherst, to the Commission, at 51 (Feb. 15, 2012).

[69] United States v. Sawyer, 786 F. Supp. 2d 1352, 1355–56 (N.D. Ohio 2011) (noting that Gigatribe is "a 'closed' peer-to-peer file sharing program . . . that is slightly different from . . . 'open' programs" such as LimeWire); United States v. Ladeau, No. 09-40021-FDS, 2010 WL 1427523, at *1 (D. Mass. Apr. 7, 2010) (describing the private nature of Gigatribe).

[70] *See* United States v. Sawyer, 786 F. Supp. 2d 1352, 1354 (N.D. Ohio 2011); United States v. Ladeau, No.09-40021-FDS, 2010 WL 1427523, at *1 (D. Mass. Apr. 7, 2010) (describing Gigatribe in context of denial of motion to suppress evidence seized based on search after investigator downloaded files from defendant's Gigatribe account).

[71] *See, e.g.*, *About OneSwarm,* http://www.oneswarm.org/about.html (last visited Nov. 30, 2012) (describing the benefits of a F2F system).

[72] *See Ladeau*, 2010 WL 1427523, at *1.

[73] *See* Gigatribe homepage, http://www.gigatribe.com/en/home (last visited Nov. 30, 2012).

[74] O'DONNELL & MILNER, *supra* note 7, at 38; TAYLOR & QUAYLE, *supra* note 5, at 122–23 (describing chat rooms).

[75] JENKINS, *supra* note 3, at 78 (describing the live stream activities of a pedophile group).

IRC channels are sometimes self-policed by moderators who control membership and monitor channel activity.[76] Channels may be open to anyone or private.

Newsgroups are another sharing modality.[77] Newsgroups allow non-real-time discussion groups that are "basically discussion forums" allowing people to post messages and read and respond to messages others have posted.[78] In addition to text messages, pictures and other files can be posted directly on newsgroups or shared via e-mail to other trusted newsgroup posters.[79] The largest and most prominent newsgroup system is Usenet, which carries thousands of groups.[80] A critical feature of Usenet is that it is not owned or run by any central authority; instead, "[a]lmost anyone can read the contents of a Usenet newsgroup, create new newsgroups or contribute to an existing one" and a new group joins Usenet "simply by finding any existing site that is willing to pass along a copy of the collection of messages it receives."[81] Web-based bulletin boards, often called Internet forums, serve a function similar to Usenet newsgroups but exist on web servers rather than on a Usenet.[82]

Note that newsgroups or bulletin boards dealing with child pornography may serve functions other than the simple sharing of illicit images and videos. For example, many may not themselves host child pornography but instead periodically post information about accessing private trading groups or provide links to anonymous caches of child pornography shared temporarily on free hosting websites.[83]

The social-networking websites Facebook, BlackPlanet, and FetLife, among others, are websites that combine many of the features of the aforementioned technologies by allowing users an opportunity to meet, chat in real-time or on bulletin boards, and sometimes share files.[84]

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[76] TAYLOR & QUAYLE, *supra* note 5, at 122–23.

[77] Newsgroups at one time were probably the largest source of child pornography on the Internet and may still be, although new evidence suggests that online offenders have increasingly turned to chat and P2P. AKDENIZ, *supra* note 14, at 6 ("In terms of its availability and modes of distribution on the Internet, the problem of child pornography appears to be one that exists mainly within newsgroups . . . ."); Taylor & Quayle, *The Internet and Abuse Images of Children*, *supra* note 12, at 188 ("The Usenet newsgroup network is one of the major sources of abuse images of children on the Internet.").

[78] O'DONNELL & MILNER, *supra* note 7, at 37–38 ("Participants . . . contribute to discussions by posting messages to the group and returning later to see what, if any, response to their observations have been elicited."); *see* FERRARO & CASEY, *supra* note 15, at 31–33.

[79] O'DONNELL & MILNER, *supra* note 7, at 37–38; Taylor & Quayle, *The Internet and Abuse Images of Children, supra* note 12, at 188 ("Individuals post material to these newsgroups in the form of digital files, which are essentially like email attachments, and subscribers to that newsgroup can download these files.").

[80] TAYLOR & QUAYLE, *supra* note 5, at 122.

[81] *Id.* (noting that "[t]his in turn makes the Usenet a different social space from that which is possible in the offline world.").

[82] JENKINS, *supra* note 3, at 64.

[83] *See id.* at 67–69 (describing how "bulletin boards permit porn sites to exist and be used on a purely transient and anonymous basis."); *see also* United States v. McGarity, 669 F.3d 1218, 1230 (11th Cir. 2012) (discussing the method by which a closed child pornography trading group posted images for its members).

[84] *See* http://www.facebook.com/*;* http://www.blackplanet.com/; http://www.fetlife.com/.

Private social networks like ning.com and bigtent.com share most of the same features of their larger public counterparts but allow users to participate in private and by invitation-only to interact with one another and share files securely.[85] Child pornography offenders may utilize the infrastructure of such existing social networks to develop a community in which to distribute images.

Child pornography is also available via commercial Internet websites.[86] Although commercial child pornography websites exist, it is difficult to judge the number and proportion of commercial sites because of their transitory nature as well as the limited law enforcement resources dedicated to policing them.[87] Most of the commercial sites appear to be associated with either the United States or Russia.[88] In addition, there are websites which purport to offer "child model" images. These sites usually do not directly host illegal child pornography and instead typically feature sexualized images of children that straddle the standards for legality.[89] Nevertheless, as discussed in Chapter 4, some child pornography offenders, particularly pedophilic offenders, collect these sexualized child modeling images.[90]

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[85] *See* Ning, http://www.ning.com; BigTent, http://www.bigtent.com.

[86] O'DONNELL & MILNER, *supra* note 7, at 36. Jenkins discusses the transitory manner that child pornography can be anonymously posted and then information about where one goes to get the images or the codes to unlock the images can be distributed within the online community. *See* JENKINS, *supra* note 3, at 67–69. An Internet user not associated with the online community would have little ability to find or stumble upon the child pornography because he would not know the URL; *see also* United States v. McGarity, 669 F.3d 1218, 1230 (11th Cir. 2012) (discussing the complicated security measures taken by a sophisticated child pornography group to ensure that no one outside the group would be able to access and view the child pornography postings).

[87] AKDENIZ, *supra* note 14, at 6 (noting that "the true nature [of child pornography] over the World Wide Web can only be speculated upon"). For example, the U.S. Immigration and Customs Enforcement estimates the number of *commercial* sites active at any given time at about 250, although many are short-lived and are available for less than 100 days. *See* NATIONAL STRATEGY, *supra* note 3, at 25–26. The UK-based Internet Watch Foundation reported that it received around 40,000 complaints to its Hotline in 2009, which led them to almost 9,000 child pornography URLs across 1,316 different domains. *See* INTERNET WATCH FOUNDATION, 2009 ANNUAL AND CHARITY REPORT 15, 17 (2009), http://www.iwf.org.uk/assets/media/annual-reports/IWF%202009%20Annual%20and%20Charity%20Report.pdf (last visited Nov. 30, 2012) ("This sort of detailed analysis is helpful in judging the scale of the problem, that is, 38,173 total reports processed; 8,844 confirmed child sexual abuse URLs; 461 identifiable brands being run as businesses to profit from the sexual abuse of children.").

[88] Quayle & Latapy, *supra* note 22, at 2 (citing Internet Watch Foundation statistics from 2007 showing 82.5% of websites linked to U.S. or Russia, up from 67.9% in 2005); *see also* International Watch Foundation, OPERATIONAL TRENDS 2011, http://www.iwf.org.uk/resources/trends (last visited Nov. 30, 2012).

[89] A large-scale prosecution for sexualized child modeling websites occurred in Alabama. Three co-conspirators and a corporation were convicted. One offender possessed child pornography on his computer in addition to his involvement with the child modeling site, another offender pleaded to money laundering, and the third was both a photographer of sexualized child images and hosted a child modeling website. *See* Sentencing Memorandum, United States v. Pierson, 05-cr-00429, ECF No. 22, at 1-2 (N.D. Ala. Feb. 7, 2011); *see also* Declan McCullagh, *Federal Case May Redefine Child Porn*, CNET, (Nov. 30, 2006), available at http://news.cnet.com/Federal-case-may-redefine-child-porn/2100-1030_3-6139524.html (last visited Nov. 30, 2012) (discussing the unusual nature of the prosecution).

[90] *See* Chapter 4 at 83–84.

Child pornography offenders also may trade images directly with one another through email, instant messenger services, webcasting, and videostreaming.[91] Webcasting and videostreaming are ways to watch content such as television programming without downloading the files directly.[92] Content may be webcast "live" or streamed as video after it occurs. Popular ways to stream legal video content include Hulu and Amazon Instant Video, both of which permit individuals to watch television shows and movies on Internet-enabled devices.[93] Webcasting has been associated with some adult pornography websites for years but research indicates that child pornography is now being streamed live as well, which allows users to witness and sometimes direct specific sex acts while leaving less evidence because files are not saved on the viewer's computer.[94] Webcasting enables child abusers to "provide a live broadcast of their abuses and have been known to take special orders as to what types of events offenders will pay to view."[95]

3. *Technology Child Pornography Offenders Use to Evade Detection and Prosecution*

Because of the illicit nature of the trade, child pornography offenders have learned to harness various technologies to evade law enforcement detection and to lessen the likelihood of successful prosecution if caught.[96] Most of the means of identity protection and safeguarding data as discussed below have legitimate uses; however, when used by child pornography offenders to avoid law enforcement investigation or prosecution, they present certain challenges.

a. Obscuring Identity or Location

An offender may attempt to prevent authorities from discovering his true identity by employing simple techniques like not downloading child pornography using a computer or account associated with his residence or workplace. In particular, he may make his identity untraceable by downloading from free or public wireless local area (Wi-Fi) networks at places like libraries, airports, and coffee shops, or by logging on to unsecured Wi-Fi networks in nearby private residences.[97] Because some commercial websites and Usenet providers require users to

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[91] *See* FERRARO & CASEY, *supra* note 15, at 23–24, 33–37.

[92] Carol A. Lin, *Webcasting Adoption: Technology Fluidity, User Innovativeness, and Media Substitution*, 48 J. OF BROADCASTING & ELECTRONIC MEDIA 446, 446–47 (2004). Webcasting typically refers to a visual content that is being shown "live," however, webcasts may also be recorded and streamed as video.

[93] *See* Hulu, *More About Hulu*, http://www.hulu.com/about (last visited Nov. 30, 2012); Amazon, *Setting up and Watching Amazon Instant Video on Your TV*, www.amazon.com/gp/video/ontv/faq/ (last visited Nov. 30, 2012).

[94] NATIONAL STRATEGY, *supra* note 3, at 23–24 ("Offenders also increasingly access streaming web cam video to view victims in real time without actually producing or storing images or videos that could later be discovered by law enforcement.").

[95] SINCLAIR & SUGAR, *supra* note 7, at 20.

[96] O'DONNELL & MILNER, *supra* note 7, at 165 ("Even narrowly targeted surveillance is problematic on account of the easy availability of advanced encryption software and private communication channels. . . . A forensically aware offender will be difficult to catch and even a naïve one will take time to prosecute successfully.").

[97] NATIONAL STRATEGY, *supra* note 3, at 23. A study of child pornography offenders arrested in 2006 found that 77% mainly used computers at home, 3% mainly used work computers, and 19% used computers in other places,

pay for access (and thus risk law enforcement detection), many use alternative or anonymous payment methods such as digital currencies to disguise their identities.[98] Many digital currencies such as Bitcoin were created with privacy in mind and are virtually untraceable.[99] Other users may buy access to child pornography using stolen credit cards.[100]

Other offenders may access the Internet from home but attempt to mask their online identities. Every device connected to the Internet is assigned an "Internet Protocol" (IP) address that can theoretically be used by law enforcement to identify the computer and, by extension, the individual using the computer. Savvy offenders may use various techniques to disguise their IP addresses and avoid being identified.[101] For example, a proxy server is a website that acts as an intermediary between a user's computer and another computer, allowing an offender to search for or access child pornography material and, in so doing, display the other computer's proxy server's IP address rather than the offender's.[102] An investigator then has to go through an additional legal process to recover the true IP address from the proxy server, a task that is often impossible if the proxy server fails to keep accurate logging information, or, as is often the case, fails to keep identifying information at all.[103] Through a process of proxy relaying, web administrators can make their websites appear as though they are located in a foreign country, leading local investigators to focus on websites that appear to be hosted in their own jurisdictions.[104]

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including laptops. Janis Wolak, David Finkelhor & Kimberley Mitchell, *Child Pornography Possessor: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE 22, 32 (2011).

[98] NATIONAL STRATEGY, *supra* note 3, at 24 ("To further shield their identities, offenders occasionally will deviate from the common use of traditional credit cards and rely on digital currencies and prepaid credit cards to conceal transactions."); JENKINS, *supra* note 3, at 56–57.

[99] For more information on Bitcoin *see* http://www.weusecoins.com/questions.php.

[100] Wade Luders, *Child Pornography Web Sites: Techniques Used to Evade Law Enforcement*, FBI LAW ENFORCEMENT BULLETIN 17, 18 (July 2007).

[101] Brian Neil Levine & Clay Shields, *Hordes: A Multicast Based Protocol for Anonymity*, 10 J. OF COMPUTER SECURITY 3, 4 (2002).

[102] *See* NATIONAL STRATEGY, *supra* note 3, at 23, n.39 ("A proxy server is a computer system or an application program that acts as a go-between for requests from clients seeking resources from other servers."); Eric R. Diez, Comment, *"One Click, You're Guilty": A Troubling Precedent for Internet Child Pornography and the Fourth Amendment*, 55 CATH. U. L. REV. 759, 786 (2006) ("[C]hild pornographers routinely use protective measures such as anonymous proxy servers to eliminate 'digital fingerprints' in cyberspace."); Luders, *supra* note 100, at 18 (explaining that proxy servers are free and easy to use, require no identifying information, are often located in other countries, and keep no logs or other identifying information at all.).

[103] *See* NATIONAL STRATEGY, *supra* note 3, at 23, n.40 ("[T]here is no federal statute or regulation requiring providers to keep user IP information for any length of time, or at all.").

[104] Luders, *supra* note 100, at 20 (noting that because so-called redirect servers "have the outward appearance of being located in another country . . . law enforcement agencies often elect to use their investigative resources to find sites obviously hosted within their own jurisdiction to avoid the additional legal hurdles of pursuing an international legal process").

Along similar lines, an anonymizer is a software application that enables individuals to access the Internet while hiding the individual's identifying information.[105] Offenders sharing images via email may render their messages untraceable using re-mailers (which anonymously forwards email to a recipient), disposable email addresses (which may be used temporarily and anonymously and then discarded), or secure, encrypted free email addresses from services like hushmail.com.[106] An offender may also disguise his IP address through use of an "onion router." An onion router is a counter-surveillance tool that relies on a chain of proxies that "direct that Internet activity along complex circuitous routes in a network designed to completely obscure its origins."[107]

b. Safeguarding Child Pornography Collections

Beyond obscuring identity, many child pornographers make their child pornography collections more difficult to discover and analyze through various means. Some offenders rename their child pornography files so a casual observer will not recognize the illegal nature of the file. For example, an image or video file may be given an innocuous-sounding name, like "soccer.jpg." In addition, the file's extension — *i.e.*, the part of the filename generally comprised of a period followed by three letters (such as .jpg, .gif, or .tif for image files and .mov, .mpg, or .avi for video files) — may also be changed by the user in order to disguise the nature of the file. If the user changes "soccer.jpg" to "soccer.doc," the image is still accessible by an image-viewing program but appears from the file name to be a document. Other offenders use powerful password-protected encryption.[108] Encryption of data (in the form of images, videos, documents, etc.) can be used to secure the data so that it cannot be accessed without decryption software or a password. Some offenders have also been known to use steganography, which "make[s] it possible to hide an illegal image within an otherwise innocuous file."[109] Offenders may also use software to "partition" their computer or digital devices so that child pornography exists in a separate operating system and cannot be located during a cursory examination.[110]

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[105] NATIONAL STRATEGY, *supra* note 3, at 23. Anonymizers have been criticized as "weak protection" as "users are placing all their trust in the Anonymizer's administrators." N. Boris Margolin, Matthew Wright & Brian Neil Levine, *Guardian: A Framework for Privacy Control in Untrusted Environments*, U. Mass Tech Report 04–37, at 2 (2004), available at http://prisms.cs.umass.edu/brian/pubs/margolin.wright.guardian.pdf (last visited Nov. 30, 2012).

[106] O'DONNELL & MILNER, *supra* note 7, at 161 ("A smart cybercriminal will never send a traceable message. It is easy to exchange messages using remailers that anonymise communications and then forward them to their destination."); SINCLAIR & SUGAR, *supra* note 7, at 20–21; *see also* Investigations Involving the Internet, *supra* note 17, at 51–52 (describing a complex scenario relaying on both P2P networks and proxy servers).

[107] NATIONAL STRATEGY, *supra* note 3, at 24, n.42.

[108] *See* HANDBOOK OF DIGITAL FORENSICS AND INVESTIGATION 39–40 (Eoghan Casey, ed., 2010) ("HANDBOOK") (describing common encryption techniques like PGP and BestCrypt); NATIONAL STRATEGY, *supra* note 3, at 23 ("Offenders also diminish the ability of law enforcement officials to investigate child pornography by storing images in encrypted files.").

[109] O'DONNELL & MILNER, *supra* note 3, at 161; *see also* HANDBOOK, *supra* note 108, at 40 (noting that examiners in child exploitation cases are advised to "be on the lookout for other forms of data concealment such as steganography," indicated by the presence of steganography software or unusually large files); SINCLAIR & SUGAR, *supra* note 7, at 23.

[110] For example, TrueCrypt is free encryption software that can partition storage devices, *see* http://www.truecrypt.org/ (last visited Oct. 12, 2012).

Offenders may also use software to "wipe" hard drives to prevent law enforcement from recovering previously deleted files.[111]

Knowledge about these methods is actively disseminated among the offending community.[112] According to one researcher, "[t]he constant emphasis on safety and self-defense is evident from the abundance of technical information, which constitutes a majority of postings on the [newsgroup] boards."[113] Child pornography offenders share things like encryption and proxy techniques, how to disguise the online identities of viewers as well as the offline identities of producers,[114] how to avoid tracking by law enforcement, and the importance of regularly cleaning their computers of evidence of illegal child pornography possession.[115] Offenders also engage "in specific counter-surveillance activities" like researching and sharing news of law-enforcement investigations and techniques as well as the screen names of suspected undercover agents.[116]

4. *Emerging Technology*

There appears to be a shift by some child pornography offenders toward even more secretive and sophisticated technologies. As briefly recounted above, some child pornography offenders utilize powerful multi-proxy anonymizing routers such as Tor and Freenet.[117] These anonymizers cloak an individual's online identity such that it is significantly more difficult to

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[111] *See* HANDBOOK, *supra* note 108, at 43; NATIONAL STRATEGY, *supra* note 3, at 23.

[112] Fottrell Testimony, *supra* note 67, at 24–25; *but see* Grant Testimony, *supra* note 68, at 44–47 (cautioning that encryption and other privacy features are also used for legal purposes such as to protect against identity theft); *see also* Thomas J. Holt, Kristie R. Blevins & Natasha Burkert, *Considering the Pedophile Subculture Online*, 22 SEXUAL ABUSE 3, 15–22 (2010) (discussing how online pedophilic communities share security knowledge).

[113] JENKINS, *supra* note 3, at 110.

[114] United States v. McGarity, 669 F.3d 1218, 1230 (11th Cir. 2012) (describing the security measures shared in a sophisticated child pornography trading group which included distribution to new members of a document entitled "Security and Encryption FAQ"); NATIONAL STRATEGY, *supra* note 3, at 25 (describing how "producers of child pornography are increasingly taking precautions to hide their identities and the identities of their victims in images and videos," such as by removing location-tags or editing images and videos to "scrub" recognizable faces or identifiers).

[115] JENKINS, *supra* note 3, at 110–11.

[116] NATIONAL STRATEGY, *supra* note 3, at 24; *see also* JENKINS, *supra* note 3, at 151 ("Board participants are well aware of the various traps and investigations and regularly post news clippings and summaries of criminal cases as they arise, so other enthusiasts can learn about law enforcement techniques and be sure not to make the same mistakes themselves.").

[117] Tor explains that it is "free software and an open network that helps you defend against a form of network surveillance that threatens personal freedom and privacy, confidential business activities and relationships, and state security known as traffic analysis." Tor, *What is Tor?*, https://www.torproject.org/ (last visited Dec. 3, 2012). Freenet explains that it "is free software which lets you anonymously share files, browse and publish 'freesites' (web sites accessible only through Freenet) and chat on forums, without fear of censorship. Freenet is decentralised to make it less vulnerable to attack, and if used in 'darknet' mode, where users only connect to their friends, is very difficult to detect." Freenet, *What is Freenet?*, https://freenetproject.org/whatis.html (last visited Oct. 12, 2012).

trace it back to the individual.[118] Freenet acknowledges that some individuals exploit its anonymizing software to trade child pornography. While Freenet does not support child pornography or other illegal activity, it prioritizes freedom of speech and anonymity. Freenet discourages those who do not hold similar priorities from using Freenet by stating, "[i]f this is not acceptable to you, you should not run a Freenet node."[119]

Individuals using these anonymizers are able to access an otherwise invisible Internet through the use of hidden services.[120] In effect, the anonymizers function as magic glasses to access the invisible Internet; once the individual dons the glasses, the hidden services become visible. This invisible Internet is referred to alternately as "Deep Web," "Dark Net," "Darknet," and "Dark Web."[121] Here, for continuity, it will be referred to as Deep Web. Deep Web has been described as a "parallel" Internet that exists below the "surface" Internet.[122] Deep Web is simply not accessible without use of cloaking anonymizers.[123]

Within Deep Web, in addition to advertising other illegal material like weapons and drugs, individuals sometimes freely advertise child pornography.[124] Recent articles suggest that due to the high levels of protection afforded in Deep Web, law enforcement has minimal ability to identify child pornography offenders in Deep Web.[125]

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[118] Some research has shown that even those offenders using powerful anonymizers may not always use such precautions and as such may be vulnerable to identification at times. *See* Ryan Hurley et al., *Measurement & Analysis of Child Pornography Trafficking on Gnutella & eMule*, TECH. REP. UM-CS-2012-016 (May 2012), (available at https://web.cs.umass.edu/publication/docs/2012/UM-CS-2012-016.pdf) (finding that "offenders use Tor inconsistently" with at least 60% of Tor users failing to use it at all times).

[119] See Freenet, *Freenet Frequently Asked Questions*, https://freenetproject.org/faq.html#childporn (last visited Dec. 3, 2012).

[120] Zhen Ling et al., *Protocol-Level Hidden Server Discovery*, http://www.cs.uml.edu/~xinwenfu/paper/HiddenServer.pdf (last visited Dec. 3, 2012) (discussing Tor's hidden services features) (last visited Oct. 12, 2012); *see also* Tor: Hidden Service Protocol, https://www.torproject.org/docs/hidden-services.html.en (last visited Dec. 3, 2012).

[121] While the term Dark Net/Darknet was used by Microsoft programmers in 2002 to describe any non-commercial online sharing of internet content, *see* Peter Biddle et al., *The Darknet and the Future of Content Distribution*, http://msl1.mit.edu/ESD10/docs/darknet5.pdf (last visited Dec. 3, 2012), it has come to mean a sharing of digital content through onion routers or other sophisticated anonymizing technology. *See* BBC News, *File-Sharing 'Darknet' Unveiled* (Aug. 16, 2006), http://news.bbc.co.uk/2/hi/technology/4798059.stm (last visited Dec. 3, 2012).

[122] *See* Eileen Ormsby, *The New Underbelly*, THE AGE (June 1, 2012) (available at (http://www.theage.com.au/technology/technology-news/the-new-underbelly-20120531-1zktt.html); *see also* http://en.wikipedia.org/wiki/Deep_web (last visited Dec. 3, 2012).

[123] *See* Adrian Goldberg, *The Dark Web: Guns and Drugs for Sale on the Internet's Secret Black Market*, BBC NEWS, http://www.bbc.co.uk/news/business-16801382 (Feb. 3, 2012) (last visited Dec. 3, 2012); Eileen Ormsby, *supra* note 122.

[124] *See* Goldberg, *supra* note 123; Ormsby, *supra* note 122.

[125] *See* Adrian Chen, *'Dark Net' Kiddie Porn Website Stymies FBI Investigation*, GAWKER, (June 11, 2012), http://gawker.com/5916994/dark-net-kiddie-porn-website-stymies-fbi-investigation (last visited Dec. 3, 2012); Christopher Williams, *The Hidden Wiki: an Internet Underworld of Child Abuse*, TELEGRAPH (Oct. 27, 2011),

5. *Offender Culpability and Technology*

Offenders vary tremendously with respect to their technological sophistication and use of technology. Some federal offenders appear to be less technologically sophisticated than other offenders. A study conducted of local law-enforcement agencies about child pornography offenders arrested in 2006 found that just one in five child pornography possessors used a technical method to hide images.[126] Some have explained the phenomena of limited use of protective technology by arrested offenders by positing that "more technologically sophisticated [child pornography] possessors managed to avoid detection" and that law enforcement might be "nabbing the newest, least sophisticated, or most impulsive CP possessors."[127]

Some offenders claim to be technologically unsophisticated in that they only accidentally viewed child pornography or that, while they maintained possession of child pornography, they were not deliberately collecting it.[128] Although some individuals may accidentally access child pornography, the Commission's review of over 2,600 presentence reports from child pornography cases[129] indicates that the typical federal child pornography offender accessed child pornography on numerous occasions, across weeks, months or years, and deliberately collected hundreds or thousands of images. Intent to access child pornography is typically shown through a digital forensics examination of the offender's computer and other digital storage devices.[130]

Child pornography offenders claim that, even though they intentionally downloaded child pornography to their computers, they did not intentionally distribute child pornography on an "open" P2P network.[131] They typically explain that due to limited technological ability they did not understand that by installing a P2P program, they would end up sharing some files. Some courts have specifically rejected offenders' arguments that open P2P distribution should be distinguished from other types of distribution, noting that the offender "may not have actively pushed pornography on [P2P] users, but he freely allowed them access to his computerized stash of images and videos and openly invited them to take, or download, those items."[132] Other

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http://www.telegraph.co.uk/technology/internet/8851242/The-Hidden-Wiki-an-internet-underworld-of-child-abuse.html (last visited Dec. 3, 2012).

[126] Wolak et al., *Child Pornography Possessor: Trends*, *supra* note 97, at 32.

[127] Janis Wolak, David Finkelhor & Kimberley Mitchell, *Child-Pornography Possessors: Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study*, NAT'L CENTER FOR MISSING & EXPLOITED CHILDREN 10, 28 (2005).

[128] *See, e.g.* Belinda Winder & Brendan Gough, "*I Never Touched Anybody — That's my Defence": A Qualitative Analysis of Internet Sex Offender Accounts*, 16 J. SEXUAL AGGRESSION 125, 135 (2010) (a small study reporting that many child pornography offenders claimed their first exposure to child pornography was accidental).

[129] *See* Chapter 6 at 121–22 (discussing review of child pornography cases from fiscal years 1999, 2000, 2010, and 2012).

[130] *See infra* Sec. 3.b. *Proving Intent with Digital Forensics*.

[131] *See* Gelber, *supra* note 51, at 66, 68 (noting that because P2P programs put downloaded content automatically in a Shared folder, "by default it becomes available to other users of the P2P network, turning someone who thought he was *possessing* child pornography into someone who *distributes* child pornography—a much more serious offense.").

[132] United States v. Shaffer, 472 F.3d 1219, 1223 (10th Cir. 2007).

courts have focused on a fact-specific analysis of an individual's use of an open P2P network to determine whether the offender knowingly intended to share child pornography. In such cases, the court may reject an "automatic application of [the distribution enhancement under the guidelines] based solely on a defendant's use of a file-sharing program" but still find that "absent concrete *evidence* of ignorance . . . a fact-finder may reasonably infer that the defendant knowingly employed a file sharing program for its intended purpose."[133]

A subset of sophisticated child pornography offenders uses a variety of software applications to form or participate in child pornography communities dedicated to trading child pornography. The technological sophistication of some of these offenders enables members of their communities to evade detection and to exploit new victims.[134]

B. LAW ENFORCEMENT EFFORTS TO COMBAT CHILD PORNOGRAPHY

The rapid increase in the number of offenders and the sheer size of child pornography collections have challenged the ability of authorities to stem its rising tide.[135] Some in the law enforcement community view the "impact of these traders on law enforcement's ability to respond" as "catastrophic," as the scale of Internet trading "has caused the investigative and forensic infrastructure to be overwhelmed."[136] Various organizations are increasingly developing and utilizing technological tools such as "complex databases and software that scan for child-pornography images, increased ability to engage in undercover activity, and the ability to track electronic trails and evidence left by offenders as they communicate and surf online."[137] This section discusses some of these organizations, initiatives, and techniques.

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[133] *See* United States v. Durham, 618 F.3d 921, 931 (8th Cir. 2010); *see also* United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010).

[134] *See* Chapter 4 at 92–99 (discussing child pornography communities).

[135] For example, one Internet Crimes Against Children task force commander stated that the growth of child pornography "forces us into more of a reactive strategy, thereby we're responding to tips from the public, from the service providers, instead of being proactive and going out and combating this problem." Testimony of Captain Kirk Marlowe, Virginia State Police Bureau of Criminal Investigation, to the Commission, at 252–53 (Feb. 15, 2012) ("Marlowe Testimony").

[136] Statement of Flint Waters, Special Agent, Wyoming Attorney General Division of Criminal Investigation, *Child Sex Crimes on the Internet: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) ("Waters Statement") at 2; *see* JENKINS, *supra* note 3, at 154 ("Even if they arrest hundreds or thousands of child porn users each year, the staggering mathematics of Internet usage imply that the traffic will continue."). One example, Operation Roundup, reports that over 100 search warrants have been completed from leads generated since its 2008 inception. *See* NATIONAL STRATEGY, *supra* note 3, at 13–14. But over that same time period, Operation Roundup has identified well over one million unique IP addresses trading in child pornography. *See id.*; *see also* Diez, *supra* note 102, at 786 ("[I]n an ever-evolving technological world, government bureaucracy and legislatures tend to be reactive to, and thus, two steps behind, net-savvy child pornographers.").

[137] Wolak et al., *Child Pornography Possessor: Trends, supra* note 97, at 29 ("[W]hile evolving technology may raise additional challenges in law enforcement's investigation of these cases, technological developments also have given new tools and advantages to law enforcement.").

1. *Organizational Overview*

Many government agencies and several private organizations participate in the investigation and forensic analysis of child pornography. The following discussion highlights some of the most prominent examples.

The largest United States law enforcement organization dedicated to stopping the creation and spread of child pornography is the group of task forces under the umbrella moniker Internet Crimes Against Children ("ICAC"). Founded in 1998, the ICAC Task Force Program is a national network of 61 separate task forces associated or affiliated with 2,500 federal, state, local, and tribal agencies located in all 50 states.[138] Through the use of federal grants, ICAC task forces assist in investigations, prosecutions, and training sessions related to child pornography and other forms of child exploitation. ICAC task forces also perform the bulk of computer forensic examinations related to child pornography.[139] In 2010, ICAC investigated 32,000 cases of child pornography and made 5,300 arrests.[140]

At the federal level, there are several agencies that investigate child pornography offenses and analyze evidence. The first is the Federal Bureau of Investigation ("FBI"), which administers several anti-child-pornography initiatives, conducts investigations, and analyzes forensic evidence. In 2010, the FBI investigated 6070 child pornography cases and made 1094 arrests.[141] In addition, the Immigration and Customs Enforcement ("ICE"), within the Department of Homeland Security ("DHS"), operates several programs to help combat child pornography.[142] Still other investigative and forensic work is performed elsewhere in the federal government, such as by U.S. Postal Service investigators and the Secret Service.[143] Federal child pornography cases are often prosecuted with assistance from the Child Exploitation and Obscenity Section of the Criminal Division ("CEOS") of the Department of Justice ("DOJ"). CEOS attorneys lead investigations and advise and train line prosecutors in U.S. Attorneys Offices across the country, as well as assist them in the prosecution of child pornography offenders.[144]

The National Center for Missing and Exploited Children ("NCMEC") is a public-private partnership created in 1984 pursuant to the Missing Children's Assistance Act of 1983[145] to help prevent child abduction and sexual exploitation and locate missing children, among other

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[138] NATIONAL STRATEGY, *supra* note 3, at 58.

[139] *Id.* at 76.

[140] 2011 GAO Report, *supra* note 24, at 53.

[141] *Id*. at 51.

[142] *Id*. at 54–55.

[143] *Id*. at 55–57.

[144] *See* CEOS website at http://www.justice.gov/criminal/ceos/ (last visited Dec. 3, 2012).

[145] Pub. L. No. 98–473, 98 Stat. 1837 (1984), *see also* 42 U.S.C. § 5773 enumerating 19 specific tasks which NCMEC has been congressionally authorized to perform.

missions.[146] NCMEC was statutorily created, receives funding from federal sources, and has specific statutory responsibilities. Nevertheless, it is a private, nonprofit organization.[147] With regard to child pornography specifically, Congress has mandated that NCMEC operate both the CyberTipline and the Child Victim Identification Program ("CVIP"). The CyberTipline "serves as the national clearinghouse for online reporting of tips regarding child sexual exploitation including child pornography." Since its 1998 inception the CyberTipline has received over 1,300,000 reports,[148] including a 69-percent increase between 2005 and 2009.[149] Electronic communication service providers such as email systems and other websites that store online content are mandated to report child pornography that they find on their system to the CyberTipline.[150]

The CVIP program attempts to find identifiable children in child pornography images. CVIP relies on a variety of techniques including hash values to determine if the images they receive are known images of child pornography or if they are new images that have never before been encountered. CVIP had reviewed over 28.5 million child pornography images and videos by 2009, including a 432- percent increase in videos and images submitted for identification between 2005 and 2009.[151]

Child pornography is an international crime and there are international law enforcement efforts to combat it. INTERPOL is an international police organization with 190 member countries across the world, including the United States.[152] INTERPOL maintains a division dedicated to fighting Internet crimes against children.[153] INTERPOL works to identify victims, develop international strategies, and provide training to member countries.[154]

2. *Law Enforcement Investigations*

Investigations of child pornography offenders may take several forms. Some offenders are initially investigated for contact child sex offending and child pornography is found on their

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[146] Nat'l Center for Missing & Exploited Children, *Mission and History*, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=4362 (last visited Dec. 3, 2012).

[147] *Id.*

[148] Nat'l Center for Missing & Exploited Children, *2011 Annual Report*, at 7 (2011).

[149] NATIONAL STRATEGY, *supra* note 3, at 11, 94.

[150] 2011 GAO Report, *supra* note 24, at 3; NATIONAL STRATEGY, *supra* note 3, at 11.

[151] NATIONAL STRATEGY, *supra* note 3, at 11. NCMEC reports that this number continues to increase; the CVIP program reviewed over 17.4 million images in 2011 alone. NCMEC, *2011 Annual Report*, *supra* note 148, at 7 (2011).

[152] *See* INTERPOL, *About INTERPOL*, http://www.interpol.int/About-INTERPOL/Overview (last visited Dec. 3, 2012).

[153] *See* INTERPOL, *Crimes Against Children*, http://www.interpol.int/Crime-areas/Crimes-against-children/Crimes-against-children (last visited Dec. 3, 2012).

[154] *Id.*

computers during the investigation of the contact offense. Similarly, some offenders are initially arrested for "travel" or "enticement" offenses in which an offender travels to meet a real child (or an undercover law enforcement agent posing as a child) for sexual purposes and the offender also possesses child pornography. Other offenders are identified when an individual with access to the offender's computer finds the illegal material and reports the offender to the police. The reporting individual is commonly a family member, information technology support staff at the offender's workplace, or a computer technician hired by the offender to repair the computer.

Among federal offenders, many are identified through online investigations involving the recovery of IP addresses on P2P networks or Internet forums, or the recovery of incriminating payment authorizations at Usenet providers or commercial child pornography sites. A P2P investigation may involve trolling a certain network using specialized software to determine the IP addresses of those sharing child pornography images. By initiating a search, investigators can obtain a list of shared files involving child pornography that are then matched by hash values with known child pornography images or videos.

In such operations, investigators generally have two ways of identifying distributors: (1) identifying the IP address of the computer involved in the child pornography offense, and (2) a Globally Unique Identifier ("GUID"), which is the unique serial number assigned to each P2P program downloaded by a user.[155] The local investigator may then cross-check the IP address and GUID with past crimes or ongoing investigations and confirm that the computer is sharing illegal child pornography.[156] The IP address may reveal the general jurisdiction in which the computer is located and can be used to obtain the name and address of the user of the IP address through a subpoena for an ISP's records.[157] Unless the distributor has disabled the feature, the investigator is usually able to browse the distributor's computer directly to see a list of all files he is currently sharing.[158] If the IP address indicates the distributor is in a different jurisdiction, the investigator will share that information with the appropriate investigating jurisdiction. If the distributor is in the local jurisdiction, the investigator may subpoena the ISP to attempt to identify the distributor. If the distributor can be identified, the investigator will try to identify the occupants of the distributor's residence to determine if any children are present and whether any of the occupants have prior criminal history including child pornography offenses or other sexually dangerous behavior to prioritize the investigation. The investigator may then seek a search warrant to seize evidence for forensic examination, as well as interview the suspected offender during the execution of the warrant.[159]

Obtaining the IP address is typically only the first step in identifying a suspect. Several, sometimes challenging, steps must occur after obtaining the IP address. The law enforcement

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[155] Moulin, *supra* note 46, at 2; 2003 GAO Report, *supra* note 7, at 25.

[156] Note that while GUIDs are globally unique, they are assigned to specific software programs rather than individuals and cannot be used to identify a particular user.

[157] *See* NATIONAL STRATEGY, *supra* note 36, at 23.

[158] Moulin, *supra* note 46, at 1–2. Increasingly, however, P2P applications have removed remote browsing as an option.

[159] Waters Statement, *supra* note 136, at 4.

agency must determine which ISP customer was using the IP address at a given time by subpoenaing information from the ISP. The ISP may simply not have a record of which customer was using that IP address at that time. 160 While in practice many ISPs do keep records as to which customer was using an IP address (at least for a short period of time), no federal statute requires the ISPs to retain sufficient information to associate an IP address with a particular customer.[161] Further, even those ISPs that express an intent to cooperate with law enforcement and retain excellent records may not respond promptly to all law enforcement requests due to insufficient resources dedicated to subpoena compliance. Finally, offenders who connect to the Internet after cloaking their identities with anonymizing proxy servers may be identified only by the additional step of subpoenaing the proxy server provider, many of which keep no records.[162] The same barriers stand in the way of locating those running child pornography websites. Law enforcement officials often lament the tedious and frustrating process because "by the time investigators have taken the legal steps to track administrators, the suspect sites have moved from one place to another on the Internet."[163]

Other offenders are identified via investigative sting techniques like website "honeypots" or through chatting with law enforcement agents posing as minors.[164] One example of an Internet sting operation involving a website "honeypot" was Operation Pin in 2003, in which the U.K. National Crime Squad (with help from INTERPOL, the FBI, and other international authorities) set up a series of fake websites offering child pornography and affording users the option of either proceeding to illegal content or leaving the website.[165] Once the user clicked through a sufficient number of pages he would receive a message from the authorities informing him that he had committed an offense and that his information had been submitted to the appropriate authorities.

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[160] ISPs may assign users either a single fixed IP address, sometimes called "static," or one of many different rotating IP addressed sometimes called "dynamic." Only some individuals and businesses require a static IP address. For example, individuals or businesses that run email or Web servers, services that require external approval (such as approval for credit card purchases), or those who are using more sophisticated programs may require a static IP address. By contrast most home Internet users are assigned by their ISP a dynamic IP address that varies depending on when they access the Internet.

[161] *See* 2011 GAO Report, *supra* note 24, at 42–43; NATIONAL STRATEGY, *supra* note 3, at 23, n.40 (citing a 2009 survey showing that a majority of criminal investigators believed that the failure of ISPs to maintain user records detrimentally affects investigations).

[162] JENKINS, *supra* note 3, at 160–61 ("[C]ollecting IP addresses is rarely of much use since virtually all board participants use proxies, so only the individuals identified would be the inexperienced who were 'surfing naked'. . . . To be valuable, any information collected about IPs would require an additional step finding the real identities lying behind the proxies.").

[163] Luders, *supra* note 100, at 17.

[164] O'DONNELL & MILNER, *supra* note 7, at 155 (noting that as many as one in four arrests for Internet sex crimes against children involve investigators posting as minors); JENKINS, *supra* note 3, at 14 ("Both trading and chat lines are deadly because one is dealing with faceless individuals who often turn out to be police officers masquerading either as fellow enthusiasts or as underage girls; avoiding such chat facilities is a primary rule offered to novices in this underworld.").

[165] Taylor & Quayle, *The Internet and Abuse Images of Children, supra* note 12, at 189–90.

Finally, some sophisticated operations stem from infiltration of a closed Internet trading community by a law enforcement officer. As these private trading groups operate clandestinely, successful undercover infiltrations often require the arrest of a participating offender.[166] If the offender quickly cooperates by allowing his logon information to be used in the investigation, the subsequent infiltration can bring down an entire network of offenders.[167] Even in such cases it is often difficult to identify all members of a worldwide group due to the difficulty in coordination and cooperation across international jurisdictions.[168]

3. *Digital Forensics*

Once investigators seize computers or other property via an arrest or search warrant, they typically turn over the recovered evidence to digital forensic examiners. The goal of the forensic examiner is to identify the child pornography images and videos on the computer and preserve the evidence in a forensically sound manner.[169] Digital forensic examiners in child pornography investigations seek to identify the illegal child pornography images and uncover evidence of the user's identity and intent, as described below. Forensic examinations in child pornography cases are predominately conducted by state and local law enforcement agencies through one or several of the agencies that are members or affiliates of one of the ICAC task forces.[170] The number of such examinations has increased in recent years, from nearly 10,500 examinations in fiscal year 2007, to 14,339 in 2008, and 19,269 in 2009.[171] The amount of time each investigation takes may vary greatly depending on the type of device, size of the collection, and sophistication of the suspect.[172] A forensic examination typically requires making a duplicate image of a computer hard drive and then running an automated search for all the files with the same hash values as known child pornography images to identify the number of child pornography files in active space. While conducting such an automated search can be trivial in terms of time and resources, an exhaustive search of every part of a computer can be "enormously laborious," especially a search of parts of the computer that are inaccessible to the user and which may contain fragments

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[166] NATIONAL STRATEGY, *supra* note 3, at 27 ("[T]hese criminal enterprises typically go to great lengths to evade law enforcement and, ultimately, are identified only when an individual member's computer is seized for unrelated conduct and law enforcement, posing as the member, observes the group activity on the computer and can infiltrate the group.").

[167] For example, several of the most prominent investigations, such as Operation Wonderland, were broken up only after low-level participants were arrested and subsequently cooperated with law enforcement officials in pursuing the wider ring. *See* JENKINS, *supra* note 3, at 152–53 (detailing publicly known information about the discovery, investigation, and prosecution of the Wonderland club); *cf.* United States v. Ladeau, No. 09-40021-FDS, 2010 WL 1427523, at *1 (D. Mass. Apr. 7, 2010) (noting that investigators used different arrested individuals' online identities to infiltrate Gigatribe network and engage with other potential suspects, including defendant).

[168] NATIONAL STRATEGY, *supra* note 3, at 27 ("While investigations into these groups can yield the arrest of multiple child molesters, identification of the members and cooperation with foreign law enforcement, which may be required, can frustrate efforts to identify specific suspects.").

[169] NATIONAL STRATEGY, *supra* note 3, at 76.

[170] 2011 GAO Report, *supra* note 24, at 33–34.

[171] NATIONAL STRATEGY, *supra* note 3, at 131.

[172] 2011 GAO Report, *supra* note 24, at 34; NATIONAL STRATEGY, *supra* note 3, at 30.

of deleted files.[173] In large part, however, forensics delays appear to be due to backlogs in forensics analysis rather than the complexity of performing forensics reviews.[174] For example, the FBI has reported that the volume of data processed at its labs increased by 3,000 percent between 2003 and 2009.[175]

a. Recovery of Child Pornography

One of the forensic examiner's main goals after forensically preserving the seized evidence is to search the computer or other media (such as external hard drives, DVDs, CDs, flash drives, or cell phones) for child pornography images.[176] This process may involve the search of file folders, browsing or communications programs, e-mails, and chat logs through automated search for files with relevant extensions (*e.g.*, .jpg, or .gif for images; .movor .mpeg for videos), or hash values indicating known child pornography images.[177] The files may be easily located by being stored in dedicated computer folders with names like "My Pictures" or "Shared," or that describe the type of child pornography stored in the folder.[178] At other times, the entire computer, or certain folders or files, have been hidden, renamed, encrypted, password protected, or deleted.

During a forensics examination it may be possible to determine when and how often an individual accessed child pornography files. This can be accomplished through a review of metadata that records when a file is created or changed and the last time the file was accessed.[179] Another basic forensics review technique examines the temporary files saved automatically by the computer and many programs. For example, web browsers keep a temporary Internet cache by default.[180] When browsing websites, the cache automatically downloads images and other files in order to speed up the browsing experience and, instead of re-downloading oft-visited pages, the browser can simply load the file from the cache. The forensic examiner may be able to recover individual child pornography images from the cache or load saved versions of the

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[173] O'DONNELL & MILNER, *supra* note 7, at 165 ("The biggest obstacle facing any police force attempting to tackle child pornography is the huge commitment required in terms of time."); NATIONAL STRATEGY, *supra* note 3, at 30.

[174] 2011 GAO Report, *supra* note 24, at 35. This backlog was discussed by an ICAC commander at the Commission's recent hearing on child pornography. The commander stated "We do on-scene triage with regards to forensics to get information, but quite often those cases still need a full-blown forensics before they go to trial. So that backlogs the system for three to six months on any given case." Marlowe Testimony, *supra* note 135, at 252.

[175] 2011 GAO Report, *supra* note 24, at 35–36.

[176] NATIONAL STRATEGY, *supra* note 3, at 76 ("Investigators commonly seize multiple media in one investigation, including: internal and external hard drives, flash drives, DVDs and CDs, cells phones and other digital media devices containing terabytes of data in an effort to identify contraband files.").

[177] *Id.* at 76.

[178] *See* Fig. 3–2, Chapter 3 at 50.

[179] Nat'l Inst. of Justice, *Special Report: Forensic Examination of Digital Evidence: A Guide for Law Enforcement* 16 (Apr. 2004) (available at https://www.ncjrs.gov/pdffiles1/nij/199408.pdf).

[180] *See* HANDBOOK, *supra* note 108, at 280–82 (describing mechanics of web cache).

websites themselves.[181] Many successful prosecutions for possession of child pornography have been based on the existence of such files found only in the temporary cache.[182]

Many offenders regularly delete their downloaded files and clear their temporary files.[183] In these cases, forensic examinations must rely on more sophisticated techniques to recover data that, although deleted by the user, still remains on the computer's storage device.[184] Using powerful data recovery or file carving software, examiners can often recover files that suspects believe they have deleted.[185] Even if a sophisticated offender has used software to "wipe" their unallocated space, an investigator may still be able to recover a list of all the deleted files.[186] Forensic examination may also decrypt hidden or encrypted files with the help of powerful software tools.[187]

b. Proving Intent with Digital Forensics

In addition to identifying the illegal child pornography possessed by the defendant, forensic examinations also play a role in offering evidence of the offender's intent. Because federal law prohibits the receipt, possession, or distribution of child pornography only if it is done knowingly,[188] the examination helps demonstrate the suspect's knowledge or intent in viewing, downloading, or distributing the illegal material. While not discussed here, a thorough digital forensics examination is equally important to an individual's defense. Such an

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[181] JENKINS, *supra* note 3, at 111 ("Participants will instruct novices in the essential importance of cleaning the computer's cache regularly to erase images, which might otherwise constitute legal evidence of possession of child pornography.").

[182] *See* Marin, *supra* note 52, at 1213–14 (describing how temporary Internet files constituting illegal child pornography can be retained in a user's cache); *see, e.g.,* United States v. Romm, 455 F.3d 990, 998 (9th Cir. 2006) ("Here, we hold Romm exercised dominion and control over the images in his cache by enlarging them on his screen, and saving them there for five minutes before deleting them. . . . [and] this evidence of control was sufficient for the jury to find that Romm possessed and received the images in his cache.").

[183] Products used to clean and optimize computer drives, such as CCleaner, have legitimate uses but they are also sometimes used by child pornography offenders to avoid prosecution. *See* HANDBOOK, *supra* note 108, at 43; NATIONAL STRATEGY, *supra* note 3, at 23.

[184] In simplified terms, when a computer user saves a file, the operating system scans for enough free space to write the data and then sends the data there. Those newly written clusters become allocated space. When a user deletes a file, the operating system *does not* go back and change the previously written clusters; instead, it simply revises the map so that those clusters show up as unallocated space. *See* HANDBOOK, *supra* note 108, at 36–37 (noting that unallocated space "is important from an investigative standpoint because it often contains significant amounts of data from deleted files"); FERRARO AND CASEY, *supra* note 15, at 200–201.

[185] *See* HANDBOOK, *supra* note 108, at 36–37 (listing file carving tools like Foremost, Scalpel, DataLifter, and PhotoRec).

[186] *See id.* at 43; NATIONAL STRATEGY, *supra* note 3, at 23.

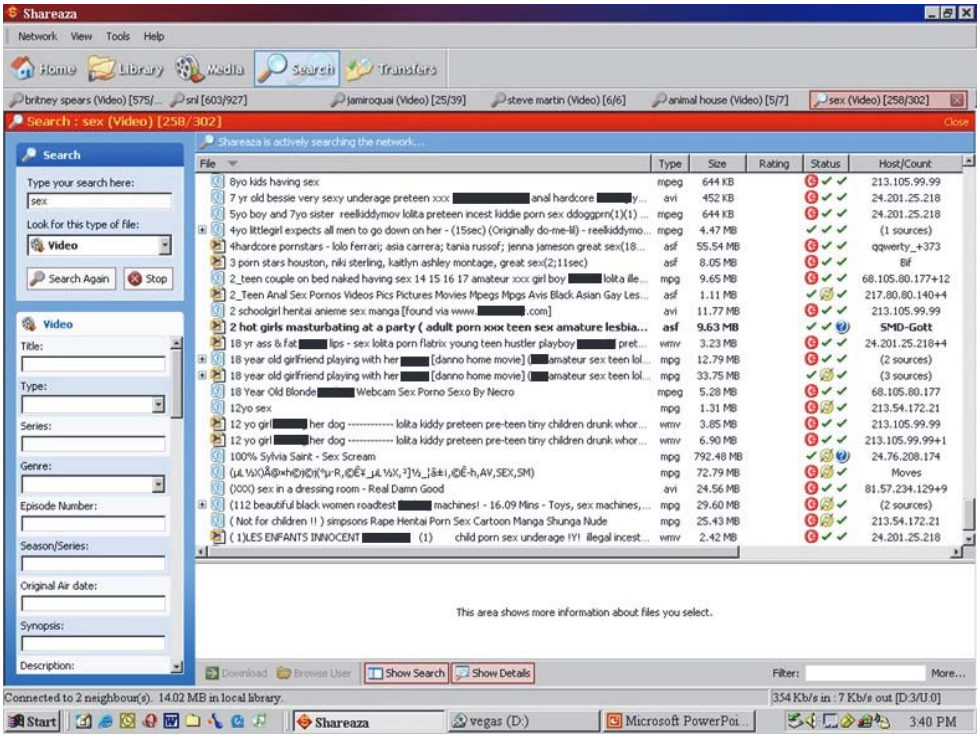
[187] *See* HANDBOOK, *supra* note 108, at 39.

[188] *See* 18 U.S.C. §§ 2252 & 2252A.

examination may negate claims regarding a defendant's intent to access or share images or it may otherwise limit sentencing exposure.[189]

Although some collections may be so vast or so organized that the question of knowledge is not an issue,[190] other times an offender may not have intentionally saved any images on the computer, as the offender instead only browsed web pages containing child pornography images.[191] Examinations may provide several ways to build a powerful evidentiary case against an offender who attempts to deny knowledge or intent. By collecting the right types of information, such as screenshots of an offender's sharing preferences as seen below in Figure 3-3, search terms, folder structure, and the like, forensics examinations can demonstrate that child pornography offenders intended to view or distribute child pornography.

Figure 3-3[192]
Federal Defender Technology Presentation: Screenshot of P2P Search Window



[189] *See* Grant Testimony, *supra* note 68, at 46–47 (discussing the importance of a full forensic examination to the defense team).

[190] *See* Chapter 4 at 80–85 (discussing offender collecting behavior).

[191] Marin, *supra* note 52, at 1211 (distinguishing between the Internet's "multiple avenues to access[ing] child pornography," including viewing files from an Internet server versus downloading an image to one's computer); *see also* Fottrell Testimony, *supra* note 67, at 22–23 ("[i]mages in particular folders sorted and organized . . . are not accidentally viewed; they are purposely sorted and organized in a particular manner").

[192] Grant Presentation, *supra* note 49.

Even when a file cannot be decrypted or has been deleted and cannot be recovered, the presence of powerful encryption, steganographic, or drive-erasing software may be used to buttress a showing of criminal intent.[193]

E. CONCLUSION

This chapter provided information regarding how child pornography offenders access and distribute child pornography.

- Until the late 1970s and early 1980s, child pornography was difficult to find, risky to produce, expensive to duplicate, and required a secure and private storage area. Technological advances since that time have made child pornography much more widely available and reduced the barriers to offending.

- Although it is possible that some individuals may accidentally access child pornography, the Commission's review of more than 2,600 non-production child pornography cases indicates that the typical federal child pornography offender intentionally accessed child pornography on numerous occasions, across weeks, months or years, and downloaded hundreds or thousands of images.

- Most child pornography offenders now rely on Internet or Internet-enabled technology to access and distribute child pornography.

- Many child pornography offenders rely on P2P networks, which enable people to connect directly to other individuals' computers without having to use a third-party. Some P2P networks are "open" in that they permit individuals to share with others in an anonymous or "impersonal" fashion. Other P2P networks operate in a "closed" fashion and combine elements of social networking. Closed P2P network users may select with whom they wish to share files in a "personal" fashion.

- Open P2P networks typically have default settings that permit sharing of a user's files; however, in most cases, both downloading locations and sharing options may be changed by users to limit whether files are available for sharing.

- Offenders use technology in a wide variety of ways to commit child pornography crimes. While some offenders utilize relatively non-sophisticated technology to view and save child pornography, others engage in sophisticated and elaborate tactics to communicate with other child pornography offenders and to evade detection.

- The extent of offenders' use of sophisticated techniques is unclear, given that most of what law enforcement and researchers know about child pornography

[193] NATIONAL STRATEGY, *supra* note 3, at 131; *see* HANDBOOK, *supra* note 108, at 33–34.

offenders is gleaned from those who are least likely to have used such techniques and are thus more likely to have been identified and arrested.

- Many federal law enforcement agencies and community resources are dedicated to fighting child pornography crimes, but these efforts face challenges from the sheer volume of online child pornography distribution, the technological sophistication of some offenders, delays in obtaining identifying information from ISPs regarding their customers suspected of distributing child pornography, and the logistics of completing timely forensics analysis.

Chapter 4

CHILD PORNOGRAPHY OFFENDER BEHAVIOR

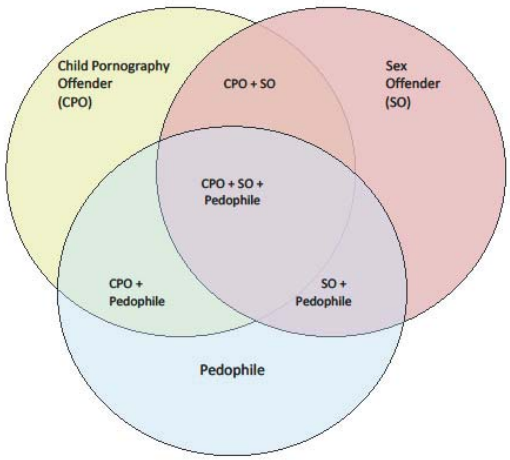
This chapter describes the social science research regarding the three broad categories of child pornographer behavior patterns: collecting behavior; participation in an online child pornography "community" (and the related concept of a child pornography "market"); and commission of criminal sexually dangerous behavior in conjunction with child pornography offending. Each of the sections in this chapter relates to one or more of those categories of child pornography offender behavior.

The first section of this chapter discusses the types of child pornography offenders. The second section explains motivations to collect child pornography. The third section describes the collecting behavior exhibited by child pornography offenders. The fourth section describes child pornography communities and illustrates the impact that these communities may have on child pornography offenders and on the child pornography "market." The fifth section discusses the relationship between child pornography offending and other sex offending.

A. TYPES OF CHILD PORNOGRAPHY OFFENDERS

In general, child pornography offenders can be classified based on their degree of sexual interest in children, their motivation to collect child pornography, and their tendency to engage in other sex offending. Some child pornography offenders meet the clinical diagnosis for pedophilia as defined and discussed below, and some child pornography offenders engage in other sex offending. However, not all child pornography offenders are pedophiles, and not all child pornography offenders engage in other sex offending. While there is overlap in these categories, each is separate and none is a predicate to any other. Figure 4–1 shows the relationship between child pornography offenders, other sex offenders, and pedophiles. Figure 4–1 is merely intended to depict these relationships and does not attempt to show actual ratios of the various groups.

Figure 4–1
Relationship Among Child Pornography Offenders, Pedophiles, and Other Sex Offenders
(does not reflect actual percentages)



Pedophilia is a clinical psychiatric diagnosis of a persistent sexual interest in sexually immature

children and can be manifested in thoughts, fantasies, urges, sexual arousal, or behavior.[1] Pedophiles may be sexually interested in infants and toddlers, prepubescent children,[2] pubescent children,[3] or all children, but most pedophiles do have a preference for victim age range and gender.[4] Only a small fraction of pedophiles have an exclusive sexual interest in children;[5] most

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[1] The fourth edition of the American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders Text Revision (DSM-IV-TR) provides a diagnosis of pedophilia as:

> A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
>
> B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.
>
> C. The person is at least age 16 years and at least 5 years older than the child or children in Criterion A.

AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS TEXT REVISION 572 (2000).

The current clinical diagnosis is sometimes used inclusively to describe an attraction to pubescent children (typically aged 11-14), a paraphilia sometimes called "hebephilia." *See* Ray Blanchard et al., *Pedophilia, Hebephilia, and the DSM-V*, 38 ARCHIVES OF SEX BEHAV. 335, 335 (2009). Because the strict definition of pedophilia would not include hebephilia, and to better address the differences between pedophilia, hebephilia, and the related disorders, the APA is currently in the process of revising the DSM-IV-TR and has proposed changing the diagnosis of pedophilia to "pedophilic disorder." In the forthcoming DSM-5 (May 2013), pedophilic disorder will be defined as:

> A. Over a period of at least 6 months, an equal or greater sexual arousal from prepubescent or early pubescent children than from physically mature persons, as manifested by fantasies, urges, or behaviors.
>
> B. The individual has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or impairment in social, occupational, or other important areas of functioning.
>
> C. The individual must be at least 18 years of age and at least 5 years older than the children in Criterion A.

Proposed Revisions to the Diagnostic and Statistical Manual of Mental Disorders to be included in the DSM-V, http://www.dsm5.org/ProposedRevision/Pages/proposedrevision.aspx?rid=186# (last visited May 9, 2012).

[2] Prepubescent refers to children who have not begun puberty. These children show no sign of development of secondary sex characteristics. *See* MedlinePlus, *Puberty & Adolescence,* http://www.nlm.nih.gov/medlineplus/ency/article/001950.htm (last visited Nov. 1, 2012).

[3] Pubescent refers to children who have started puberty. These children show some development of secondary sex characteristics such as initial breast development or evidence of pubic hair or armpit hair. Postpubescent refers to individuals who have completed puberty and have fully developed secondary sex characteristics. *See* MedlinePlus, *Puberty & Adolescence,* http://www.nlm.nih.gov/medlineplus/ency/article/001950.htm. As discussed in note 2, sexual interest in pubescent children who are starting to show signs of secondary sex characteristic but are not yet sexually mature is sometimes thought to be a separate paraphilia called "hebephilia." Blanchard, *supra* note 1, at 336.

[4] Ryan C. W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLIN. PROC. 457, 459 (2007).

[5] Hall & Hall, *supra* note 4, at 459 (citing GENE G. ABEL & NORA HARLOWE, THE STOP CHILD MOLESTATION BOOK (2002), which found that only 7% of pedophiles were exclusive); *see also* Jennifer McCarthy, *Internet Sexual Activity: A Comparison Between Contact and Non-Contact Child Pornography Offenders*, 16 J. SEXUAL AGGRESSION 181, 187 (2010) (finding that in a sample of child pornography offenders, approximately half were pedophiles but only 12% were exclusively pedophiles).

maintain some sexual interest in adults as well.[6] Being married or having sexual relations with adults does not mean a child pornography offender is not also a pedophile.

Some researchers and clinicians believe that a clear majority of child pornography offenders who have committed their offenses over a period of time are pedophiles,[7] while others report that most child pornography offenders are not pedophiles.[8] While the prevalence of pedophilia among child pornography offenders is unclear, research in the area demonstrates that child pornography offenders, regardless of whether they meet the clinical definition for pedophilia, are much more likely to be sexually aroused by children than contact child sex offenders or the general population.[9]

Some but not all sex offenders who offend against children are pedophiles.[10] Among those sex offenders who offend against children, there are distinctions between those who commit incest offenses versus those who select non-related victims.[11] Sex offending may occur when an opportunity to offend appears in conjunction with the presence of risk factors in the potential offender.[12]

In addition to the disagreement over the percentage of child pornography offenders who are pedophiles, there is significant debate about the association between child pornography offending and other sex offending. This issue is discussed at length later in this chapter and Chapter 7.[13]

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[6] A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation & Attraction to Underage Persons*, 7 ARCHIVES OF SEXUAL BEHAV. 175, 180 (1978); *see also* STEPHEN HOLMES & RONALD HOLMES, SEX CRIMES: PATTERNS & BEHAVIORS 110 (3d ed. 2009).

[7] *See* Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610, 610–13 (2006) (finding 61% of child pornography offenders are pedophiles versus 35% of contact child sex offenders); Testimony of Gene Abel, M.D., Medical Director, Behavioral Medicine Institute, to the Commission, at 130–31 (Feb. 15, 2012) ("Abel Testimony")

[8] *See, e.g.,* Testimony of Richard Wollert, Ph.D., to the Commission, at 203 (Feb. 15, 2012) ("Wollert Testimony") (stating that typical child pornography offenders are not pedophiles; rather, their illegal behavior is "more consistent with a learning theory explanation"). The social learning theory of deviant behavior suggests that crime can be learned through social interaction with people who favor criminal behavior. A social learning theory of child pornography offending suggests that rather than pre-existing pedophilic impulses, online communities that trade child pornography and the availability of child pornography motivate otherwise non-pedophilic individuals to become child pornography offenders. *See* Rob D'Ovidio et al., *Adult-Child Sex Advocacy Website as Social Learning Environments: A Content Analysis*, 3 INT'L J. OF CYBER CRIMINOLOGY 421, 421–22 (2009).

[9] Seto et al., *Child Pornography Offenses*, *supra* note 7, at 612–13.

[10] MICHAEL C. SETO, PEDOPHILIA & SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, & INTERVENTION 5 (2008).

[11] Joseph A. Camilleri & Vernon L. Quinsey, *Pedophilia: Assessment & Treatment in* SEXUAL DEVIANCE 183, 191 (D. Richard Laws & William R. O'Donohue eds. 2d ed. 2008).

[12] *See* William L. Marshall, Geris A. Serran, & Liam E. Marshall, *Situational and Dispositional Factors in Child Sexual Molestation: A Clinical Perspective, in* SITUATIONAL PREVENTION OF CHILD SEXUAL ABUSE (Richard Wortley & Stephen Smallbone eds., 2006).

[13] *See infra* Sec. 4.E.; Chapter 7 at 169–181.

Researchers have attempted to classify child pornography offenders into different types based on their behavior and use of child pornography. Some researchers have categorized child pornography offenders based on their use of technology and other sex offending.[14] Others have focused on the offender's motivation for collecting child pornography.[15] Still others have focused on the offender's level of involvement in child pornography, involvement in a child pornography community, and the extent to which an offender is trying to evade detection.[16] Social science research suggests that, while categories can be helpful, the spectrum of child pornography offenders is not static; and child pornography offenders may move across a spectrum of behaviors, sometimes escalating into more serious child pornography behaviors or into other sexual offending.[17]

B. MOTIVATIONS TO COLLECT CHILD PORNOGRAPHY

Child pornography offenders exhibit an array of motivations.[18] Research suggests that motivations vary and most offenders exhibit more than one motivation.[19] This section will address both the sexual and non-sexual motivations to collect and distribute child pornography.[20]

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[14] *See generally* Eileen M. Alexy, Ann W. Burgess & Timothy Baker, *Internet Offenders: Traders, Travelers, and Combination Trader-Travelers*, 20 J. INTERPERSONAL VIOLENCE 804 (2005).

[15] *See* L. Webb, J. Craissati & S. Keen, *Characteristics of Internet Child Pornography Offenders: A Comparison With Child Molesters,* 19 SEX ABUSE 449, 450–51 (2007) (citing Joe Sullivan & Anthony Beech, *Assessing Internet Offenders*, in CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER 69 (M. Calder ed., 2004)).

[16] *See* Tony Krone, *A Typology of Online Child Pornography Offending,* 279 TRENDS & ISSUES IN CRIME AND CRIM. J. 1, 4 (2004); Eva J. Klain, Heather J. Davies & Molly A. Hicks, *Child Pornography: The Criminal-Justice-System Response*, AM. BAR ASS'N CTR. ON CHILDREN AND THE L. FOR THE NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN 1, 4 (2001) (identifying "closet," "isolated," "traders," "cottage," and "commercial" collectors).

[17] Some research suggests that viewing child pornography causes some offenders to develop distorted attitudes about the sexuality of children, and these attitudes may act as a precursor to contact sex offending. Martin C. Calder, *The Internet: Potential, Problems, and Pathways to Hands-on Sexual Offending in* CHILD SEXUAL ABUSE & THE INTERNET: TACKLING THE NEW FRONTIER 2 (Martin C. Calder ed., 2004); Ethel Quayle & Max Taylor, *Child Pornography and the Internet: Perpetuating a Cycle of Abuse*, 23 DEVIANT BEHAV. 331, 335 (2002). With respect to the role of distorted attitudes in child sex abuse generally, *see* Theresa Gannon, Kirsten Keown & Devon L.L. Polaschek, *Increasing Honest Responding on Cognitive Distortions in Child Molesters: The Bogus Pipeline Revisited*, 19 SEX ABUSE 5, 6 (2007); Tony Ward & Richard J. Siegert, *Toward a Comprehensive Theory of Child Sexual Abuse: A Theory Knitting Perspective*, 8 PSYCHOL., CRIME & L. 319, 328 (2002).

[18] *See* Michael C. Seto, Lesley Reeves, & Sandy Jung, *Explanations Given by Child Pornography Offenders for Their Crimes*, 16 J. SEXUAL AGGRESSION 169, 175 (2010); Seto et al., *Child Pornography Offenses*, *supra* note 7, at 613; Quayle & Taylor, *Child Pornography and the Internet, supra* note 16, at 332–333; *see also* KERRY SHELDON & DENNIS HOWITT, SEX OFFENDERS & THE INTERNET 242–45 (2007).

[19] McCarthy, *supra* note 5, at 184; Joe Sullivan & Anthony R. Beech, *Assessing Internet Sex Offenders in* CHILD SEXUAL ABUSE & THE INTERNET: TACKLING THE NEW FRONTIER 69 (Martin C. Calder ed. 2004).

[20] Although some child pornography offenders distribute, advertise, and traffic in child pornography for financial gain, *see* Anthony R. Beech et al., *The Internet and Child Sexual Offending: A Criminological Review*, 13 AGGRESSION & VIOLENT BEHAV. 216, 224–25 (2008), there are very few such offenders in the federal population. In fiscal year 2010, none of the 1,075 cases in which non-production defendants distributed child pornography involved a traditional *commercial* distributor (*e.g.*, a commercial child pornography website operator); all distribution in the fiscal year 2010 cases was either gratuitous or involved bartering. *See* Chapter 6 at 149.

The typical federal child pornography offender has viewed child pornography over a period of time, most over months or years.[21] Some child pornography offenders claim that they initially encountered child pornography by accident, while searching for adult pornography rather than due to a preexisting pedophilic interest.[22] Regardless of the initial motivation, child pornography offenders are clearly motivated to *continue* intentionally to access child pornography.[23]

1. *Sexual Motivations to Collect Child Pornography*

Sexual interest in children and corresponding sexual gratification are significant motivators for most child pornography offenders.[24] Offenders often use the images to masturbate and to validate their sexual interest in children.[25] Some offenders also use images to "groom" or lower the inhibitions of potential victims.[26]

Among all child pornography offenders, pedophiles have the most direct sexual motivation to access child pornography. Other sexually motivated child pornography offenders may be sexually motivated and have indiscriminate deviant sexual interests that include sexual

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[21] *See* Chapter 3 at 61.

[22] *See, e.g.,* Belinda Winder & Brendan Gough, *"I Never Touched Anybody – That's my Defence": A Qualitative Analysis of Internet Sex Offender Accounts*, 16 J. SEXUAL AGGRESSION 125, 135 (2010).

[23] SHELDON & HOWITT, *supra* note 18, at 243–44 (noting that "there is no meaningful sense in which offenders 'accidentally' come across child pornography" when viewing adult pornography sites). A forensics review can also debunk an excuse that child pornography was accidentally viewed. *See* Testimony of James Fottrell, Child Exploitation and Obscenity Section, Criminal Division, U.S. Department of Justice, to the Commission, at 22–23 (Feb. 15, 2012) (on behalf of the U.S. Department of Justice) ("Fottrell Testimony") ("[i]mages in particular folders sorted and organized . . . are not accidentally viewed; they are purposely sorted and organized in a particular manner").

[24] Seto et al., *Child Pornography Offenses*, *supra* note 7, at 613 ("people are likely to choose the kind of pornography that corresponds to their sexual interests, so relatively few nonpedophilic men would choose illegal child pornography"). *See also* Abel Testimony, *supra* note 7, at 105–06 ("Why do heterosexual men buy Playboy? . . . To look at the pictures. Why? Because they're interested in the pictures . . .").

[25] Ethel Quayle & Max Taylor, *Paedophiles, Pornography & the Internet: Assessment Issues*, 32 BRITISH J. OF SOC. WORK 863, 866–67 (2002). Most analyses find that most child pornography offenders masturbate to the images. *See, e.g.,* Quayle & Taylor, *Child Pornography and the Internet, supra* note 16, at 338–39 (2002) (noting that in a qualitative sample of 13 offenders, 11 offenders masturbated using child pornography; one did not because he was unable to ejaculate, and one did not because he was excited by the "taboo"). However, at least one recent study found that only some offenders admitted to using child pornography to masturbate. *See* McCarthy, *supra* note 5, at 189; *see also* Olivia Henry et al., *Do Internet-Based Sexual Offenders Reduce to Normal, Inadequate & Deviant Groups*? 16 J. SEXUAL AGGRESSION 33, 34 (2010) (discussing various uses of child pornography to satisfy different sexual desires).

[26] *See* Melissa Wells, David Finkelhor, Janis Wolak & Kimberly J. Mitchell, *Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession*, 8 POLICE PRACTICE & RES.: AN INT'L J. 269, 271 (2007) (noting that offenders "may use child pornography to validate their sexual interest in children, to groom children and lower their inhibitions, or to blackmail victims or other offenders"); U.S. DEP'T OF JUST., NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION & INTERDICTION 31 (2010) ("NATIONAL STRATEGY") ("[t]hroughout the grooming process, predators gradually introduce child pornography into their seduction methodology").

interest in children.[27] Such individuals have a variety of sexual interests that may include sexual violence, bestiality, or other deviant sexual interests.[28] They may also engage in other risky or illegal sexual behavior separate from their child pornography offenses.[29] Finally, even those offenders who fail to meet a clinical diagnosis of pedophilia, may be sexually motivated by pedophilic interests and use the images for masturbation.

Some offenders who have used child pornography for sexual gratification report habituation to adult pornography and an increasing need to identify new and more extreme images in order to achieve sexual arousal. Some research posits that offenders who have masturbated to child pornography become desensitized to images that previously may have been horrifying to the offender.[30] Other research doubts this progression, noting that most child pornography offenders are selective about the age, gender, and sexual content of the images they preferentially collect.[31] Child pornography offenders also may develop or increase deviant sexual interests and distorted attitudes about children as appropriate sexual partners.[32] Such symptoms may serve to further socially isolate the child pornography offender and escalate his use of child pornography.[33]

2. *Non-Sexual Motivations for Collecting Child Pornography*

Non-sexual motivations for viewing child pornography include initial curiosity,[34] compulsive collecting behaviors,[35] avoidance of stress or dissatisfaction with life, and an ability

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[27] Henry et al., *supra* note 25, at 42–43.

[28] Testimony of Jennifer A. McCarthy, Assistant Director & Coordinator, Sex Offender Treatment Program, New York Center for Neuropsychology, to the Commission, at 110–11 (Feb. 15, 2012) ("McCarthy Testimony").

[29] For example, some federal child pornography offenders in fiscal year 2010 engaged in contact sexual offenses, non-contact sexual offenses (such as voyeurism), or generally sexually deviant behavior such as collecting children's underwear or engaging in bestiality. See Chapter 7 at 176–77.

[30] *See* Martin C. Calder, *The Internet: Potential, Problems and Pathways to Hands-on Offending*, *in* CHILD SEXUAL ABUSE & THE INTERNET: TACKLING THE NEW FRONTIER 17 (Martin C. Calder ed., 2004); *see* Wollert Testimony, *supra* note 8, at 203 (discussing desensitization).

[31] Ian A. Elliott & Anthony R. Beech, *Understanding Online Child Pornography Use: Applying Sexual Offense Theory to Internet Offenders,* 14 AGGRESSION & VIOLENT BEHAV. 180, 187 (2009); *see also* Quayle & Taylor, *Child Pornography and the Internet, supra* note 17, at 333–34 ("many pedophiles are highly selective in their choice of material").

[32] Cognitive distortions are attitudes or beliefs which tend to justify and excuse illegal or otherwise inappropriate behavior. *See* Caoilte Ó Ciardha, *A Theoretical Framework for Understanding Deviant Sexual Interest and Cognitive Distortions as Overlapping Constructs Contributing to Sexual Offending Against Children*, 16 AGGRESSION & VIOLENT BEHAV. 493, 494–500 (2011). The development of deviant sexual interest in children is further discussed *infra* section 4.D.3.

[33] Tony Ward & Anthony Beech, *An Integrated Theory of Sexual Offending*, 11 AGGRESSION & VIOLENT BEHAV. 44, 57 (2006) ("the consequences of sexually abusive actions can modify, entrench, or worsen the personal circumstances of an offender and in this way, increase or maintain the offending behavior").

[34] *See* Henry et al., *supra* note 25, at 34.

[35] McCarthy Testimony, *supra* note 28, at 110–11.

to create a new and more socially successful identity (within an online community).[36] Some child pornography offenders appear to use child pornography as an escape from the real world.[37] One offender explained that his use of child pornography "was a fantasy world for me . . . and it was so different from the mundane existence I'd been leading. Here was something that was dangerous . . . it was exciting . . . it was new."[38] Some research has noted the prevalence of socially inadequate and isolated males among child pornography offenders. This type of offender may rely on child pornography communities as a way to create a positive social identity and as a substitute for a real sex life.[39]

Problematic Internet use, also called compulsive Internet use,[40] may also partially explain why some offenders collect or distribute child pornography or escalate their behavior after initially viewing child pornography.[41] Research suggests that some individuals may be particularly vulnerable to problematic Internet use due to poor impulse control, emotional problems, lack of social and emotional outlets, and deviant sexual interests or beliefs.[42] These

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[36] Ethel Quayle, Mary Vaughn & Max Taylor, *Sex Offenders, Internet Child Abuse Images and Emotional Avoidance: The Importance of Values*, 11 AGGRESSION & VIOLENT BEHAV. 1, 1–3 (2006). *See also* McCarthy Testimony, *supra* note 28, Tr. at 110–11; Testimony of Deirdre D. von Dornum, Assistant Federal Defender, Federal Defenders of N.Y., to the Commission, at 393–94 (Feb. 15, 2012) (on behalf of the Federal and Community Defenders) ("von Dornum Testimony") (discussing a socially inadequate individual who developed an interest in child pornography).

[37] *See* Prepared Statement of Jennifer McCarthy, Assistant Direct & Coordinator, Sex Offender Treatment Program, N.Y. Ctr for Neuropsychology, to the Commission, at 2 (Feb. 15, 2012).

[38] Ethel Quayle & Maxwell Taylor, *Model of Problematic Internet Use in People With a Sexual Interest in Children*, 6 CYBERPSYCHOL. & BEHAV. 93, 98 (2003) (quoting a child pornography offender).

[39] Henry et al., *supra* note 25, at 34 ("pathological Internet users are lonely and for these people the Internet helps to escape the unhappiness of real life, alter negative mood states and even change self-perception") (internal citations omitted). There appears to be a subclass of child pornography offenders who have little or no sex life offline. *Id.* It is possible that in the Internet age, the greater sense of anonymity and the prevalence of child pornography images attracts new viewers including some socially inadequate individuals who may not have engaged in offline offending. Al Cooper, *Sexuality and the Internet: Surfing Into the New Millennium*, 1 CYBERPSYCHOL. & BEHAV. 187, 188–89 (1998).

[40] Problematic Internet ("PIU") or compulsive Internet use ("CIU") or are generally thought of as an inability to stop using Internet technologies without experiencing distress and where such use has resulted in a significant negative impact. Such behavior was clinically described by Kimberly Young, Ph.D. in 1996, and later refined by Nathan Shapira, MD, who suggested a three-pronged definition that the behavior was: (a) uncontrollable; (b) caused significant distress or impairment; and (c) occurred in the absence of other pathology that might explain the behavior. Nathan A. Shapira et al., *Psychiatric Features of Individuals with Problematic Internet Use*, 57 J. OF AFFECTIVE DISORDERS 267, 268 (2000).

[41] Some researchers refer to CIU of child pornography as an "addiction," *see* Mark Griffiths, *Sex on the Internet: Observations and Implications for Sex Addiction*, 38 J. OF SEX RES. 333, 340 (2001) (finding limited evidence "that Internet sex addiction exists for a small proportion of users"), but most literature avoids the term addiction in the child pornography context. *See, e.g.*, MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 174 (2003) (acknowledging that some use the term addiction but stating that "[t]he label of addiction may be seen as problematic however, and DSM-IV use instead the term dependence") (internal citations omitted).

[42] Elliott & Beech, *supra* note 31, at 183–86; *see also* Dana Putnam, *Initiation and Maintenance of Online Sexual Compulsivity: Implications for Assessment and Treatment*, 3 CYBERPSYCHOL. & BEHAV. 553, 555 (2000) (discussing susceptibility to problematic Internet use); Bryant Paul & Jae Woong Shim, *Gender, Sexual Affect & Motivations for*

attributes, in combination, may make immersion in online child pornography an attractive option.[43] Such users report developing a problematic use that impedes a normal social and professional life. Problematic Internet pornography users report negative career outcomes, social isolation, and depression.[44]

C. CHILD PORNOGRAPHY OFFENDER COLLECTING BEHAVIOR

This section discusses the types of collecting behavior in which some child pornography offenders engage, including the types of images and ancillary child-related objects some offenders collect, the way a some offenders organize their collections.[45] This chapter does not distinguish between photographs and videos, and refers to both as "images," except where specifically stated.

1. Child Pornography Collecting Activities

Child pornography offenders often amass large collections of child pornography with thousands or even hundreds of thousands of images and videos.[46] Some offenders have collected images over a series of decades and began in the pre-Internet era.[47] Child pornography offenders' collections often contain a variety of images including legal but sexually suggestive child images,[48] sexually explicit poses, explicit sex acts, and images depicting violence,

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Internet Pornography Use, INT'L J. OF SEXUAL HEALTH 187, 196–97 (2008) (finding males more interested in Internet pornography generally and thus more susceptible to problematic Internet use).

[43] Quayle & Taylor, *Paedophiles, supra* note 25, at 867–73; *see also* Quayle et al., *Sex Offenders, supra* note 36, at 3.

[44] Michael P. Twohig & Jesse M. Crosby, *Acceptance and Commitment Therapy as a Treatment for Problematic Internet Viewing*, 41 BEHAV. THERAPY 285, 285 (2010). In particular, Internet pornography use harmed users' relationships and families. *See, e.g.*, Jennifer P. Schneider, *Effects of Cybersex Addiction on the Family: Results of a Survey*, 7 SEXUAL ADDICTION & COMPULSIVITY 31, 31 (2000) (surveying 94 adults whose partners were engaged in Internet sexual activity and finding that problematic "cybersex activities were a continuation of pre-existing compulsive sexual behaviors").

[45] Another collecting behavior, protecting the collection from discovery by law enforcement, is discussed in Chapter 3 at 56–59.

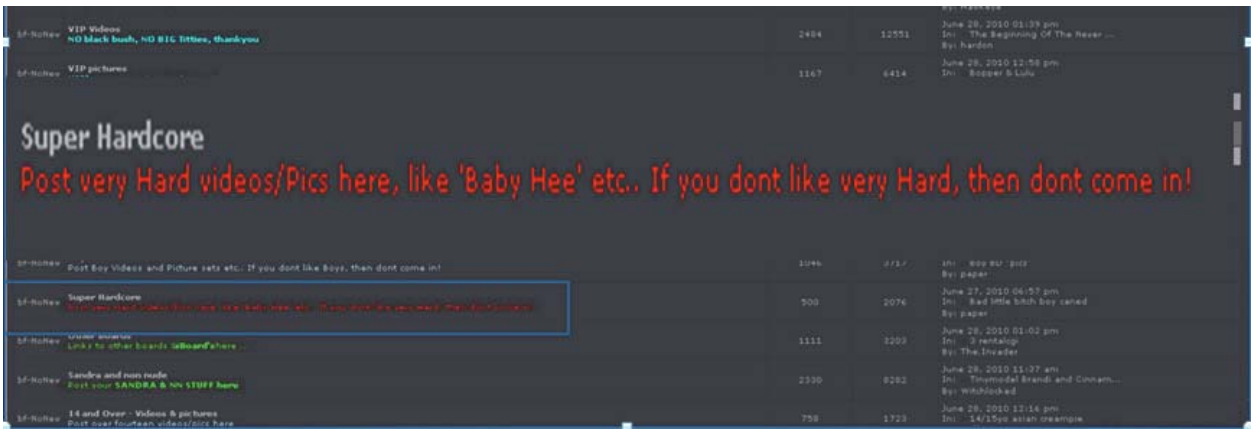
[46] *See, e.g.,* Sentencing Memorandum, United States v. Dewey Burr, No. 09-cr-308, ECF No. 26 (D. Or. July 23, 2010) ("A forensic review of the defendant's computer and digital media storage devices have located over one million images of child pornography"); Peggy O'Hare, *Pilot Arrested on Child Porn Charges*, HOUSTON CHRON., July 1, 2010 (available at http://www.chron.com/disp/story.mpl/metropolitan/7089813.html) ("police investigators seized what they called the largest cache of child pornography ever discovered in Harris County, amounting to 'millions of images'").

[47] *See, e.g.,* NATIONAL STRATEGY, *supra* note 26, at 24–26 ("[t]hese offenders . . . often have been involved in collecting child pornography for years – many before the advent of the Internet"); PHILIP JENKINS, BEYOND TOLERANCE 48 (2001) (quoting child pornography offenders who had been collecting images for decades).

[48] Sexually suggestive child images, sometimes called "child erotica", as described in Chapter 3 at 55, are not necessarily illegal and it may only be the inclusion of them within a collection of more explicit child pornography that suggests a deviant purpose. *See* Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN 1, 65–66 (2001) (available at http://www.missingkids.com/en_US/publications/NC70.pdf). Research suggests that pedophilic contact child sex

humiliation, bondage, and bestiality. Some child pornography offenders are very discriminating and limit the kinds of images they will collect by gender, age, or sexual activity.[49] For example, one child pornography offender stated that his collection consisted of "just basically images of girls mainly. Girls actually having sex. And they had to look happy . . . I mean I wasn't looking for rape or anything."[50] One offender explained that he wouldn't collect "[k]ids with animals . . . I got rid of that . . . ."[51] Other child pornography offenders collect more fringe images; one offender described his method of finding new images as, "I'd go for the most extreme named ones possible . . . baby sex . . . child snuff or something."[52] Figure 4–2, from a presentation given by a Department of Justice technology expert to the Commission, includes a screenshot of an area of a child pornography community that posted particularly violent images.

Figure 4–2 (cont'd on next page)[53]
DOJ Presentation: Screenshot of Rules of Child Pornography Community



offenders are more likely to collect and maintain collections of child pornography and sexually suggestive child images than other contact child sex offenders. *Id.* at 65–66.

[49] TAYLOR & QUAYLE, *supra* note 41, at 80.

[50] *Id.* at 82 (quoting a child pornography offender).

[51] SHELDON & HOWITT, *supra* note 18, at 110 (quoting a child pornography offender).

[52] TAYLOR & QUAYLE, *supra* note 41, at 168 (quoting a child pornography offender).

[53] See Prepared Presentation of James Fottrell, Child Exploitation and Obscenity Section, Criminal Division, DOJ, to the Commission (Feb. 15, 2012) (on behalf of the U.S. Department of Justice) ("Fottrell Presentation").

Posted: November 27, 2008 03:16 am

Super Hardcore, is babyshi, baby-he etc..

Its not k-girl, its not 'real lolita vol3'

Its very young kids, getting [redacted], and preteens in distress, and or crying, etc...
Getting hit hard on the [redacted] with a belt and so on..

I cant believe some of you guys cant work it out for yourselves?

And 'pretend' bondage, 'pretend light whipping' is not super hardcore.

If the girl looks totally comfortable, shes not in distress, it does NOT belong in this section

Offenders tend to collect material they find most sexually exciting, but some also collect for other reasons.[54] Some offenders keep images they do not find appealing in order to use them for trading at a later date. For example, a child pornography offender stated that "some of them I kept with the idea . . . [that] I might be able to use these sometime in the future perhaps for swapping with somebody else . . . ."[55] Other child pornography offenders collect compulsively to find rare images or are seeking to complete a series[56] of images.[57] The desire to complete a series is sometimes "particularly important where there is a narrative theme to a series, such as pictures showing a child gradually removing their clothes."[58]

Many child pornography offenders expend considerable efforts to organize and categorize their collections.[59] Offenders often file images by gender, sexual activity, or the age of the child. For example, one offender stated that his collection "was very organized there were boys; there was girls . . . there would be boys posing on their own in a folder; boys in groups; boys soft as I put it; boys with erections."[60] For some, cataloging is part of the pleasure of collecting; for others, it is simply a necessity to permit them usable to find a desired image either for personal use or for trading purposes.[61] Researchers have found that offenders engaged in

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[54] Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: A J. OF RES. & TREATMENT 201, 202 (2005).

[55] TAYLOR & QUAYLE, *supra* note 41, at 185 (quoting a child pornography offender).

[56] A "series" is a group or set of child pornography images that are linked by a common element. It always contains at least one victim but may contain several victims and may include dozens or hundreds of images. A series typically contains less and more graphic images. Prepared Statement of Michelle Collins, Vice President, Exploited Children Division and Assistant to the President of National Center for Missing & Exploited Children, to the Commission, at 3–4 (Feb. 15, 2012) ("Collins Statement").

[57] Ethel Quayle, *The Impact of Viewing on Offending Behavior*, *in* CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER 31 (Martin Calder ed. 2004).

[58] *Id*. at 31; *see also* JENKINS, *supra* note 47, at 103 (quoting a child pornography user who is searching for a particular subset of images within a series).

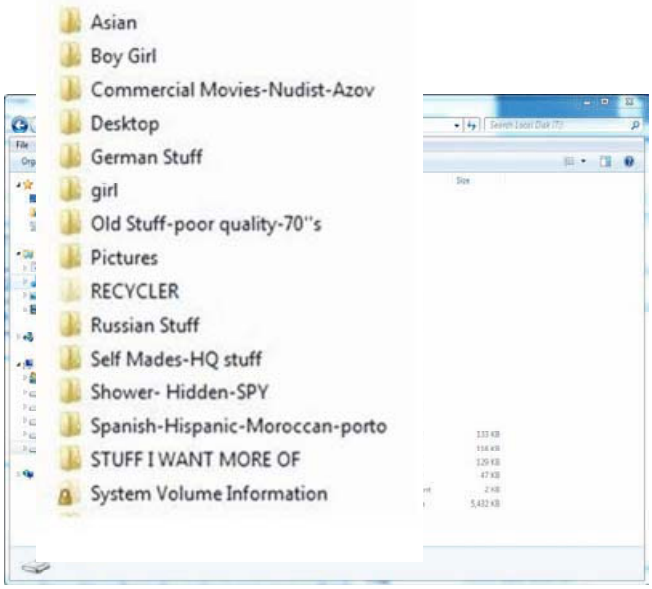
[59] Sarah Laulik, Jane Allam, & Lorraine Sheridan, *An Investigation Into Maladaptive Personality Functioning in Internet Sex Offender*, 13 PSYCHOL. CRIME & LAW 523, 527 (2007).

[60] SHELDON & HOWITT, *supra* note 18, at 105 (quoting a child pornography offender).

[61] Quayle, *The Impact of Viewing*, *supra* note 57, at 31.

more extensive trading activities are more likely to have particularly organized collections.[62] Figure 4–3, from a presentation given by a Department of Justice technology expert to the Commission, includes a screenshot from one child pornography offender's computer showing the degree to which some offenders organize their collections.

Figure 4–3[63]
DOJ Presentation: Screenshot of Child Pornography Offender Collection



Research suggests that the process of collecting images is enjoyable for some offenders regardless of whether all images are sexually exciting.[64] One child pornography offender explained "there was also the thrill in collecting them[.] You wanted to get a complete set so it . . . was a bit like stamp collecting as well."[65] This collecting behavior may explain why some offenders devote countless hours to viewing child pornography.

Child pornography offenders, particularly pedophilic offenders, sometimes also collect ancillary child-related items.[66] For example, some offenders collect images of children in

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[62] Quayle & Taylor, *Child Pornography and the Internet, supra* note 17, at 354.

[63] Fottrell Presentation, *supra* note 53.

[64] Quayle & Taylor, *Child Pornography and the Internet, supra* note 17, at 353–54.

[65] TAYLOR & QUAYLE, *supra* note 41, at 83 (quoting a child pornography offender).

[66] *See* Lanning, *Child Molesters, supra* note 48, at 85. Among the items seized after the arrest of a child pornography offender in 2009 were: sexually suggestive child photos and photos of girls on public beaches; adult female mannequins; child mannequins with pubic hair glued to pubic areas of the child mannequins; a large doll of a child approximately three years old; an infant baby doll with baby powder on it; a poster of celebrity children Mary Kate and Ashley Olson with handwriting on it; framed pictures of children in erotic poses or sexual poses; computer generated pictures of clothed celebrity children; and a Hannah Montana lamp with handwriting on it. Press Release, Wisconsin Dep't of Justice, *Derks Pleads Guilty to 10 Counts of Possession of Child Pornography* (Mar. 14, 2011),

underwear or bathing suit advertisements,[67] nudist-style images of children,[68] or self-made non-pornographic pictures of neighborhood children.[69] Some offenders engage in pedophilic activities such as writing or collecting stories about sex with children, drawings, or cartoons.[70] Others collect information about sex offenders, articles on child psychology, or children's toys.[71] Such collecting activities may be related to sexual deviance and correlated with other sex offending.[72]

2. *Child Pornography Collections*

The legal definition of child pornography is relatively broad as it encompasses both "lascivious exhibition of the genitals or pubic area" and "sexually explicit conduct" involving a child under 18 years of age.[73] While this definition may include images of the "barely illegal" variety (*e.g.*, a fully sexually developed 16 or 17 year old), typical child pornography images contained in federal offender collections depict prepubescent children engaging in explicit sexual conduct.[74] The following two subsections describe child pornography images. The first subsection relies on research which has attempted to describe child pornography generally. The second provides a qualitative description of the types of images that are possessed by federal child pornography offenders as recounted in recent federal judicial opinions.

In general, the Commission here relies primarily on social science research and available judicial opinions. This is because the presentence reports (PSRs) prepared in preparation for sentencing of federal child pornography offenders vary in the detail provided with respect to the content of the child pornography offender's collection. While some PSRs describe an offender's collection with great specificity (*e.g.*, the victim age, gender, and sexual activity depicted), others describe enough information only to satisfy specific sentencing enhancements in the guidelines.[75] For that reason, the Commission cannot provide precise quantitative data based on PSR

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http://www.doj.state.wi.us/absolutenm/templates/template_share.aspx?articleid=2449&zoneid=1 (last visited Nov. 30, 2012).

[67] *See* Janis Wolak, David Finkelhor & Kimberly Mitchell, *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE 22, 31 (2011) (recording the frequency with which U.S. child pornography offenders were found to have possessed child erotica (including stories and images) and non-sexual images of children).

[68] *See* Quayle & Taylor, *Child Pornography and the Internet, supra* note 17, at 341 (quoting one child pornography offender who collected nudist images because "[t]hese were the only pictures where I was sure that the kids weren't being hurt or coerced or anything").

[69] Lanning, *Child Molesters, supra* note 48, at 68.

[70] *Id.* at 68, 119; Wolak et al., *Child Pornography Possessors: Trends, supra* note 67, at 31.

[71] Lanning, *Child Molesters, supra* note 48, at 68.

[72] *See* McCarthy, *supra* note 5, at 188–91.

[73] 18 U.S.C. § 2256(2) (2012).

[74] *See* Chapter 6 at 140–41 (noting that, in fiscal year 2010 non-production cases, 96.3% of offenders possessed child pornography depicting prepubescent minors or minors under 12 years of age and 74.2% possessed sado-masochistic images, which typically involve vaginal or anal penetration of a prepubescent child by an adult male).

[75] *See, e.g.,* USSG §2G2.2(b)(2) (enhancement for the possession of an image depicting a prepubescent minor).

descriptions of child pornography offenders' collections.[76] Nevertheless, the Commission has reviewed over 2,600 PSRs in USSG §2G2.2 cases in preparation for this report, and finds that the overwhelming majority of PSRs included reference to images depicting oral, vaginal, or anal penetration of a prepubescent child. The Commission further finds that a substantial minority of PSRs included reference to images depicting sexual acts involving infants or toddlers.

a. Child Pornography Image Data

Online child pornography offending is a global crime where the particular images may be collected and traded by offenders across the world. Once an image is in Internet circulation, there are no country-specific borders, and data collected in other countries regarding the content of images is likely to be applicable to U.S. offenders.[77] Some in law enforcement have suggested child pornography images are getting more graphic in general and that this trend suggests that offenders are demanding more extreme images featuring younger victims.[78] In recent years there has been an increase in the frequency with which particularly violent images and images of younger children are found in offender collections. It is unclear whether this trend relates to a relatively few commonly traded images available on peer-to-peer filesharing networks or new types of victimization.[79]

This section relies primarily on three sources which are based on detailed child pornography image data reported by law enforcement officials: (1) the National Juvenile Online Victimization Survey (Online Victimization Survey), (2) the Child Exploitation and Online Protection ("CEOP") database (a United Kingdom entity), and (3) the National Center for Missing & Exploited Children ("NCMEC").[80] Each of these sources has attempted to describe the types of child pornography images as they are currently being distributed and possessed. There are challenges associated with this endeavor: first, law enforcement does not have access to the entire universe of child pornography images; and second, the official organizations that

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[76] Because PSRs did not routinely describe the ages of victims depicted in images or videos – other than describing them as "prepubescent" or under 12 years of age, in accordance with USSG §2G2.2(b)(2) – the Commission was unable to code precise data concerning the ages of the victims depicted.

[77] *See supra* Chapter 3 at 43 (discussing international scope of the offense).

[78] *See, e.g.,* Fottrell Testimony, *supra* note 23, at 83–84 (noting "the prolific increase in the number of [images] of infants and toddlers"); Testimony of Steve DeBrota, Assistant United States Attorney, Northern District of Indiana, to the Commission, at 236–239 (Feb. 15, 2012) (on behalf of the U.S. Department of Justice") ("DeBrota Testimony") ("[I]n 1996, there were no readily traded series on the Internet involving infants and toddlers . . . . There were none.").

[79] *See* sec.C.2.a, *infra*.

[80] NCMEC is a private, 501(c)(3) nonprofit organization created in 1984. The mission of the organization "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." Nat'l Ctr. For Missing & Exploited Children, *National Mandate & Mission*, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=1866 (last visited Nov. 30, 2012). NCMEC provides information and resources to law enforcement, parents, and children (including child victims) as well as other professionals. NCMEC's exploited children division has several programs that work with law enforcement to track child pornography images and identify and rescue child pornography victims where abuse is ongoing. For more information on NCMEC *see* http://www.missingkids.com.

collect images often do not report data on images unless they are widely distributed on the Internet.

The Online Victimization Survey relies on interviews with law enforcement individuals in over 2,500 United States agencies regarding the child pornography collections of arrested offenders. The Online Victimization Survey reports data from interviews conducted in 2000 and again in 2006.[81]

The Online Victimization Survey reports that most child pornography offenders possessed a variety of images depicting children of different ages. Data from the 2006 survey showed that 28 percent of offenders possessed at least one image of a child under three years of age. The Online Victimization Survey reports that in 2000 and 2006 , more offenders collected child pornography collections featuring primarily female victims images than primarily male victim images.[82] Almost all offenders possessed graphic sexual images that focused on genitals or showed explicit sexual activity.[83] Images containing graphic sexual content, sexual penetration, and violence were slightly more common in 2006.

While most offenders in 2006 possessed both still images and videos (58% possessed at least one video), still images were more common.[84] There was evidence that a small number of 2006 offenders (5%) had viewed real-time images of child sexual abuse.[85]

Offenders also possessed related legal images and items. In 2006, more than two-thirds of offenders (68%) possessed at least some adult pornography[86] and 21 percent of offenders possessed nonsexual images of children.[87] A small number of offenders (11%) possessed written material about the sexual abuse of children.[88] Data from the Online Victimization Survey is presented in table format in Table 4–1 below.

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[81] Wolak et al., *Child Pornography Possessors: Trends*, *supra* note 67, at 31; Janis Wolak, David Finkelhor, & Kimberly J. Mitchell, *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings From the National Juvenile Online Victimization Study*, 44 (2005).

[82] Wolak et al, *Child Pornography Possessors: Trends*, *supra* note 67, at 31.

[83] *Id.*

[84] *Id.*

[85] *Id.* This question was not asked of the 2000 cohort.

[86] *Id.* In 2000, 71% of offenders possessed some adult pornography.

[87] *Id.* This question was not asked of the 2000 cohort.

[88] *Id.* This question was not asked of the 2000 cohort.

Table 4–1[89]
Data from the Online Victimization Survey

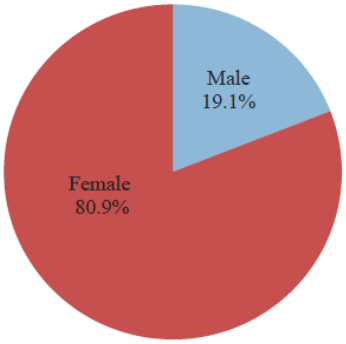
Online Victimization Survey	2000	2006
Collection contained at least one image of a child:		
Younger than 3	19%	28%
3–5	39%	46%
6–12	83%	86%
13–17	75%	67%
Collection Contained Images Of Children Who Were:		
Mostly Female	71%	69%
Mostly Male	14%	17%
Both	15%	15%
Collection Contained At Least One Image Of:		
Graphic Sexual Content	92%	94%
Sexual Penetration	80%	82%
Sexual Contact Between Child and Adult	71%	75%
Violence	21%	24%
Collection Contained Videos:		
At Least One Video	32%	44%
Only Videos	4%	3%
Evidence of Real-Time Images	*	5%
Collection Contained Non-Illegal Items:		
Adult Pornography	*	68%
Non-Sexual Images of Children	*	21%
Sexually Explicit Child Pornography Stories	*	11%

[89] Some questions were not asked of the 2000 cohort; those boxes are denoted with an asterisk.

The second study is an analysis of images submitted to the CEOP database. CEOP is a United Kingdom multidisciplinary entity charged by the Home Secretary with performing a similar function to that which NCMEC performs in the United States.[90] The CEOP database was created in 1998 to identify victims.[91] Images seized by law enforcement officials in the United Kingdom are sent to CEOP. This CEOP database analysis relied on a ten percent sample of the 247,950 images received by CEOP between 2005 and 2009.[92] Given that child pornography images can continue to circulate in perpetuity and these images were seized in recent years, it is likely these images remain in current distribution.

Most images in the CEOP database featured female victims. The CEOP database analysis found that 80.9 percent of images were of female victims, as seen in Figure 4–4 below.[93]

Figure 4-4
Gender of Victims in CEOP Database



Images of males were likely to depict younger victims than images of females. The CEOP database analysis found that, of male victim images, 73 percent were of prepubescent males, 25 percent were of pubescent males, and 1.6 percent showed very young males under the age of two.[94] By contrast, the CEOP database found that of female victim images, 51.4 percent were of prepubescent females, 47.9 percent were of pubescent females, and 0.7 percent showed very young females under the age of two.[95] The age of female victims is shown below in Figure 4–5 and the age of male victims is shown below in Figure 4–6.

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[90] *See supra* Chapter 3 at 63–64 and *supra* note 80 (discussing NCMEC's role in combating child pornography and identifying victims).

[91] Ethel Quayle & Terry Jones, *Sexualized Images of Children on the Internet*, 23 SEXUAL ABUSE 7, 7 (2011).

[92] *Id.*

[93] *Id.* at 14.

[94] *Id.* at 14.

Figure 4–5
Age of Female Victims in CEOP Database

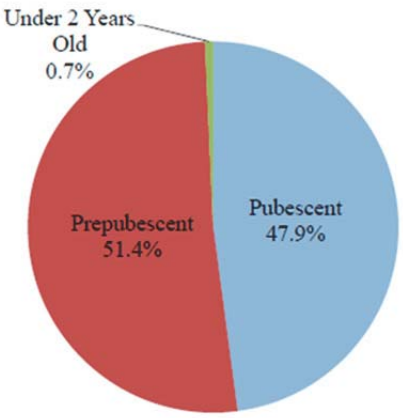
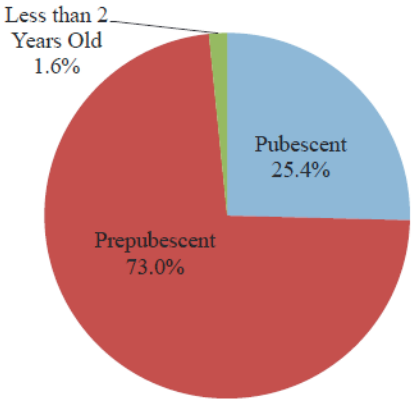


Figure 4–6
Age of Male Victims in CEOP Database



The third data source comes from NCMEC. NCMEC maintains a database and works with law enforcement to identify child victims. As of February 15, 2012, NCMEC supported law enforcement officials in their identification of over 4,103 child pornography victims.[96] When federal or state law enforcement officials seize child pornography, many choose to send copies of the images to NCMEC.[97] In recent years, NCMEC has started to report some data about identified victims. NCMEC provides data regarding images of identified child victims that are "frequently submitted to NCMEC," meaning they are images that are in circulation and repeatedly recovered by law enforcement.[98] The following data relates to images of identified victims frequently submitted to NCMEC.[99]

NCMEC identified victim data reflects that more female victims than male victims appear in the frequently submitted images. NCMEC reported that 57 percent of the victims were female, and 43 percent were male.[100] Most images depicted prepubescent children: Seventy-six percent of the victims were prepubescent children; 24 percent were pubescent children of which 10 percent were infants or toddlers.[101]

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[96] Collins Statement, *supra* note 56, at 4.

[97] As discussed *supra* at 85, NCMEC is statutorily mandated to work with law enforcement to identify and rescue children. Federal and state law enforcement agencies are not mandated to remit images to NCMEC but many do as a matter of practice.

[98] Collins Statement, *supra* note 56, at 4.

[99] *Id.* at 4. No information is provided about victims who have not yet been identified or images that are not frequently submitted. *Id.* at 4–5.

[100] *Id.* at 4.

[101] *Id.*

Images depicted victims suffering a variety of sexual abuse. NCMEC reported that 84 percent of the victims had at least one image depicting oral penetration; 76 percent of the victims had at least one image depicting anal and/or vaginal penetration; 52 percent of the victims had at least one image depicting the use of foreign objects or sexual devices; 44 percent of the victims had at least one image depicting bondage or sadistic behavior; 20 percent of the victims had at least one image depicting urination or defecation; and four percent of the victims had at least one image depicting bestiality.[102]

b. Child Pornography Image Descriptions

Consistent with the child pornography image data reported by the Online Victimization Survey, CEOP, and NCMEC, judicial opinions contain descriptions of child pornography images. Judicial opinions reflect that some minor victims are depicted as compliant or even happy during the sexual acts,[103] while others are shown to be in pain and crying – occasionally as the result of sexual torture.[104] Images of bestiality and urination or defecation together with sexual activity involving minors, while not typical, are not uncommon.[105]

The following contains graphic descriptions of child pornography images contained in judicial opinions representative of descriptions of images contained in PSRs reviewed by the Commission.[106]

- "The images of the boys showed one of the boys being anally penetrated by the finger and penis of an adult male, a boy's penis being manipulated by an adult hand, and a boy's face covered with what appeared to be ejaculate fluid."[107]

- "[I]mages involving prepubescent male and female children engaged in anal and oral sex, and/or vaginal penetration, with each other and/or with adults; . . . an image of a prepubescent female wearing a mask with her hands bound, while an

[102] *Id.* at 5.

[103] The myth of a "compliant" victim is discussed more fully in Chapter 5. *See* Chapter 5 at 109–110.

[104] *See*, *e.g.*, United States v. Mantanes, 632 F.3d 372, 373 (7th Cir. 2011) (describing a "video, entitled 'Kiki crying in pain while being ass [***]ked' depict[ing] a young female child screaming in pain as she is being raped"); *id.* at 374 ("One image depicts a close up of an infant female's genitals. The infant's genitals are pierced with a needle. Adult fingers are spreading the infant's vaginal area. A caption at the top of the photograph reads 'Two Years Little Girls Tortured with Needle.'").

[105] *See, e.g.*, *id.* at 373–74 (noting an "image depict[ing] an adult male's penis urinating on a naked prepubescent female"); United States v. Mohr, 418 Fed. App'x 902, 903 (11th Cir. 2011) ("[F]orensic examination revealed 262 movies containing child pornography and 47 images of child pornography . . . . Some of the movies showed girls as young as six or eight in bondage or engaging in sex acts with an animal.").

[106] *See supra* at 84–85 (Commission's finding that a majority of PSRs included reference to images that depict oral, vaginal, or anal penetration of prepubescent children and a substantial minority depicted sex acts involving infants or toddlers). Because PSRs are nonpublic court documents, *see* United States v. Martinello, 556 F.2d 1215, 1216 (5th Cir. 1977), the Commission does not disclose portions of them or quote from them.

[107] United States v. Baker, 672 F. Supp. 2d 771, 772 (E.D. Tex. 2009).

adult male holds an inanimate object, which appears to be a dildo, in her mouth. The youngest children depicted in the images are approximately age four."[108]

- "One example, among many, was a video file depicting a nude minor female being anally raped by a nude adult male while a nude adult female holds the minor female in place."[109]

- "An examination of these files revealed that several depicted adult males penetrating and otherwise sexually abusing prepubescent children, some of whom were bound with rope and tape."[110]

- "Five of the photographs depicted intercourse between adult men and girls ranging from five to twelve years old, digital penetration of a young girl, and two young girls masturbating each other. Two other photographs depicted an adult man with a child who appeared to be no more than three years old and a nude man with a young female whose genitalia was exposed."[111]

- "The images of the infant showed her bound at the hands and feet by restraints, being anally penetrated by the penis of an adult male, and her face covered with what appeared to be ejaculate fluid."[112]

- "Seventeen images depicted sexual intercourse between adults and infants and twenty-two images depicted violent sexual assaults on children involving rope restraints, rope gagging, dog collars, and vaginal and anal intercourse between children and adults . . . At least one of the videos . . . portrayed images of a prepubescent minor who was bound and tied with ropes to ceiling beams and tables while being sexually assaulted."[113]

- "The webcam videos depict images such as a six or seven year old girl performing oral sex on an adult male; and vaginal penetration of a female (approximately age eight) by an adult male. The videos also depict digital penetration of females under the age of 12, by adult males."[114]

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[108] United States v. Beckham, No. H-05-484, 2009 WL 2615817, at *7 (S.D. Tex. Aug. 24, 2009).

[109] United States v. Miller, 665 F.3d 114, 117 (5th Cir. 2011) (internal quotations omitted).

[110] United States v. Maurer, 639 F.3d 72, 75 (3d Cir. 2011).

[111] United States v. Edens, 380 Fed. App'x 880, 882 (11th Cir. 2010).

[112] United States v. Baker, 672 F. Supp. 2d 771, 772-73 (E.D. Tex. 2009).

[113] United States v. Regan, 627 F.3d 1348, 1350-51 (10th Cir. 2010).

[114] United States v. Webb, 785 F. Supp. 2d 790, 793 (D. N.D. 2011).

- "One of the videos contained an adult male forcing a female minor, who appears to be crying, to perform oral sex on him."[115]

- "[A]n image of a nude prepubescent female lying on her back with her legs being spread apart by a nude adult male while being vaginally penetrated by the adult male's erect penis."[116]

D. CHILD PORNOGRAPHY "COMMUNITY" BEHAVIOR

This section explains the role of socialization in child pornography communities, their structures, the way communities can contribute to an offender's development of deviant sexual beliefs, and the contribution these communities can make to the child pornography "market." Internet forums allow child pornography offenders to connect with one another, commiserate about their marginalized status in society, and validate and normalize their sexual interest in children.[117]

1. Child Pornography Communities and Socialization

Child pornography communities are varied. Some exist primarily as a means to find trading partners, while others are dedicated to furthering sexual interest in children.[118] Offenders' engagement in child pornography communities also varies from casual users of a forum to those who establish trading forums and invite others to join to users who spend hours encouraging other individuals to produce new images.[119] Not all child pornography offenders are engaged in online communities. In particular, offenders who receive and distribute child pornography images via "open" P2P file-sharing networks may not communicate directly with

[115] United States v. McElheney, 630 F. Supp. 2d 886, 896 (E.D. Tenn. 2009).

[116] United States v. Richardson, No. 4:11CR3116, 2012 WL 10382, at *2 (D. Neb. Jan. 3, 2012).

[117] *See* Thomas J. Holt, Kristie R. Blevins & Natasha Burkert, *Considering the Pedophile Subculture Online*, 22 SEXUAL ABUSE 3 (2010); Amir Rosenmann and Marilyn P. Safir, *Forced online: Push Factors of Internet Sexuality: A Preliminary Study of Online Paraphilic Empowerment*, 51 J. OF HOMOSEXUALITY 71 (2006); s*ee also infra* at 93–99 (discussing child pornography communities).

[118] *Compare* Elaine O'Halloran & Ethel Quayle, *A Content Analysis of a "Boy Love" Support Forum: Revisiting Durkin and Bryant*, 16 J. SEXUAL AGGRESSION 71 (2010) (analyzing an online pro-pedophilic support group) *with* Francis Fortin, Panel Presentation at the Third Annual Illicit Networks Workshop (Oct. 3, 2011), *Usenet Newsgroups, Child Pornography & the Role of Participants*, THE INT'L CTR. FOR COMP. CRIMINOLOGY at 8–11, http://www.erdr.org/textes/fortin.pdf (analyzing three communities where images were made available).

[119] Fortin, *supra* note 118, at 5–11 (finding that fewer than 25% of child pornography group members were responsible for posting all images).

other offenders.[120] Nevertheless, online access to child pornography can contribute to development of distorted beliefs about children as sexual partners.[121]

Child pornography offenders' involvement in child pornography communities can be classified based on "the different socialization aspects of the activity."[122] The lowest level of such "socialization" involves an offender "acting alone to receive, collect, and share material on-line."[123] Such activity is typically done through the use of commercial websites offering child pornography for a fee or through anonymous, open P2P technologies discussed in Chapter 3.[124] Offenders who purchase images from commercial websites may have to reveal their identities and thus risk detection. An offender who does may not be involved in a trading community and "may even be an entry-level offender."[125] Similarly, open P2P file-sharing does not require much technological sophistication. More sophisticated offenders may remain in the comparatively safer confines of newsgroups or chat channels.[126]

"As the offender increases their desire for more specific material, they [often] begin to reach out and contact other individuals"[127] in "web-based forums" of individuals "who share the same interest."[128] They typically use interactive technologies such as Gigatribe, Instant Messaging, Newsgroups, email, social networking sites, and Internet-related chat rooms that

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[120] As discussed previously, offenders are utilizing a variety of technologies to download and distribute images. This may occur via email, instant messaging, Internet relay chat (IRC), F-Serve, a closed group Bulletin Board System (BBS), newsgroup, or a closed group P2P server such as Gigatribe. *See* Chapter 3 at 43–60 (discussing offenders' use of technology).

[121] Ó Ciardha, *supra* note 32, at 494–500; Holt et al., *supra* note 117, at 4; D'Ovidio et al., *supra* note 8, at 428; Quayle & Taylor, *Paedophiles, supra* note 25, at 866–68.

[122] Fottrell Testimony, *supra* note 23, at 23.

[123] *Id.* at 23–24.

[124] *Id.* at 26; *see also* United States v. Darway, 255 F. App'x 68, 71 n.4 (6th Cir. 2007) ("[F]ile sharing software like Limewire [sic] is designed with the express purpose of passive distribution."); *cf.* United States v. Shaffer, 472 F.3d 1219, 1223–24 (10th Cir. 2007) (analogizing open P2P file-sharing programs like LimeWire to a "self-service gas station" at which the owner impersonally distributes gasoline).

[125] NATIONAL STRATEGY, *supra* note 26, at 28 (contrasting pay websites, which often recycle old images, with private trading groups that "have more extreme and new material and membership in some of these groups is strictly vetted by the offenders operating the groups").

[126] *Id.*; *see also* UNITED STATES GENERAL ACCOUNTING OFFICE, FILE-SHARING PROGRAMS: PEER-TO-PEER NETWORKS PROVIDE READY ACCESS TO CHILD PORNOGRAPHY 2 (2003) ("Child pornography is easily accessed and downloaded from peer-to-peer networks"). One very sophisticated child pornography ring "utilized a maze of rotating newsgroups and parallel newsgroup postings not only to communicate with one another but also to hide their communications from outsiders." United States v. McGarity, 669 F.3d 1218, 1230 (11th Cir. 2012).

[127] Fottrell Testimony, *supra* note 23, at 24; *see also* Testimony of Gerald R. Grant, Digital Forensics Investigator, Office of the Federal Public Defender, Western District of New York, to the Commission, Tr. at 34–44 (Feb. 15, 2012) ("Grant Testimony"); Testimony of Brian Levine, Ph.D., Professor of Computer Science, University of Massachusetts, Amherst, to the Commission, at 50–54 (Feb. 15, 2012) ("Levine Testimony").

[128] Fottrell Testimony, *supra* note 23, at 24; *see also* Grant Testimony, *supra* note 127, at 34–44; Levine Testimony, *supra* note 127, Tr. at 50–54.

"allow direct communication and trading of images or videos" with "like-minded peers."[129] Such "on-line communities" dedicated to child pornography "validate [offenders'] behavior" and "provide encouragement" to continue offending.[130] As discussed further in the following section, child pornography communities are often hierarchical and provide opportunity to develop distorted attitudes towards children.[131]

While the culpability of child pornography offenders may vary depending on the extent of their immersion in an online community of offenders and their utilization of sophisticated technology to access and distribute child pornography, "there is no evidence that . . . dangerousness is necessarily correlated with technical savvy."[132] Existing social science research is inconclusive regarding whether a child pornography offender's community involvement is associated with an increased risk of committing other sex offenses.[133] As such, assumptions that an offender has engaged in other sex offenses should not be based merely on an offender's technological savvy or his involvement in child pornography communities. However, as noted elsewhere in this chapter, the existence of such communities increases the likelihood that *other* community members may engage in sex offending to create new child pornography images for trading online.[134]

2. *Structure of Child Pornography Communities*

Online communities are often very organized. They facilitate the trading of images and the transmission of information and messages. They also provide a means to screen prospective trading partners and to include and exclude other individuals.[135] Online communities often show

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[129] Fottrell Testimony, *supra* note 23, at 24; *see also* Grant Testimony, *supra* note 127, at 34–44; Levine Testimony, *supra* note 127, at 50–54.

[130] Fottrell Testimony, *supra* note 23, at 24.

[131] *Id.* at 28.

[132] Robert J. Walls et al., *Effective Digital Forensics is Investigator -Centric*, In Proc. USENIX Workshop on Hot Topics in Security (HotSec), at 5 (2011); *see also* Austin F. Lee et al., *Predicting Hands-On Child Sexual Offenses Among Possessors of Internet Child Pornography*, 18 PSYCH., PUBLIC POL'Y & L. 644 (2012); Supplemental Statement of Dr. Michael Seto, Ph.D, Director of Forensic Rehabilitation Research, Royal Ottowa Health Care Group, to the Commission, at 1–2 (Apr. 25, 2012) ("Seto Supplemental Statement").

[133] *Compare, e.g.*, Seto Supplemental Statement, *supra* note 132, at 1–2 ("There is no evidence that child pornography offenders who communicate online with other child pornography offenders are more dangerous in the sense of being more likely to sexually reoffend."), *with* McCarthy, *supra* note 5, at 190 (study of 110 child pornography offenders, which found that offenders with a history of committing sexual contact offenses were more likely to have communicated with others about child pornography than child pornography offenders with no such histories of contact offenses).

[134] *See infra* at 96 (discussing the involvement of community members in encouraging other individuals to produce new images).

[135] Bryce G. Westlake, Martin Bouchard, & Richard Frank, *Finding Key Players in Online Child Exploitation Networks*, 3 POLICY & INTERNET 2, Art. 6, at 4 (2011). A screening process may be informal or it may be a formal process such as one used by sophisticated group which required new users to complete "certain tests designed to weed out potential law enforcement infiltrators." United States v. McGarity, 669 F.3d 1218, 1230 (11th Cir. 2012). Some Internet pedophlic communities are public and do not require membership, these may serve as pathways for "[t]hose who are just recognizing their attraction to children . . . ." Holt et al., *supra* note 117, at 5.

a standard group dynamic. Offenders gain status and expertise vis-á-vis other community members by amassing large organized collections, distributing missing parts of image series, posting new images, and educating other members about technology.[136]

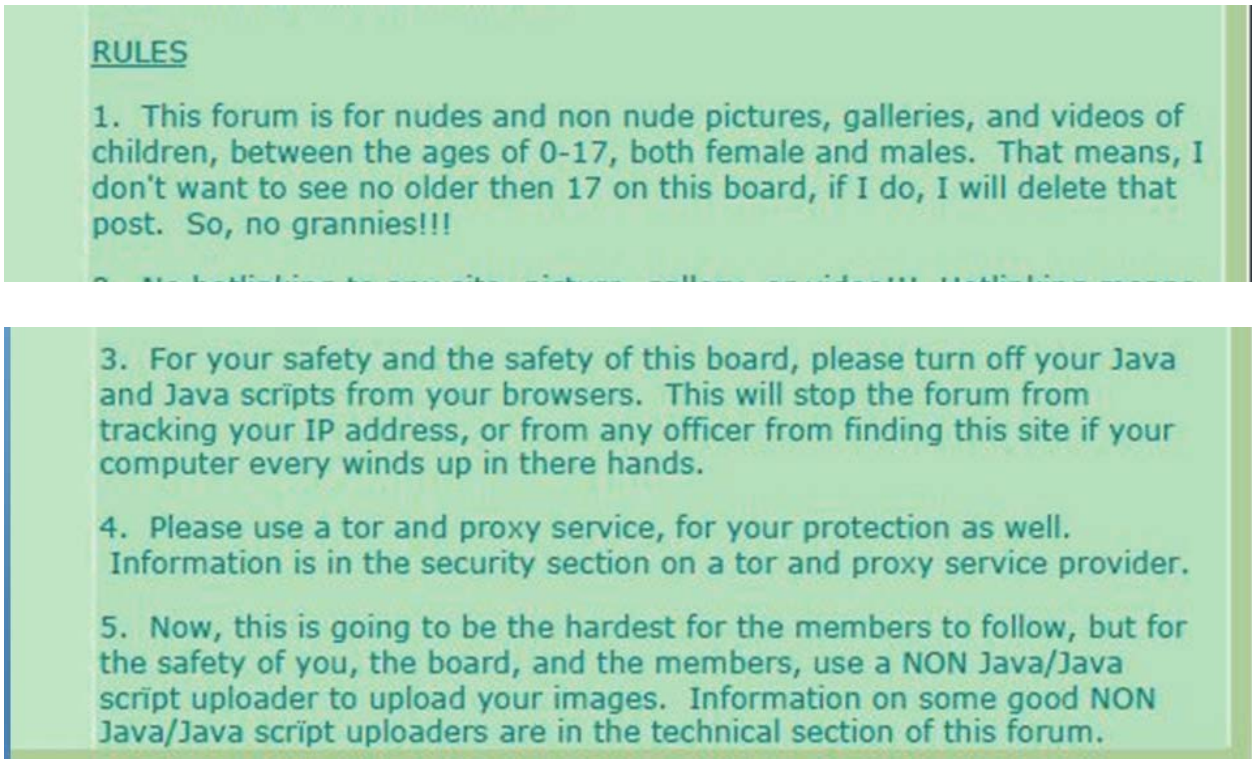
Some closed private groups are vetted and password-protected. Participants in such groups, who must actively seek access and acceptance and who "often dedicate significant amounts of time to a particular group to maintain membership," are considered by many in law enforcement to be the most secretive, dedicated, and sophisticated offenders on the Internet.[137] This is often because "some private trading groups have more extreme and new material and membership in some of these groups is strictly vetted by the offenders operating the groups."[138] For example, as seen below in Figure 4-7, adapted from a presentation by a Department of Justice technology expert to the Commission, some child pornography groups have explicit rules about content and demand that its members use security precautions.

[136] TAYLOR & QUAYLE, *supra* note 41, at 128–135; Holt et al., *supra* note 117, at 15–22 (noting that communication about security is frequent in pro-pedophilic communities); JENKINS, *supra* note 47, at 94; *see also* Fottrell Testimony, *supra* note 23, at 24–25 (discussing how more experienced community members teach newer members about technology).

[137] *See* NATIONAL STRATEGY, *supra* note 26, at 28

[138] *Id.* at 28, 9 (describing global online communities in which members, "[r]ather than simply downloading or uploading images of child pornography to and from the Internet, . . . also use current technologies to talk about their sexual interest in children, to trade comments about the abuse depicted in particular images — even as images are shared real-time — to validate each other's behavior, to share experiences, and share images of themselves abusing children as they do so"); *see also* YAMAN AKDENIZ, INTERNET CHILD PORNOGRAPHY AND THE LAW: NATIONAL AND INTERNATIONAL RESPONSES 7("[T]he major problem for the future is the availability of channels devoted to child pornography within the Internet Relay Chat, ICQ environment and on peer to peer (P2P) file sharing systems like Kazaa, and eDonkey.").

Figure 4-7[139]
DOJ Presentation: Screenshot of Rules of Child Pornography Community



RULES

1. This forum is for nudes and non nude pictures, galleries, and videos of children, between the ages of 0-17, both female and males. That means, I don't want to see no older then 17 on this board, if I do, I will delete that post. So, no grannies!!!

3. For your safety and the safety of this board, please turn off your Java and Java scripts from your browsers. This will stop the forum from tracking your IP address, or from any officer from finding this site if your computer every winds up in there hands.

4. Please use a tor and proxy service, for your protection as well. Information is in the security section on a tor and proxy service provider.

5. Now, this is going to be the hardest for the members to follow, but for the safety of you, the board, and the members, use a NON Java/Java script uploader to upload your images. Information on some good NON Java/Java script uploaders are in the technical section of this forum.

In addition to technological sophistication, child pornography communities value the production of new child pornography images. There is evidence that at least some child pornography offenders produce new child pornography in order to gain access to other child pornography images. One child pornography offender stated that individuals in his child pornography trading community "were reluctant to give me access to any of that material unless I could come up with any new material . . . it was then that I thought about . . . involving my daughter."[140] One examination of three child pornography communities found a clearly defined hierarchy with producers, posters of new materials, and prolific re-posters at the top of the pyramid.[141]

[139] Fottrell Presentation, *supra* note 53.

[140] TAYLOR & QUAYLE, *supra* note 41, at 161; *see also* Testimony of Francey Hakes, National Coordinator Child Exploitation Prevention & Interdiction, to the Commission, at 382–84 (Feb.15, 2012) (on behalf of the U.S. Department of Justice) (recounting the case of an offender who was moved to produce increasingly violent child pornography images of a child in his control in order to have new images to trade).

[141] Fortin, *supra* note 118, at 6. The study also found that a small number of users were responsible for most posting of images and most community members were "leechers" and failed to post images, provide technological information, or even actively participate in community discussions. *Id.*

3. *Child Pornography Communities and Deviant Beliefs*

Child pornography communities seek to make the viewing of sexualized images of children acceptable and implicitly or explicitly condone sexual contact with children.[142] Typical cognitive distortions include denying that children suffer harm from sexual contact, suggesting that children receive a benefit, condemning those who condemn, and "appealing to higher loyalties," for example, by likening the struggle for pedophile acceptance to a socially acceptable cause such as the advancement of civil rights.[143]

Child pornography communities can be social and supportive environments.[144] In these communities, a child pornography offender can develop relationships with others who share his interests. One child pornography offender posted on a child pornography community bulletin board, "[f]or many of us, this is our social life. We can discuss our feelings here and feel a part of something without fear of being condemned by society for our feelings and beliefs."[145] Relationships in child pornography communities can be emotionally gratifying and may escalate the level of offending.[146] Offenders receive reinforcement and support by finding that others are trading images depicting sexual activity with children.[147] Research also suggests that online communities help child pornography offenders to develop positive feelings about their own deviant online sexual identities. As their online sexual identities become dominant, willingness to comply with cultural and societal norms may erode.[148] This process may explain why some

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[142] TAYLOR & QUAYLE, *supra* note 41, at 107, 130–36; Dennis Howitt & Kerry Sheldon, *The Role of Cognitive Distortions in Paedophilic Offending: Internet and Contact Offenders Compared*, 13 PSYCHOL., CRIME & LAW 469, 478 (2007) (Internet offenders were significantly more likely to hold distorted views about sexual interest in children than non-Internet contact child sex offenders); Ó Ciardha, *supra* note 33, at 494–500.

[143] O'Halloran & Quayle, *supra* note 118, at 79; *see also* Holt et al., *supra* note 117, at 8; D'Ovidio et al., *supra* note 8, at 428. One child pornography support forum user posted "[n]ot all these children are 'abused'. . . many of them enjoyed or at least WANTED to participate in child porn." O'Halloran & Quayle, *supra* note 118, at 78 (quoting a child pornography offender) (emphasis in original). Other offenders argue that pedophilia is very common and normal; for example, one offender stated "society will soon realize that there are too many of 'us' for them to keep trying to suppress . . . We are everywhere." JENKINS, *supra* note 47, at 119.

[144] *See, e.g.*, Quayle, *The Impact of Viewing*, *supra* note 57. One child pornography offender opined that he felt alone and was reassured "you are not alone. We share your emotions. We are into kids, that's why we are here." JENKINS, *supra* note 47, at 106. Another child pornography support forum user posted, "I will gladly share any information, and to help anyone who might need it and at the same time, learn from others." O'Halloran & Quayle, *supra* note 118, at 80.

[145] Fortin, *supra* note 118, at 5; *see also* CHILD PORNOGRAPHY, *supra* note 41, at 139 (quoting a child pornography offender who said "almost I got more satisfaction from actually just interacting with my . . . fellow paedophiles and just finding new computer stuff . . . [than] I did actually looking at the pictures"); *see also* Holt et al., *supra* note 117, at 10 (quoting a pedophilic forum users as stating "I am sooo glad I came across this board. I want to talk about so many things with others like me but I have never known anyone else like me . . .").

[146] *See* TAYLOR & QUAYLE, *supra* note 41, at 180 (quoting a child pornography offender who stated "I was finding more explicit stuff on the computer . . . and thinking . . . it can't be that bad . . . it's there you know").

[147] Quayle, *The Impact of Viewing*, *supra* note 57, at 33 (discussing the "normalizing" effect that communities may have on offenders).

[148] Rosenmann & Safir, *supra* note 117, at 78–79; Anne Burke et al., *Child Pornography and the Internet: Policing and Treatment Issues*, 9 PSYCH, PSYCHOL. & L. 79, 81 (2002).

researchers have found that some offenders progress from viewing child pornography to committing other sex offenses.[149] Other researchers, however, caution that inappropriate attitudes and beliefs have not been investigated sufficiently among child molesters to draw firm conclusions about the pathway from online child pornography offending to other sex offending.[150]

4. *Child Pornography Communities and the Child Pornography "Market"*

In recent decades, criminal punishments for the production, distribution, receipt, and possession of child pornography in part have been based on the belief that such punishments will help "destroy" (or at least significantly reduce) the "market" for child pornography.[151] Critics have contended that recent changes in Internet technology have undercut the ability of the criminal laws to affect the "market."[152]

To date, social science research has not addressed whether, or to what extent, criminal punishments have affected the commercial or non-commercial "markets" in child pornography since the advent of the Internet and P2P file-sharing. In view of the exponential growth in child pornography in recent years and the worldwide scope of offending, such research may be impossible to undertake.

The Commission's analysis of fiscal year 2010 federal child pornography cases, which is discussed in Chapter 6, reveals that the typical §2G2.2 offender received and/or distributed child pornography using a P2P file-sharing program and not for financial gain.[153] Most offenders used open P2P file-sharing programs that did not require the offenders to trade images in order to receive new images or videos from another.[154] Approximately one quarter of federal offenders

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[149] Kimberly Young, *Profiling Online Sex Offenders, Cyber-Predators & Pedophiles*, 5 J. BEHAV. PROFILING 1, 12–13 (2005); TAYLOR & QUAYLE, *supra* note 41, at 186–87; Burke et al., *supra* note 148, at 79, 81 (noting that it is uncertain that child pornography offenders "will progress towards hands-on offences" but "the longer sexual fantasies are maintained and elaborated on, the greater the chance that the behaviour will be acted out in real life").

[150] *See e.g.,* Calder, *supra* note 17, at 2; Ward & Siegert, *supra* note 17, at 328.

[151] Osborne v. Ohio, 495 U.S. 103, 109 (1990) (noting the state's interest in seeking "to destroy a market for the exploitative use of children"); *id.* at 110–11 ("[M]uch of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, [the] [s]tates have found it necessary to proscribe the possession of this material."); *see also* NATIONAL STRATEGY, *supra* note 26, at 17–18 ("This growing and thriving market for child pornographic images is responsible for fresh child sexual abuse because the high demand for child pornography drives some individuals to sexually abuse children and some to commit the abuse for profit or status [on an on-line community].").

[152] *See, e.g.*, Prepared Statement of Deirdre D. von Dornum, Assistant Federal Defender, Federal Defenders of New York, to the Commission, at 47–48 (Feb. 15, 2012) (on behalf of the Federal and Community Defenders) ("Child pornography thrives in cyberspace independent of an organized marketplace. . . . Because child pornography is free, widely available and easy to produce, it is not subject to the normal laws of supply and demand. . . . . For this reason, it is unlikely that harsh punishment of an end user will do anything to destroy the market for child pornography.").

[153] *See* Chapter 6 at 153–54.

[154] *See id.*; *see also supra* note 124 and accompanying text (discussing "impersonal" P2P programs such as LimeWire).

received child pornography from commercial websites, thereby fostering the commercial market; however, no federal offenders prosecuted for distributing child pornography in fiscal year 2010 did so by operating a commercial website.[155]

The clearest example of a child pornography market appears to exist online where individuals trade with one another in a non-commercial manner in child pornography communities. In fiscal year 2010, the non-commercial child pornography market appeared most active in the approximately 25 percent of cases in which offenders engaged in "personal" distribution to another individual. These offenders engaged in behaviors including bartering images in Internet chat-rooms, trading via closed P2P programs such as Gigatribe, and participating in hierarchical child pornography communities.[156]

E. RELATIONSHIP BETWEEN CHILD PORNOGRAPHY OFFENDING AND OTHER SEX OFFENDING

This section describes social science research that has attempted to distinguish child pornography offenders who also have engaged in other sex offending from those child pornography offenders who have not.[157] While "little is known about which [child pornography]

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[155] *See* Chapter 6 at 149.

[156] *See id.* The minority of offenders who use commercial websites may be shrinking. *See id.* (finding that 38.5% of offenders used commercial websites in fiscal year 2010 compared to 17.5% in the first quarter of fiscal year 2012).

[157] *See, e.g.*, Richard Wollert et al., *Federal Internet Child Pornography Offenders – Limited Offense Histories and Low Recidivism Rates*, *in* THE SEX OFFENDER: CURRENT TRENDS IN POLICY & TREATMENT PRACTICE Vol. VII (Barbara K. Schwartz, ed. 2012) (based on a study of 72 federal child pornography offenders in the United States who were treated by the authors during the past decade, the authors found that 20, or 28%, had prior convictions for a contact or non-contact sexual offense); Wolak et al., *Child Pornography Possessors: Trends, supra* note 67, at 34 (finding, based on 2006 data from surveys of approximately 5,000 law enforcement officials throughout the United States, that 21% of cases that began with investigations of child pornography possession "detected offenders who had either committed concurrent sexual abuse [offenses] or been arrested in the past for such crimes"); Michael C. Seto, R. Karl Hanson & Kelly M. Babchishin, *Contact Sex Offending by Men With Online Sexual Offenses*, 23 SEXUAL ABUSE 124, 124, 135–136 (2011) (meta-analysis of 24 international studies, which found that approximately one in eight "online offenders" — the majority of whom were child pornography offenders — had an "officially known contact sex offense history," but estimating that a much higher percentage, approximately one in two, in fact had committed prior contact sexual offenses based on clinical "self-report" data); Michael L. Bourke & Andres E. Hernandez, *The "Butner Study" Redux: A Report on the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183 (2009) (study of 155 federal child pornography offenders in the United States who participated in the residential sex offender treatment program at FCI Butner from 2002–05; finding that 85% had committed prior "hands on" sex offenses); Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending,* 9 BMC PSYCHIATRY 43 (2009) (study of 231 Swiss child pornography offenders; finding that only 1.0% had prior convictions for "hands-on" sex offenses and an additional 3.5% had prior convictions for possession of child pornography); Caroline Sullivan, *Internet Traders of Child Pornography: Profiling Research – Update* (New Zealand Dep't of Internal Affairs 2009) (finding that approximately 10% of 318 New Zealand child pornography offenders prosecuted from 1993–2007 "have been found to have criminal histories involving a sexual offence against a male or female under the age of 16 years"), http://www.dia.govt.nz/pubforms.nsf/URL/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf/$file/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf .

possessors are most likely to be abusers,"[158] the association between sex offending and child pornography offenses is important.

The Commission undertook a special coding project to determine what percentage of child pornography offenders sentenced under the non-production guidelines also previously committed other sex offenses.[159] The Commission looked for incidents of criminal sexually dangerous behavior ("CSDB") in such offenders' presentence reports. As defined by the Commission, for purposes of this report, CSDB comprises three different types of criminal sexual conduct:

- **"Contact" Sex Offenses:** any illegal sexually abusive, exploitative, or predatory conduct involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender's commission of a non-production child pornography offense;

- **"Non-Contact" Sex Offenses:** any illegal sexually abusive, exploitative, or predatory conduct not involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender's commission of a non-production child pornography offense; and

- **Prior Non-Production Child Pornography Offenses:** a non-production child pornography offender's prior commission of a non-production child pornography offense if the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender.

The results of the Commission's CSDB research are discussed in Chapter 7.[160]

1. *Distinguishing Child Pornography Offenders Who Have Committed Other Sex Offenses*

Other researchers have focused on distinguishing child pornography offenders who also have committed other sex offenses from those child pornography offenders who have not done so. The limited research suggests there may be differences between child pornography offenders who engaged in other sex offenses and those who have solely engaged in child pornography collecting and trading activities. Studies identify "two major dimensions of risk — sexual

[158] Wolak et al., *Child Pornography Possessors: Trends, supra* note 67, at 24.

[159] *See* Chapter 7 at 169-82.

[160] *See id.* at 182-206.

deviance and antisociality" that are associated with the subset of child pornography offenders who also commit sexual contact offenses.[161]

One study of a relatively small number of child pornography offenders compared offenders who had no known history of contact sex offending with offenders who were known to have committed contact sex offenses against children.[162] The study found that there were no statistical differences between the two groups in personal characteristics such as age, race, marital status, educational background, or history of themselves being victims of abuse.[163]

There were statistically significant differences in a variety of other characteristics, however. The child pornography offenders who had a known history of contact sex offending were more likely to have a criminal history including a sex offense, have a history of drug abuse, and to be diagnosed as a pedophile.[164] The study found that child pornography offenders who also committed contact child sex offenses were more likely to use child pornography for purposes of masturbation, save child pornography images to multiple devices, maintain larger collections of child pornography on average, and communicate with other child pornography offenders.[165] The study also found that child pornography offenders who also committed contact child sex offenses were more likely to view child "modeling" sites (which may not constitute child pornography), read sexually explicit stories about children, and engage in grooming behavior with minors (or law enforcement officers posing as minors).[166]

Another study examined three categories of offenders: child pornography offenders without a known history of contact child sex offending (child pornography-only offenders), contact child sex offenders who had no known history of child pornography offending (contact sex offenders), and child pornography offenders who were known to have committed contact child sex offenses (child pornography/contact offenders).[167] The demographic characteristics of the categories did not vary by age but varied by racial and ethnic breakdown, with the contact child sex offender group showing more racial and ethnic diversity.[168] The child pornography-

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[161] Angela W. Eke & Michael C. Seto, *Risk Assessment of Child Pornography Offenders*, at 156, 160, *in* INTERNET CHILD PORNOGRAPHY: UNDERSTANDING AND PREVENTING ON-LINE CHILD ABUSE (K. Ribisl & E. Quayle eds., 2012).

[162] McCarthy, *supra* note 5, at 181 (examining 110 offenders; 56 had no known history of contact sex offending and 54 had such a known history).

[163] *Id.* at 188.

[164] *Id.*

[165] *Id.* at 188–91 (noting that half the non-contact offenders had a child pornography collection that was 252 images or fewer, while half the contact offenders had a child pornography collection that was 750 images or higher) *but compare* Chapter 7 at 169 (Commission's coding project did not find a relationship between size of collection and incidence of CSDB).

[166] McCarthy, *supra* note 5, at 190.

[167] Lee et al., *supra* note 132, at 647.

[168] *Id*. at 648. Most offenders in all groups were Caucasian. 93% of child-pornography only offenders were Caucasian, 86% of child pornography/contact offenders were Caucasian, and 79% of contact sex offenders were Caucasian. *Id.*

only offender group had more education and a higher rate of employment than the other two categories.[169] The study found that "the key factor of the presence of a history of nonsexual antisocial behavior, from childhood into adulthood" accounted for much of the likelihood that an offender was either a contact child sex offender or a child pornography/contact offender, as opposed to a child pornography-only offender.[170]

2. *Discussion of Causal Relationship Between Child Pornography and Other Sex Offending*

Most current social science research suggests that viewing child pornography, in the absence of other risk factors, does not "cause" individuals to commit sex offenses.[171] Nevertheless, research has identified some correlation between viewing child pornography and sex offending,[172] and some child pornography offenders use child pornography images for "grooming"[173] or as a "blueprint" for contact child sex offending.[174] For some individuals child pornography exposure appears to be a risk factor for other sex offending as the child pornography may strengthen "existing tendencies in ways that may create tipping-point effects

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[169] *Id.*

[170] *Id.* at 654; *see also* Chapter 10 at 285–87 (discussing risk assessments of child pornography offenders). Antisocial behavior was measured by asking questions related to such matters as an offender's history of committing violent offenses, childhood bullying behavior, and misconduct resulting in expulsion from school. *See* Lee, *supra* note 132, at 672.

[171] *See* Lee et al., *supra* note 132, at 646 ("When predisposition is present, pornography may increase risk. Absent predisposition, exposure to pornography alone is not likely to instigate an offense"); McCarthy, *supra* note 5, at 194 ("[P]ossessing child pornography, by itself, is not a causative factor in the perpetration of child sexual abuse and thus other factors need to be considered when evaluating the dangerousness of these offenders . . ."); Endrass et al., *supra* note 157, at 43 (finding that child pornography alone is not a risk factor for committing hands-on sex offenses for most offenders); Dennis Howitt, *Pornography and the Paedophile: Is it Criminogenic?,* 68 BRITISH J. OF MED. PSYCHOL. 15 (1995) (concluding after interviews with a small sample of contact child sex offenders that pornography has no simple direct causal effect on offending; some offenders had no contact with pornography before first offense, and were as likely, or more likely, to be aroused by everyday images of children); *see also* Webb et al., *supra* note 15, at 451 (reviewing research on the links between contacting offending and viewing child pornography and concluding that "as yet, there is no empirical support for a direct causal link between Internet sex offending and the commission of contact offenses"). Nevertheless, at least some child pornography offenders report that they are moved to commit contact sexual offenses in order to access new child pornography. *See* TAYLOR & QUAYLE, *supra* note 41, at 161.

[172] *See* Chapter 7 at 171–74 (discussing such research); *see also* Wolak et al., *supra* note 67, at 31 (the Online Victimization Survey reported that over 40% of child pornography offenders in the 2000 cohort had a history of sexually abusing minors); Michael C. Seto & Angela W. Eke, *The Future of Child Pornography Offenders,* 17 SEXUAL ABUSE: A J. OF RES. AND TREATMENT 201, 201–210 (2005) (24% of a sample of arrested child pornography offenders had committed a prior contact sex offense).

[173] Grooming is a process of making a child more vulnerable to contact sex offending and "is defined as a variety of techniques used by a sex offender to access and control potential and actual child victims." Lanning, *Child Molesters*, *supra* note 48, at 26–28.

[174] Quayle & Taylor, *Child Pornography and the Internet*, *supra* note 17, at 340 (quoting an offender who stated that, when he abused his victim, "I copied what I'd seen on the computer.").

on behaviors if other risk factors are also present."[175] Some research posits that for some higher-risk child pornography offenders, child pornography permits a progression predicated on deviant fantasy from viewing child pornography to other sex offending.[176]

One study attempted to evaluate whether there was a causal relationship between viewing deviant pornography, deviant fantasy, and the commission of sex offenses. The study found that "sexually deviant fantasies are highly related to actual commission of sexual offenses" but indicated that "the causal nature of this relationship cannot be determined by our data."[177] The study noted that it was "unclear if (a) fantasies encourage the acting out of behaviors, (b) fantasies represent active reliving of previous acts, or (c) some third variable (*e.g.*, sex drive) independently generates both fantasies and behavior."[178] The study found an association between sexually deviant fantasy and sex offending where the individual had a highly antisocial personality.[179]

3. *Child Pornography as an Alternative to Other Sex Offending*

Some child pornography offenders report that they used child pornography as an alternative to other sex offending.[180] For the vast majority of offenders, it is unlikely that viewing child pornography has a cathartic effect that would reduce the likelihood of other sex offending.[181] Related research on the impact of legal pornography on young people suggests that continued exposure "helps to sustain young people's adherence to sexist and unhealthy notions

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[175] Neil M. Malamuth, & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line With the Research Evidence*, 31 N.Y.U. REV. OF L. & SOC. CHANGE 773, 817 (2007); *see also* Lee et al., *supra* note 132, at 668 (finding that "CP offenders that do sexually assault children are distinguished by a much higher degree of antisociality compared to those that refrain from such crimes"); Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*; 34 AGGRESSIVE BEHAV. 341, 349–50 (2008); *see also* D'Ovidio, *supra* note 8, at 424 (finding adult-child sex advocacy web sites to be criminogenic); Quayle & Taylor, *Child Pornography and the Internet*, *supra* note 17, at 355 (finding Internet child pornography plays a key role in increasing sexual arousal to children).

[176] Burke et al., *supra* note 148, at 81; *see also* Young, *supra* note 149, at 12–13; TAYLOR & QUAYLE, *supra* note 41, at 186–87.

[177] Kevin M. Williams et al., *Inferring Sexually Deviant Behavior From Corresponding Fantasies: The Role of Personality and Pornography Consumption*, 36 CRIM. JUSTICE & BEHAV. 198, 206 (2009) (internal citation omitted).

[178] *Id.* at 206 (2009).

[179] *Id.* at 213 (noting that psychopathy as part of an antisocial personality may predispose individuals to a variety of antisocial outcomes).

[180] TAYLOR & QUAYLE, *supra* note 41, at 91 (quoting an offender who had committed contact sex offenses previously as stating that he used child pornography "rather than go off and offend again . . . rather than go out and find a victim"); Winder & Gough, *supra* note 22, at 134 (quoting an offender who had committed contact sex offenses in the past as distinguishing "just looking" from contact offending).

[181] SETO, *supra* note 10, at 68; *see also* Malamuth & Huppin, *supra* note 175, at 818 ("Although many people find this theory intuitively appealing and . . . potentially applicable for some pedophiles, in other areas of media research where this hypothesis has been extensively tested, it has not been supported.").

of sex and relationships" and, rather than have a cathartic effect, pornography may increase sexually aggressive thoughts and behaviors.[182]

Another study indicated that offenders who considered their use of child pornography therapeutic or preventative were more unlikely to accept responsible for their actions.[183] Finally, some research reports that, for offenders who were already assessed as low risk for future sexual offending, frequency of pornography use does not appear to predict criminal recidivism.[184] However, for offenders at high risk for sexual offending, such research indicates that frequency of pornography use and deviant pornographic content (with children and/or violent content) is associated with higher reoffending rates.[185]

C. CONCLUSION

- Child pornography offending, pedophilia, and other sex offending are related and overlapping classifications, but not all child pornography offenders are pedophiles or engage in other sex offending.

- Child pornography offender behavior can be broadly classified into three categories: collecting child pornography images, participating in online "communities" of offenders, and engaging in other sex offending.

- Child pornography offenders often amass large collections with thousands or even hundreds of thousands of images and videos. Offenders' collections may contain a variety of images, including legal but sexually suggestive child images as well as sexually explicit images depicting violence, humiliation, bondage, and bestiality. Some child pornography offenders, particularly pedophilic offenders, collect ancillary child-related items. Such collecting activities may be related to sexual deviance and correlated with other sex offending.

- Most child pornography offenders have some degree of sexual interest in children, but some offenders are partially or completely motivated by other sexual and non-sexual reasons.

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[182] Michael Flood, *The Harms of Pornography Exposure Among Children and Young People*, 18 CHILD ABUSE REV. 384, 384, 392 (2009) (noting that men who are heavy users of violent pornography are more likely than others to report that they would sexually assault or harass a woman if they knew they could get away with it and they are more likely to actually commit acts of sexual coercion and aggression).

[183] TAYLOR & QUAYLE, *supra* note 41, at 81, 91.

[184] Kingston et al., *supra* note 175, at 346–347

[185] *Id.* at 350 (noting that "pornography exposure was a significant predictor of aggression when examined in confluence with other risk factors"); Lee, *supra* note 132, at 646 ("When predisposition is present, pornography may increase risk. Absent predisposition, exposure to pornography alone is not likely to instigate an offense"). It appears that "[m]en who are relatively high in risk for sexual aggression are more likely to be attracted to and aroused by sexually violent media and may be more likely to be influenced by them." Neil Malamuth, Tamara Addison, & Mary Koss, *Pornography & Sexual Aggression: Are There Reliable Effects and Can We Understand Them?*, 11 ANNUAL REV. OF SEX RES. 26, 55 (2000).

- Offenders engage in a variety of collecting behaviors, some of which may relate to compulsive collecting rather than sexual interest. Many child pornography offenders expend considerable efforts to organize their collections. It appears that offenders who engage in more extensive trading are more likely to have particularly organized collections.

- Social science research establishes that child pornography images feature minor victims of all ages and depict many types of sexual conduct. Images of female victims are more commonly circulated than images of male victims.

- The Commission has reviewed over 2,600 PSRs in non-production child pornography cases in preparation for this report, and finds that the depiction of oral, vaginal, or anal penetration of prepubescent children is present in the overwhelming majority of PSRs that were reviewed. Sexual acts involving infants or toddlers, while not in a majority of PSRs, were depicted in a substantial minority.

- Purchasing child pornography through a commercial website (without use of identity-cloaking technology) is a behavior that is higher-risk for detection. Such offenders may be entry-level offenders.

- Some offenders are engaged in child pornography or pedophilic "communities." Communities are varied. Some exist primarily as a means to find child pornography trading partners, while others are also dedicated to supporting sexual interest in children by buttressing deviant sexual beliefs or encouraging the commission of other sex offending. Child pornography communities make viewing of sexualized images of children acceptable and implicitly or explicitly condone sexual offenses against children.

- Child pornography communities can be social and supportive environments and can foster relationships among offenders. These relationships appear to support development of deviant sexual beliefs concerning children and validate and normalize child sexual exploitation.

- Child pornography communities often are hierarchical communities that value those with technological sophistication and those who are able to provide new images. Evidence suggests that at least some individuals begin producing child pornography in order to gain access to additional child pornography.

- Social science research is inconclusive regarding whether child pornography offenders' involvement with such communities is a risk factor for the commission of contact sex offenses against children.

- Research has identified some correlation between viewing child pornography and other sex offending, but most current social science research suggests that viewing child pornography alone does not "cause" individuals to commit other

sex offenses absent other risk factors. Research suggests that deviant sexual beliefs and antisociality are the two primary risk factors for other sex offending.

- It is unlikely that viewing child pornography has a cathartic effect that would reduce the likelihood of other sex offending against children. In addition, offenders who considered their use of child pornography therapeutic or preventative were less likely to hold themselves responsible for their actions.

Chapter 5

VICTIMS OF CHILD PORNOGRAPHY

This chapter presents information on victims of child pornography. It is unknown how many victims of child pornography exist worldwide. The National Center for Missing and Exploited Children ("NCMEC") has reviewed over 57 million images and videos of child pornography (many of them duplicates) and has assisted law enforcement in the identification over 4,103 individual victims.[1] The number of identified victims represents only a small portion of the victims whose images are in circulation. It is estimated that there are over five million unique child pornography images on the Internet[2] and some offenders possess over one million images of child pornography.[3] This chapter considers the issues and harms surrounding victimization through the production of child pornography and the continued existence and distribution of child pornography. It also addresses the legal issues surrounding victims' rights for child pornography victims.

A. VICTIMIZATION THROUGH PRODUCTION

Child pornography victims have usually been the victims of contact child sex abuse.[4] Like other victims of child sex abuse, child pornography victims can suffer physical harms

[1] NCMEC was established in 1984 as a nonprofit organization working in partnership with federal law enforcement. NCMEC works to find missing children, prevent victimization, and identify exploited children. *See* http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=4327; Prepared Statement of Michelle Collins Vice President, Exploited Children Division and Assistant to the President of the National Center for Missing & Exploited Children, to the Commission, at 4 (Feb. 15, 2012) ("Collins Statement").

[2] Government of Canada, Federal Ombudsman for Victims of Crime, *Every Image Every Child: Internet Facilitated Child Sexual Abuse in Canada*, 18 (Aug. 20, 2009), http://www.victimsfirst.gc.ca/pdf/childp-pjuvenile.pdf.

[3] *See, e.g.,* Sentencing Memorandum, United States v. Burr, No. 09-cr-308 (D. Or. July 23, 2010), ECF No. 26 at 3–4 ("A forensic review of the defendant's computer and digital media storage devices have located over one million images of child pornography"); Sentencing Memorandum, United States v. Worman, 07-cr-40 (E.D. Pa. July 30, 2009), ECF No. 208 at 1 ("1.2 million images of child pornography were seized"); Peggy O'Hare, *Pilot Arrested on Child Porn Charges*, HOUS. CHRON., July 1, 2010, http://www.chron.com/disp/story.mpl/metropolitan/7089813.html ("police investigators seized what they called the largest cache of child pornography ever discovered in Harris County, amounting to 'millions of images'").

[4] *See* Chapter 9 at 263. Two primary exceptions are victims whose images were taken with hidden cameras or recorded remotely (*e.g.,* via webcam) and victims whose images were used to create morphed child pornography images. *See id.* While victims of sexual exploitation, they may not have been victims of contact sex abuse. "Morphed" child pornography is produced by manipulating images of identifiable children in conjunction with computer generated graphics or drawings. In 2007, the PROTECT Our Children Act of 2008 made it unlawful to knowingly produce with intent to distribute or to knowingly distribute morphed child pornography ("child pornography that is an adapted or modified depiction of an identifiable minor"). *See* PROTECT Our Children Act of 2008, Pub. L. 110–401, § 304 (2008); USSG App. C., Amend. 733 (Nov. 1, 2009). Morphed child pornography offenses are rarely prosecuted in federal court. *See* Chapter 6 at 146.

during the abuse, including bone fractures and sexually-transmitted diseases.[5] They may also suffer long-term physical and psychological harms.[6]

There is limited information available about the subset of child sex abuse victims who are also victims of child pornography production offenses.[7] Though children of both genders are sexually abused, females appear more likely to be victims of child pornography production offenses.[8] Children of all ages are victimized by child pornography producers, from as young as infants and toddlers to adolescents; about half of victims are younger than 12 years of age.[9] NCMEC reports that 24 percent of identified victims were pubescent, and 76 percent were prepubescent. Ten percent of the prepubescent identified victims were infants or toddlers.[10] That range of victim ages is consistent across different data pools. Child pornography producers may target young victims because they are pre-verbal and unable to report their abuse. They are also less likely to recognize inappropriate touching.[11]

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[5] IAN O'DONNELL & CLAIRE MILNER, CHILD PORNOGRAPHY CRIME, COMPUTERS & SOCIETY 77 (2007).

[6] *See, e.g.,* Holly L. Wegman & Cinnamon Stetler, *A Meta-Analytic Review of the Effects of Childhood Abuse on Medical Outcomes in Adulthood*, 71 PSYCHOSOMATIC MED. 805 (2009); O'DONNELL & MILNER, *supra* note 5, at 77; Beth E. Molnar, Stephen L. Buka, & Ronald C. Kessler, *Child Sexual Abuse and Subsequent Psychopathology: Results from the National Comorbidity Survey*, 91 AM. J. OF PUB. HEALTH 753 (2001); Bernice Andrews, Chris R. Brewin, Suzanna Rose, & Marilyn Kirk, *Predicting PTSD Symptoms in Victims of Violent Crime: The Role of Shame, Anger, and Childhood Abuse*, 109 J. OF ABNORMAL PSYCHOL. 69 (2000); Angela Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research.* 99 PSYCHOL. BULL. 66 (1986); Marvin L. Blumberg, *Depression in Abused and Neglected Children*, 35 AM. J. OF PSYCHOTHERAPY 342 (1981).

[7] Additional information regarding the child pornography victims can be found in the discussion of child pornography images. *See* Chapter 4 at 85–92.

[8] Janis Wolak, David Finkelhor, Kimberly J. Mitchell, & Lisa M. Jones, *Arrests for Child Pornography Production: Data at Two Time Points From a Nat'l Sample of U.S. Law Enforcement Agencies*, 16 CHILD MALTREATMENT 184, 188 (2011); David Finkelhor & Richard Ormrod, *Child Pornography: Patterns From NIBRS*, OFFICE OF JUVENILE JUST. & DELINQUENCY PREVENTION, JUV. JUST. BULL., NCJ 204911, at 6 (Dec. 2004) (available at https://www.ncjrs.gov/pdffiles1/ojjdp/204911.pdf).

[9] While recent research finds that most victims of child pornography production are teens, *see* Janis Wolak, David Finkelhor, & Kimberly J. Mitchell, *Trends in Arrests for Child Pornography Production: The Third Nat'l Juv. Online Victimization Study (NJOV-3)*, 3 (2012), http://www.unh.edu/ccrc/internet-crimes/papers.html (last visited Nov. 30, 2012), the same researchers agree that offenders possessed images of victims of different ages including those of children under three (28%), aged three to five (46%), aged six to 12 (86%), and older than 12 years (67%). Janis Wolak, Kimberly J. Mitchell, & David Finkelhor, *Child Pornography Possessors: Trends in Offender and Case Characteristics,* 23 SEXUAL ABUSE: A J. OF RES. & TREATMENT 22, 31 (2011). Criteria for inclusion in the N-JOV studies include an Internet-related sexual exploitation crime (possession, trafficking, distribution, or production) ending in arrest, in which a victim was under the age of 18. *Id.* at 22–23.

[10] Collins Statement, *supra* note 1, at 4–5.

[11] Max Taylor, Gemma Holland & Ethel Quayle, *Typology of Paedophile Picture Collections,* 74 THE POLICE J. 97, 106 (2001) ("Very young children (of 5 and under) may be particularly vulnerable to involvement in child pornography, in that they may be more susceptible to what for an older child would be inappropriate requests to undress, for example. Very young children have little or no awareness of the sexual context to what they are being asked to do, and may be subject to sexual victimisation without the same risk of disclosure to adults.").

Child pornography producers make victims participate through different methods. Like other contact sex offenders, they often groom their victims prior to engaging in sexual abuse.[12] While underage children are incapable of legal consent, many child pornography producers will manipulate victims to make them "agree" to participate.[13] Some offenders produce child pornography by convincing or coercing a child to take images of himself or herself. Coercion of a child to take nude images of himself or herself is production of child pornography.[14] Such images should be distinguished from self-produced nude images without an adult producer's involvement (sometimes called "sexting" or "youth-only experimental" production).[15] While sexting and youth-only experimentally produced images are serious and can lead to many negative repercussions,[16] there is little evidence that children are regularly prosecuted for such behavior.[17]

Most identified victims of child pornography production offenses are abused by a family member or acquaintance.[18] Depending on the age of the child and the relationship of the abuser

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[12] Wolak et al., *Arrests for Child Pornography Production, supra* note 8, at 190; *see* Kenneth V. Lanning, *Child Molesters: A Behavioral Analysis*, for NCMEC, at 10 (2001), http://www.missingkids.com/en_US/publications/NC70.pdf.

[13] *See* Deborah Muir, *Violence against Children in Cyberspace: A Contribution to the UN Study on Violence Against Children,* END CHILD PROSTITUTION, CHILD PORNOGRAPHY & TRAFFICKING OF CHILDREN FOR SEXUAL PURPOSES ("ECPAT INT'L"), 43(2005), www.ecpat.net/ei/Publications/ICT/Cyberspace_ENG.pdf; MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 22–23 (2003) (referring to child pornography videos where "bribes and threat made by the photographer to induce the child to do what is required"); Lanning, *supra* note 12, at 56–58. Regardless of whether a child appears to consent, a child cannot legally consent to participation in production of child pornography. 18 U.S.C. § 2251. *See also* Kenneth V. Lanning, *Compliant Child Victims: Confronting an Uncomfortable Reality* (hereinafter "*Compliant Child Victims*"), *in* VIEWING CHILD PORNOGRAPHY ON THE INTERNET 56–58 (Ethel Quayle & Max Taylor, eds. 2005).

[14] A child pornography producer is an individual who "employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . sexually explicit conduct for the purpose of producing any visual depiction of such conduct." 18 U.S.C. § 2251(a).

[15] NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, *Policy Statement on Sexting*, (Sept. 21, 2009), http://us.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4130 (Last visited Nov. 30, 2012); Wolak et al., *Trends in Arrests for Child Pornography Production*, *supra* note 9, at 2 (distinguishing "youth-only experimental" production and "youth-only aggravated" production from "adult-involved" production). For a discussion of appropriate law enforcement and societal response to sexting *see* Mary G. Leary, *Sexting or Self-Produced Child Pornography? The Dialog Continues - Structured Prosecutorial Discretion Within a Multidisciplinary Response,* 17 VIRGINIA J. OF SOC. POL. & THE L. 487, 491–92 (2010).

[16] *See, e.g.,* Slate V Staff, *Almost 9 in 10 Sexted or Emailed Youth Photos Turn Up as Porn*, http://www.slate.com/blogs/trending/2012/10/23/sexting_risk_study_says_naked_photos_end_up_online_on_porn_sites_nine_times.html (last visited Oct. 23, 2012).

[17] *See* Wolak et al., *Trends in Arrests for Child Pornography Production*, *supra* note 9, at 2 ("research shows that few youth actually participate in sexting and most police do not arrest youth in cases that come to police attention") (footnotes omitted); Leary, *supra* note 15, at 488. No juveniles were sentenced in 2010 for self-produced child pornography images. *See generally*, Chapter 9 (discussing Commission's coding project of federal child pornography producers sentenced in fiscal year 2010).

[18] Wolak et al., *Arrests for Child Pornography Production, supra* note 8, at 190; TAYLOR & QUAYLE, *supra* note 13, at 23 (noting that the abuser is "invariably a parent, guardian of some kind"). Interestingly, trends suggest that non-family acquaintances are increasingly arrested for child pornography production offense. Wolak et al., *Trends in Arrests for Child Pornography Production*, *supra* note 9, at 3 (noting that in 2009, half of production offenders in the sample were acquaintances).

to the child,[19] offenders may pressure the victims via parental authority, threats, and/or payment with drugs, alcohol, or money.[20] Other offenders manipulate by using one child to recruit other victims, including siblings.[21] These child pornography producers sometimes rely on peer pressure to encourage multiple children to participate.[22]

Images of child pornography often present a distorted picture of what actually occurred. Some child pornography images show forcible rape, forced penetration, and other violent sexual assaults,[23] but images reflecting a child crying or in distress appear to be the exception.[24] Rather, most images are manipulated to show "a compliant sexually involved child who willingly participates in the sexual behavior being portrayed."[25] Some perpetrators use such images that depict victims enjoying themselves to groom other child victims.[26] Some offenders can be heard on videos suggesting poses or exhorting victims to smile for the camera while they are abused.[27]

While the vast majority of child pornography images are created with the victim's knowledge,[28] approximately one-quarter of child pornography images appear to have been produced, at least to some extent, without the victim's knowledge.[29] Production of these images occurs by using hidden cameras, creating morphed images, or by photographing or filming

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[19] Wolak et al., *Arrests for Child Pornography Production, supra* note 8, at 190–191; TAYLOR & QUAYLE, *supra* note 13, at 21–23; Ethel Quayle, *The Impact of Viewing on Offending Behavior, in* CHILD SEXUAL ABUSE AND THE INTERNET: TACKLING THE NEW FRONTIER 31 (Martin Calder ed. 2004).

[20] Wolak et al., *Arrests for Child Pornography Production, supra* note 8, at 190*; see* Lanning, *supra* note 12, at 5–6.

[21] Wolak et al., *Arrests for Child Pornography Production, supra* note 8, at 190. Sometimes these are siblings sets and sometimes an initial victim may be encouraged by the offender to "recruit" another child. *See id;* Lanning, *Compliant Child* Victims, *supra* note 13, at 59 ("[S]ome older child victims . . . . may assist the offender in obtaining new victims.").

[22] *See* Janis Wolak, David Finkelhor & Kimberly J. Mitchell, *The Varieties of Child Pornography Production, in* VIEWING CHILD PORNOGRAPHY ON THE INTERNET, *supra* note 13, at 38–40; Finkelhor et al., *Patterns From NIBRS*, *supra* note 8, at 6.

[23] Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190.

[24] TAYLOR & QUAYLE, *supra* note 13, at 22 (noting that "[a] common characteristic of child pornography is that the subject is smiling . . . [s]miling is important because it suggests that the child is happy, even enjoying, what is happening").

[25] *Id.*

[26] "[C]hild pornography is often used as part of a method of seducing other children into sexual activity; a child who is reluctant to engage in sexual activity with an adult, or to pose for sexually explicit photographs, can sometimes be convinced by viewing depictions of other children 'having fun' participating in such activity." Child Pornography Prevention Act of 1996, P.L. 104–208, § 121(1)(3); *see also* Save the Children Europe, *Position Paper on Child Pornography and Internet-Related Sexual Exploitation of Children*, 9 (June 2003), http://ec.europa.eu/justice_home/daphnetoolkit/files/projects/2002_004/int_position_paper_on_child_pornography.pdf ("Abusers often use images in which children have been forced to smile so it can be claimed, especially with younger children, that they are 'having fun' and have given 'consent'".).

[27] Taylor et al., *supra* note 11, at 104; TAYLOR & QUAYLE, *supra* note 13, at 22.

[28] Wolak et al., *Arrests for Child Pornography Production*, *supra* note 8, at 190.

[29] *Id.* (approximately 22% of offenders used covert methods to produce images).

sleeping or drugged victims.[30] Child victims may also be too young to be aware of the abuse or of the recording.[31]

Child pornography victims, like victims of other types of sexual abuse, generally are reluctant to report child sexual abuse for a variety of reasons.[32] Some victims do not report the crime because offenders have threatened to harm the victims or others if the victim reports the crime.[33] As mentioned, in some cases, the victim is pre-verbal and unable to communicate to the authorities or may not be aware that images were recorded.

It also appears that the existence of images of abuse can make a victim even less likely than other sex abuse victims to report the crime.[34] The "feelings of guilt, shame and self-blame"[35] regarding the images can be so powerful that some victims deny existence of pornographic images even when confronted with them.[36] Those who have studied child pornography victims note that "probably the greatest inhibitors to disclosing what has occurred is the humiliation that the children feel regarding who may have seen their images and their fear of being recognized."[37] Victims report feelings of shame and embarrassment that are exacerbated by the images and prevent them from reporting the abuse.[38] Some victims fear the images will

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[30] Wolak et al., *Varieties of Child Pornography, supra* note 22, at 39–40.

[31] *Id.* at 39; Taylor et al, *supra* note 11, at 106 (discussing abuse of very young children).

[32] Tink Palmer, *Behind the Screen: Children who are the Subjects of Abusive Images in* VIEWING CHILD PORNOGRAPHY ON THE INTERNET 63–64 (Ethel Quayle & Max Taylor eds. 2005). Studies relying on self-reports estimate that from one in six to one in nine men report that they were sexually abused as boys and one in three to one in five women report that they were sexually abused as girls. John Briere & Diana M. Elliot, *Prevalence and Psychological Sequelae of Self-reported Childhood Physical and Sexual Abuse in a General Population Sample of Men and Women*, 27 CHILD ABUSE & NEGLECT 1205, 1205 (2003) (32.3% of women and 14.2% of men reported child sex abuse). By contrast, official reports of child sex abuse are much lower. *See* Emily M. Douglas & David Finkelhor, *Childhood Sexual Abuse Fact Sheet*, CRIMES AGAINST CHILDREN RES. CTR., (May, 2005), www.unh.edu/ccrc/factsheet/pdf/CSA-FS20.pdf (official records reflect that approximately 0.1% children were victims of substantiated incidents of child sex abuse in 2003 and roughly 225,000 sex abuse crimes against children were reported to the police in 2001).

[33] *See, e.g.*, United States v. Snyder, 189 F.3d 640, 643 (7th Cir. 1999) (defendant showed minor victim firearms and threatened to kill him if he reported the sexual abuse which the defendant had filmed).

[34] Palmer, *supra* note 32, at 63–64; *see* Muir, *supra* note 13, at 40–41.

[35] Prepared Statement of Dr. Sharon Cooper, Adjunct Professor, Pediatrics, University of North Carolina-Chapel Hill School of Medicine, to the Commission, at 10 (Feb. 15, 2012) ("Cooper Statement").

[36] Lanning, *Compliant Child Victims*, *supra* note 13, at 71*; see also* Testimony of Dr. Sharon Cooper, to the U.S. Senate Committee on Commerce, Science and Transportation (Sept. 19, 2006) (available at http://commerce.senate.gov/public/?a=Files.Serve&File_id=e81f4756-9ebe-43c1-9d6c-b853b51bfddb) ("children not only typically do not tell of their abuse, but will in fact deny the presence of images"); Muir, *supra* note 13, at 41 ("[i]n Sweden, a group of child victims of pornography denied the abuse despite visual evidence of its occurrence").

[37] Palmer, *supra* note 32, at 63–64. Others have described the existence of the photos as establishing a "silent conspiracy" and explaining "[o]ne of the most destructive impacts on juveniles of their participation in pornography is the silent conspiracy into which they feel bound by their offender. TAYLOR & QUAYLE, *supra* note 13, at 25 (internal citation omitted).

[38] *See* Palmer, *supra* note 32, at 64.

make it appear as though they were complicit or actively participated in the abuse.[39] Other victims, at the behest of an adult offender, may have influenced other minor victims to participate in the abuse and are afraid that their own behavior was illegal.[40] Finally, even if the contact abuse is discovered, investigators may fail to ask the victim whether images were created and miss an opportunity to identify the child as a victim of child pornography production in addition to contact sex abuse.[41]

B. RECURRENT VICTIMIZATION THROUGH EXISTENCE OF IMAGES

Child pornography victims face other types of victimization that that are separate from the harm of production. Even after the physical abuse has ended, child pornography victims suffer due to continued circulation of their images or the ongoing potential for circulation of their images.[42] Both Congress and the Supreme Court have concluded that the ongoing distribution of child pornography images violates the victim's privacy and exacerbates the continued harms to the victim.[43] Congress has spoken about ongoing circulation, noting that "its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years."[44] The Supreme Court likewise has described child pornography images as "a permanent record" and explained that "the harm to the child is exacerbated by their circulation."[45] It further noted that this is a harm distinct from that caused during the production of the images: it is "the pornography's continued existence caus[ing] the child victims continuing harm by haunting the children in years to come."[46]

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[39] *See* Muir, *supra* note 13, at 40–41; TAYLOR & QUAYLE, *supra* note 13, at 22; *see also* Lanning, *Compliant Child Victims, supra* note 13, at 56–58.

[40] O'DONNELL & MILNER, *supra* note 5, at 74. Abusers sometimes convince their victims that they will be legally liable for involving participating in abuse with other children and this "can be used as blackmail to force the child to remain silent and compliant." *Id.*

[41] Gemma Holland, *Identifying Victims of Child Abuse Images: An Analysis of Successful Identifications*, *in* VIEWING CHILD PORNOGRAPHY ON THE INTERNET *supra* note 13, at 79 (noting an instance in which one child disclosed abuse but failed to mention that she was photographed).

[42] *See,* Prepared Statement of Susan Howley, Chair of the Commission's Victims Advisory Group, to the Commission, at 2–5 (Feb. 15, 2012)(discussing harm suffered by victims); *see also* Cooper Statement, *supra* note 35, at 7 (finding that many victims suffer from posttraumatic stress disorder, anxiety, depression, and non-delusional paranoia).

[43] *See* New York v. Ferber, 458 U.S. 747, 759 n.10 (1982) ("distribution of the material violates the individual interest in avoiding disclosure of personal matters") (internal quotations and citation omitted); Child Pornography Prevention Act § 121(1)(7) ("the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests"); *see also* Cooper Written Testimony, *supra* note 35, at 7 (noting that "the invasion of privacy is a foremost concern" for child pornography victims).

[44] Child Pornography Prevention Act § 121, Pub. L. 104–208, §121, 110 Stat. 3009 (1996).

[45] Ferber, 458 U.S. at 759.

[46] Osborne v. Ohio, 495 U.S. 103, 111 (1990) (citation omitted); *see also* United States v. Blinkensop, 606 F.3d 1110, 1117 (9th Cir. 2010) (affirming the sentencing judge, who stated "it is a clear reality . . . that every time one of these web sites is opened and every time one of these images is viewed, additional harm is visited upon the victim. And the tiny children who frequently are displayed in these images are truly victims"); United States v. Pugh, 515 F.3d 1179, 1197 (11th Cir. 2009) ("Congress repeatedly has stressed the terrible harm child pornography inflicts on its victims, dating back to its first enactment of child pornography laws in 1977") (footnote omitted).

Unlike child sex abuse victims whose abuse has not been recorded, child pornography victims "grow up knowing that there are images of [themselves] being sexually abused which are available in perpetuity."[47] For this reason, child pornography victims are subject to a greater long-term risk of depression, guilt, poor self-esteem, feelings of inferiority, interpersonal problems, delinquency, substance abuse, suicidal thoughts, and post-traumatic stress disorder than other child sexual assault victims.[48] As one victim stated, "[u]nlike other forms of exploitations, this one is never ending. Everyday people are trading and sharing videos of me as a little girl being raped in the most sadistic ways."[49]

Victims have reported suffering from the knowledge that the images of their graphic abuse are being utilized for sexual gratification.[50] They also state that they fear that the images are being used to groom new victims for sexual abuse. One victim explained, "I am horrified by the thought that other children will probably be abused because of my pictures. Will someone show my pictures to other kids . . . then tell them what to do? Will they see me and think it's okay for them to do the same thing?"[51]

Victims suffer from not knowing who has seen their images. Victims "report remaining always vigilant and fearful that any interaction with a computer might lead to exposure of the images of the sexual abuse that they have endured."[52] Victims fear that strangers they see on the street have seen images of their abuse, and they are ashamed and embarrassed that a teacher, a potential date, or a stranger in public will recognize them.[53] One victim explained that "[e]very day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them — at me — when I was just a little girl being abused for the camera."[54]

Consistent with a finding that some victims suffer a non-delusional paranoia,[55] victims also fear being stalked by viewers of images. Multiple victims have reported that they have been tracked down by those who have viewed their images. In one instance, a child pornography offender who discovered a victim's real name used a social networking site to send the victim messages that he had enjoyed looking at her images for years, accused her of being a willing

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[47] Palmer, *supra* note 32, at 71; *see also* Mimi Halper Silbert, *The Effects on Juveniles of Being Used for Prostitution & Pornography in* PORNOGRAPHY RESEARCH ADVANCES & POLICY CONSIDERATIONS at 228 ("The long term impact of participating in pornography appears to be even more debilitating than the immediate effects.").

[48] *See* Palmer, *supra* note 32, at 71.

[49] Notice of Filing Victim Restitution Claim and Impact Statements, United States v. Faxon, No. 09-cr-14030 (S.D. Fla. Nov. 3, 2009), ECF No. 34-15 at 4.

[50] Palmer, *supra* note 32, at 63. Silbert, *supra* note 47, at 228 (identifying three stages of victimization and noting that they are exploitation, disclosure (for those victims who disclosed), and post-abuse).

[51] *Faxon*, No. 09-cr-14030, ECF No. 34-9 at 3 (victim impact statement of "Amy" of the "Misty" series).

[52] Cooper Statement, *supra* note 35, at 7.

[53] *See* O'DONNELL & MILNER, *supra* note 5, at 71.

[54] *Faxon*, No. 09-cr-14030, ECF No. 34-9 at 2–3.

[55] *See* Cooper Statement, *supra* note 35, at 7–9 (describing victims who feel they are constantly being watched).

participant in her abuse, and demanded that she make a pornographic video with him.[56] In another case, a victim and her mother reported that a collector of the victim's images was identified outside of the victim's middle school and followed her to softball games.[57] This victim explained that "I have had people follow me, find me from my pictures I didn't even know were out there. I have been found even by my [social networking website] profile . . . ."[58]

The types of harm suffered by victims through the continued circulation (or fear of circulation of the images) are shared by family and guardians of these victims.[59] Family members also fear that their child will be recognized by strangers who have viewed the child's images.[60] One mother stated that due to her daughter's exploitation, "I do not foster her dreams as I normally would in a normal situation. I fear her becoming famous and someone digging up 'dirt' about her unfortunate past."[61]

Additionally, guardians of underage victims, in particular victims who may not remember the contact sexual abuse or be aware the images are being circulated, struggle with whether and when to share that the abuse occurred or that the images exist. Guardians may choose not to share the frequency with which a victim's image is traded for fear of exacerbating the harms. As a mother of a young victim whose images are in circulation explained, "[m]y daughter understands that some police and social workers have seen 'the pictures' . . . [b]ut now that she's older and realizing the extent of the [I]nternet, she's beginning to grasp the darker side — how many people saw those same pictures . . . . Someday the full realization will surely strike her. I dread the day the question 'have they seen the pictures?' becomes a daily trial for her . . . as I know it already is for me."[62]

C. CRIME VICTIMS' RIGHTS ISSUES SPECIFIC TO CHILD PORNOGRAPHY VICTIMS

Children whose images appear in the collections of child pornography offenders are considered to be victims of federal non-production child pornography offenses. As such, they may be eligible for certain victims' services under the Victims Rights and Restitution Act (VRRA)[63] and have rights under the Crime Victims Rights Act (CVRA).[64] The VRRA provides

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[56] The offender was convicted of child pornography and stalking offenses and sentenced to 300 months. *See* Judgment, United States v. Hoffman, No. 08-CR-027 (D. Nev. Apr. 30, 2010), ECF No. 64.

[57] *Faxon*, No. 09-cr-14030, ECF No. 34-6 at 2–3 (statement of mother of two girls who were four and five when they were photographed for ostensibly non-pornographic purposes but whose images have been morphed into pornographic images and are highly traded). One of these victims was contacted through a social networking website by a collector of her images. *Id.* at 8.

[58] *Id.*

[59] Palmer, *supra* note 32, at 70–72.

[60] One mother stated that "I have learned that these images of our sons on the Internet will never go away . . . . As their mother, this situation has caused me to fear for [my sons'] emotional health and their abilities to trust adults." She continued "[t]his is an open-ended and ongoing problem for my husband and me." Faxon, No. 09-cr-14030, ECF No. 34-1(mother of victim).

[61] *Faxon*, No. 09-cr-14030, ECF No. 34-13 (mother of victim).

[62] *Faxon*, No. 09-cr-14030, ECF No. 34-5 at 3 (mother of victim).

[63] 42 U.S.C. § 10607.

that victims of federal crimes are to be kept informed during the investigation and about victims' services,[65] while the CVRA provides that victims of the charged offense are afforded certain enforceable rights during the federal prosecution.

The CVRA provides a victim with the rights: to reasonable notice of public court proceedings; to be reasonably heard at public proceedings involving release, plea, sentencing, or any parole; to full and timely restitution; to confer with the attorney for the government; to proceedings free from unreasonable delay; and to be treated with fairness and respect for their dignity.[66] Notification is considered by some victims' rights advocates to be a "gateway right" because "if a victim is unaware of his or her rights or proceedings in which those rights are implicated, the victim cannot participate in the system."[67]

During the investigation and prosecution of child pornography offenses, child pornography victims face unique challenges. While most federal crime victims are victims in only one or a limited number of federal cases, child pornography victims can be victims in hundreds or thousands of cases each year. The potentially large number of prosecutions makes the provision of VRRA services and the enforcement of CVRA rights a logistical challenge for victims and prosecutors,[68] particularly concerning the rights to notification and restitution.[69]

1. *Victim Notification and the Right to be Heard*

When a child pornography victim is initially identified, the victim may elect to be notified if his or her image is possessed future cases. For minor victims, a non-offending parent or guardian will make decisions about victim notification until the victim reaches the age of majority. The victim, or victim's proxy, fills out a form indicating whether the victim wishes to be notified if his or her image appears in a future case.[70] When a victim "opts-in" to being notified, he or she is entered into the DOJ's Victim Notification System ("VNS"). The VNS is

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[64] 18 U.S.C. § 3771. In the case of minor or incapacitated victims, a representative may enforce the victim's rights. 18 U.S.C. § 3771(e).

[65] Services include identification, access to mental health services, reasonable protection from the offender, and notification of ongoing case events. 42 U.S.C. § 10607.

[66] 18 U.S.C. § 3771(a).

[67] *See* NAT'L CRIME VICTIM L. INSTIT., *Featured Right: Notice*, http://law.lclark.edu/centers/national_crime_victim_law_institute/news/story/?id=9896 ("right to notice is at the heart of victims' participatory status") (last visited Nov. 30, 2012).

[68] Department of Justice policy recognizes the challenges of working with child pornography victims and determining victim status. It notes that "[c]hildren who are depicted in child pornography . . . are presumed to have been directly and proximately harmed as a result of those crimes for purposes of determining whether they are a victim under the VRRA or CVRA." Attorney General Guidelines for Victim and Witness Assistance, 2011 Edition, at (Rev. May 2012) (available at http://www.justice.gov/olp/pdf/ag_guidelines2012.pdf)

[69] The FBI manages a program which works to ensure that child pornography victims know their rights throughout federal criminal proceedings. *See* FBI, CHILD PORNOGRAPHY VICTIM ASSISTANCE ("CPVA"): A REFERENCE FOR VICTIMS AND PARENT/GUARDIAN OF VICTIMS. http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf.

[70] *See* CPVA: A Reference for Victims and Parent/Guardian of Victims. http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf.

an electronic system of providing automatic notice and outcome information of court events to crime victims in order to comply with the CVRA.[71] Victims may update their VNS notification status at any time and choose to withdraw a request to be notified.

For child pornography victims who have opted into notification, it is not unusual to receive multiple court notifications each week informing them that their images have been recovered from child pornography offenders.[72] One victim stated, "I can't tell you how many letters from the courts have come to me and how helpless they make me feel."[73] A parent who opted to receive notification as the minor victim's representative has described receiving enough "notices to overflow a 55 gallon drum."[74] Thus, even as the victims' rights laws have empowered victims and enabled them to be involved in the criminal justice process,[75] the notification process itself can have the unintended and incidental effect of exacerbating the harms associated with the ongoing distribution of the images.

As mentioned briefly above, an additional issue regarding notification has to do with the age of the victims. While victims may be minors during initial prosecution, many continue to be victims in new cases into adulthood. The CVRA permits a representative to assert a minor victim's rights, but on reaching the age of 18, the victim is entitled to exercise his or her CVRA rights. Therefore, guardians must evaluate when the victim should be told that images of their sexual abuse are in circulation or the frequency of the circulation in a manner intended to minimize distress.[76] Guardians are faced with a quandary as to whether they should reveal the ongoing distribution early or wait until a child is closer to adulthood. This decision is more difficult if the victim does not recall the initial abuse.[77]

Victims may also choose to be heard at sentencing in accordance with the CVRA.[78] In order to address the logistical challenge of affording a single victim the right to be heard at hundreds or thousands of sentencings each year, and the desire of most victims to retain as much

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[71] For additional information on the VNS see Criminal Division's Victim Notification Program, http://www.justice.gov/criminal/vns/. *See also* FBI, CPVA NOTIFICATION PREFERENCE FORM, http://www.fbi.gov/stats-services/victim_assistance/notification-preference.

[72] *See, e.g., Faxon*, No. 09-cr-14030, ECF No. 34-3("I can't tell you how many letters from the courts have come to me and how helpless they make me feel") (handwritten victim impact statement, no additional information provided). As one parent described, "I have been informed on a monthly basis of accounts where someone is being charged for having possession of her images that are on the internet. These images will never be erased." Faxon, No. 09-cr-14030, ECF No. 34-10 at 2.

[73] *Id.* ECF No. 34-3 (victim impact statement of victim, no additional information provided).

[74] *Faxon*, No. 09-cr-14030, ECF No. 34-15 at 1(stepfather of victim).

[75] *See, e.g.*, *Faxon*, No. 09-cr-14030, ECF No. 34-13 ("I can choose to stop receiving the notifications, but I don't. If my words can keep a pedophile off the streets to protect our young innocent children then that is what I need to do.")

[76] The FBI has developed a protocol to notify victims of child pornography who are turning 18 and whose parents will no longer serve as representative victims and to notify adults who may not be aware that their image is in circulation. *See* http://www.fbi.gov/hq/cid/victimassist/cpva.

[77] *See* http://www.fbi.gov/stats-services/victim_assistance/brochures-handouts/cpva.pdf.

[78] 18 U.S.C. § 3771(a)(4).

privacy as possible, the DOJ has developed a unique way to ensure that child pornography victims are able to contribute victim impact statements (VIS) to be considered by the sentencing court. Regardless of whether a child pornography victim has opted to be notified, he or she may submit a VIS and sign a release permitting the DOJ to attach the same VIS in each case where the victim's image has been possessed. Similar to opting into and out of notification, a victim may update or withdraw the VIS at any time.

2. *Restitution to Victims*

Enforcement of the restitution provision of the CVRA is complicated by the fact that child pornography victims' images are usually possessed, received, or distributed by individuals who have no other connection to the victim. Section 2259 of Title 18, United States Code, provides for mandatory and complete restitution for any victim harmed as a result of a commission of a child pornography crime or other child sex crime.[79] Section 2259 does not distinguish between production, distribution, receipt, or possession of child pornography with respect to victim status. If the offender committed one of those crimes and the victim was harmed by the commission of that crime, restitution is mandatory.

Victims have sought and received restitution from child pornography production offenders for some time.[80] A small number of child pornography victims have started seeking to enforce this statutory right to restitution against child pornography possession, receipt, and distribution offenders who may have no other connection to the victim.[81] Courts have struggled with calculating restitution for this victim population and have reached different outcomes. While courts uniformly find that the child pornography victims are victims of the offenses and have suffered harm, many district courts refuse to order restitution because they find that the defendant's crime is either not the proximate cause of the victim's injury or that it is impossible to apportion an amount of restitution to an individual defendant.[82] By contrast, other district courts that have granted restitution have agreed that apportioning restitution is a challenge but have concluded that it is clear that child pornography victims are "harmed as a result of the commission of a crime"[83] and, thus, are entitled to an appropriate restitution award.[84]

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[79] 18 U.S.C. § 2259(c).

[80] *See, e.g.,* United States v. Laney, 189 F.3d 954, 967 (9th Cir. 1999) (child pornography conspiracy participant liable for restitution to child victim of coconspirator).

[81] United States v. Faxon, No. 09-14030-CR, 2010 WL 430760, at *12 (S.D. Fla. Feb. 5, 2010) (noting that the "difficulty" of finding that "restitution is due from this particular Defendant relates to causation").

[82] *See, e.g.,* United States v. Woods, 689 F. Supp. 2d 1102, 1113 (N.D. Iowa 2010) (government failed to demonstrate the losses that the victim suffered as a result of defendant's child pornography receipt offense); United States v. Rowe, No. 09cr80, 2010 WL 3522257, at *5 (W.D. N.C. Sep. 7, 2010) (government failed to establish "the amount of losses proximately caused by the Defendant's conduct with any reasonable certainty"); United States v. Church, 701 F. Supp. 2d 814, 816 (W.D. Va. 2010) (finding that government failed to prove "'victim's losses'… proximately caused by the Defendant's offense of conviction," but awarding nominal restitution in the amount of $100) (citation omitted).

[83] 18 U.S.C. § 2259.

[84] *See, e.g.,* Order of Restitution, United States v. Baroun, No. CR-09-64 (D. Mont. Mar. 25, 2010), ECF No. 61 at 9. ("[i]t is certainly difficult, if not impossible, to determine the exact degree of victimization [], however . . . every

This uncertainty has now extended to the appellate level, where a split in the circuits has developed as to the availability of restitution for child pornography victims in possession, receipt, and distribution cases. The United States Courts of Appeals for the Seventh Circuit, Second Circuit, Ninth Circuit, D.C. Circuit, and Eleventh Circuit have held that child pornography victims are entitled only to losses that were proximately caused by the individual offender who committed a non-production offense.[85] By contrast, the en banc Fifth Circuit recently held that victims are entitled to restitution for a variety of losses without a showing of proximate cause, including for medical and mental services, transportation, lost income, and attorneys' fees from those who offenders who possessed, received, or distributed child pornography depicting the victims.[86]

D. CONCLUSION

- Like other child sex abuse victims, child pornography victims suffer physical and emotional harms during the production of child pornography images. Child pornography victims appear even less likely than other child sex abuse victims to report the abuse because of the existence of the images.

- Most identified victims of child pornography production offenses are abused by a family member or acquaintance. NCMEC reports that 24 percent of identified victims were pubescent, and 76 percent were prepubescent. Ten percent of the prepubescent identified victims were infants or toddlers.

- The ongoing nature of child pornography offenses causes a significant and separate harm to the victims depicted in the images. Some of these victims live their lives wondering who has seen images of their sexual abuse and suffer by knowing that their images are being used for sexual gratification and potentially to lure new victims into sexual abuse.

- Child pornography victims, like all federal crime victims, are entitled to certain services under the Victims Rights and Restitution Act and have rights under the Crime Victims Rights Act.

- Victims may choose to be notified when their image is found in a child pornography offender's collection. Because a victim's image may be possessed in hundreds or thousands of cases, some victims report that the notification itself has exacerbated the harm. Nevertheless, without notification, victims may be unable to enforce other rights.

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person who possesses these images causes a real and cognizable harm to the victim.); United States v. Laursen, No. 08-00263, 2010 WL 3834322, at *1 (W.D. Mo. Sept. 27, 2010) (using estimated apportionment "analogous to the rough justice allowed in class action" to award $3,000 to victim in child pornography possession case).

[85] United States v. Laraneta, 700 F.3d 983 (7th Cir. 2012), United States v. Aumais, 656 F.3d 147 (2d Cir. 2011); United States v. Kennedy, 643 F.3d 1251 (9th Cir. 2011); United States v. Monzel, 641 F.3d 528 (D.C. Cir. 2011); United States v. McDaniel, 631 F.3d 1204 (11th Cir. 2011).

[86] In re Amy Unknown, 701 F.3d 749 (5th Cir. 2012) (en banc).

- Many victims are minors when identified but will continue to be victims in new cases after they reach adulthood. The CVRA permits a representative to assert a minor victim's rights but, on reaching the age of 18, the victim is entitled to exercise his or her CVRA rights.

- The nature of child pornography offenses creates particular challenges for application of victims' rights. Enforcement of the CVRA, in particular the right to restitution, is complicated by the fact that child pornography victims' images are usually possessed or distributed by individuals who have no other connection to the victim. The lower federal courts have grappled with legal issues related to restitution in non-production cases.

Chapter 6

ANALYSIS OF SENTENCING DATA IN CASES IN WHICH OFFENDERS WERE SENTENCED UNDER THE NON-PRODUCTION SENTENCING GUIDELINES

A. INTRODUCTION

This chapter examines data concerning sentencing trends, offense conduct, and offender characteristics in child pornography cases in which offenders were sentenced under the non-production sentencing guidelines, USSG §§2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) and 2G2.4 (Possession of Materials Depicting a Minor Engaged in Sexually Explicit Conduct), during the past two decades.[1] The data in this chapter primarily are derived from two separate sources: (1) the Commission's regular annual datafiles of non-production offenses for fiscal years 1992 through 2010;[2] and (2) the Commission's special coding project of virtually all cases in which offenders were sentenced under the non-production guidelines in fiscal years 1999, 2000, and 2010, and cases from the first quarter of fiscal year 2012. Relevant data in the Commission's regular datafiles include basic demographics, criminal history, guideline applications, sentences imposed, application of specific offense characteristics, and sentences relative to the guideline range. Data in the special coding project supplement the annual datasets with more detailed information on offense conduct and offender characteristics. The first part of this chapter will discuss data from the Commission's annual datafiles, and the remainder of the chapter will discuss data from the Commission's special coding project.[3] Although the data analyzed in the first part of this chapter generally end with fiscal year 2010 cases — so as to allow a comparison to the Commission's special coding project of fiscal year

[1] Cases in which offenders were sentenced under the production guideline (USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production)) are addressed separately in Chapter 9.

[2] The Commission selected fiscal year 1992 as the starting point for data analysis because the offense of possession was created by Congress in 1990 and the corresponding sentencing guideline went into effect in 1991. *See* U.S. SENT'G COMM'N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 17-18 (Oct. 2009). In view of delays involved in the prosecution and sentencing of defendants under a new penal statute and guideline, the Commission relied on sentencing data beginning in fiscal year 1992. In accordance with 28 U.S.C. §§ 994(w)(1) & 995(a)(12)-(15), the Commission routinely collects, analyzes and disseminates data concerning the sentencing process from sentencing documents submitted by district courts to the Commission.

[3] With respect to fiscal year 2010 cases, the data analyses in the first part of this chapter (based on the Commission's regular annual datafiles) concern 1,717 cases of offenders sentenced under the non-production guidelines, while the data analyses in the second part of this chapter (based on the Commission's special coding project) concern 1,654 of those cases. The difference in the two sets of cases relates to the fact that the Commission's special coding project excluded both cases with certain types of insufficient documentation and also cases sentenced under versions of the non-production guidelines applicable to offenses committed before November 1, 2004. *See infra* note 52.

2010 cases discussed in the second half of the chapter — occasionally fiscal year 2011 data from the Commission's regular annual datafile will be noted where significant changes occurred.

With respect to data from the Commission's annual datafiles, the following analysis divides cases in which offenders were sentenced under the non-production guidelines into two primary offense types based on the manner in which the guidelines were applied: (1) receipt, transportation, and distribution offenses, as well as other similar but less common offenses (*e.g.*, importation) [hereafter collectively referred to as "R/T/D offenses"]; and (2) possession offenses.[4] With respect to data from the special coding project, cases in which offenders were sentenced under the non-production guidelines are classified in greater detail based both on the most serious offense of conviction[5] and on real offense conduct in the case.[6]

B. UNDERSTANDING THE DATA BASED ON THE CHANGING LEGAL LANDSCAPE FROM 1992 TO 2010

The data for child pornography offenses discussed in this chapter generally cover a lengthy time period (fiscal years 1992 to 2010). During that period, there were several significant changes in the legal landscape concerning constitutional law, relevant statutes, and the guidelines that affected sentencing in child pornography cases. Understanding those changes is necessary to properly interpret the data.

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[4] A case was deemed an R/T/D offense if an offender was sentenced under a version of USSG §2G2.2 in effect from November 1, 1992, through October 31, 2004, or sentenced pursuant to the current version of §2G2.2(a)(2) (which went into effect on November 1, 2004). A case was deemed a possession offense if an offender was sentenced under the former USSG §2G2.4 or the current version of §2G2.2(a)(1). (A very small number of possession cases were obscenity offenses involving images depicting minors, which were sentenced under the provisions governing possession offenses. *See infra* note 58.) Classification of offense type was thus based on guideline application rather than the statute of conviction in a case. Although the Commission's annual datafiles contain information about the statutes of conviction, there are two reasons why classification of offense type is not based on offense of conviction for non-production cases contained in the Commission's annual datafiles. First, with respect to offenders convicted of the offense of possession, the version of §2G2.4 in effect from 1992 until 2003 contained a cross-reference provision requiring courts to apply §2G2.2 to defendants convicted solely of possession but who, according to relevant conduct found by a sentencing court, actually received or distributed child pornography. *See* USSG §2G2.4(c)(2) (2003). Thus, the guideline application in such cases is a better indicator of an offender's actual conduct than the statute of conviction. Second, receipt and distribution offenses appear disjunctively in the same statutory provision (*i.e.*, "receipt or distribution" in both 18 U.S.C. §§ 2252(a)(2) & 2252A(a)(2)), which makes it impossible to determine the precise offense of conviction based solely on the statute of conviction. The Commission's annual datafiles thus do not contain complete information about the specific *offense* of conviction (only the *statute* of conviction) in such cases. As discussed below, the Commission's special coding project examined indictments and judgments to determine the specific offense of conviction.

[5] As discussed below, as part of its special coding project of fiscal year 2010 cases, the Commission examined the indictments and judgments in all USSG §2G2.2 cases to determine the most serious non-production offense of conviction. By "most serious" offense the Commission refers to the following offenses of conviction in order of gravity (from most serious to least serious): distribution; importation; transportation (including shipping and mailing); receipt; morphing; and possession. The determination of degree of gravity of offense was based both on the statutory penalty ranges for the offense types (both minimums and maximums) and whether the sentencing guidelines provide for enhanced (or reduced) offense levels based on the offense conduct. For a discussion of statutory ranges of punishment and guideline application relevant to this determination, *see* Chapter 2 at 22-32.

[6] *See infra* notes 55–57 and accompanying text (discussing the manner in which the Commission coded fiscal year 2010 non-production cases for real offense conduct with respect to receipt and distribution).

Following the enactment of the Sentencing Reform Act of 1984,[7] which resulted in the promulgation of mandatory sentencing guidelines in late 1987, the Supreme Court and Congress refined the federal sentencing system in ways that impacted sentencing generally and child pornography sentencing specifically. In 1996, the Supreme Court held in *Koon v. United States*[8] that departure decisions by federal sentencing courts were due significant deference and that appellate courts should use an abuse of discretion standard in reviewing departures.[9] *Koon* meant that district courts had greater discretion to depart from the sentencing guidelines than they did before the Supreme Court's decision. While measuring the actual impact of *Koon* on the departure rates is difficult, the downward departure rates increased from 1996 to 2003, including in child pornography cases, which led to a perception that *Koon* was, at least in part, responsible.[10]

As discussed elsewhere in this report, Congress's concern over downward departures — in particular, downward departures for child pornography and child sex offenders — was reflected in provisions of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 ("PROTECT Act").[11] The PROTECT Act did several things to increase child pornography sentences and limit downward departures for child pornography offenders. In order to ensure increased sentences, the PROTECT Act increased statutory maximums and imposed new mandatory minimums for R/T/D offenders. It also directly amended the child pornography sentencing guidelines to add a new enhancement relating to the number of images collected by an offender and made possession offenders eligible for other enhancements. In order to discourage downward departures for child pornography offenders, the PROTECT Act changed the standard of review for departures to a *de novo* appellate review for all offenses (thus superseding *Koon*); explicitly limited downward departures for sex offenses (including child pornography offenses); and required greater explanation by a court when a downward departure was imposed.[12]

On January 12, 2005, in *Booker v. United States*,[13] the Supreme Court rendered the guidelines "effectively advisory,"[14] which had the effect of lifting the PROTECT Act's restraints on sentences outside the guideline ranges in child pornography cases.[15] Subsequent decisions by the Court further clarified both the sentencing courts' discretion and appellate deference to below

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[7] Pub. L. No. 98–473, 98 Stat. 1837 (1984).

[8] 518 U.S. 81 (1996).

[9] *Id.* at 97-100.

[10] *See* U.S. SENT'G COMM'N, REPORT TO CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 54-56 (2003).

[11] Pub. L. No. 108–21, 117 Stat. 650 (2003).

[12] *See* Chapter 1 at 4, 7–8; *see also* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 38-48.

[13] 543 U.S. 220 (2005).

[14] *Id.* at 245.

[15] *See* Chapter 1 at 7 & n.48 (discussing lower courts' decisions concerning the effect of *Booker* on 28 U.S.C. § 3553(b)(2)(A)).

range sentences.[16] Since *Booker*, sentencing courts have increasingly exercised their discretion to impose below range sentences for non-production child pornography offenses.[17] As discussed in Chapter 8, some appellate courts have approved a district court's categorical refusal to sentence in accordance with the child pornography guidelines based on a "policy" disagreement.[18]

In addition to statutory and case law developments between 1987 and the present, the child pornography guidelines themselves have gone through several iterations based on both the Commission's own review and amendment process and also directives from Congress and other legislation regarding appropriate guideline penalties. These changes are comprehensively chronicled in the Commission's 2009 publication, *History of the Child Pornography Guidelines,* but are briefly summarized in Tables 6–1 and 6–2. As reflected in Table 6–1, since 1992, the base offense levels have increased for both R/T/D offenses and possession offenses.[19]

Table 6–1
INCREASES IN BASE OFFENSE LEVELS — NON-PRODUCTION GUIDELINES

R/T/D Offenses 18 U.S.C. §§ 2252(a)(1)-(2), (b)(1) and 2252A(a)(1)-(2), and (b)(2).			Possession[20] 18 U.S.C. §§ 2252(a)(4) , (b)(2) and 2252A(a)(5), (b)(2).		
1992	**2000**	**Present**	**1992**	**2000**	**Present**
2G2.2	2G2.2	2G2.2	2G2.4	2G2.4	2G2.2
15	17	22	13	15	18

Increases in the base offense levels have raised sentence ranges under the guidelines. In the guidelines' Sentencing Table,[21] depending on the exact offense level at issue, an increase of 2 levels typically raises the corresponding guideline minimum (*i.e.*, the bottom of the applicable sentencing range) approximately 20 to 30 percent, and an increase of 5 levels typically raises the corresponding guideline minimum approximately 70 to 80 percent. For example, assuming an

[16] *See, e.g.*, Kimbrough v. United States, 552 U.S. 85 (2007) (holding that a district court has discretion to "vary" from the applicable guidelines range as a "policy" matter); Gall v. United States, 552 U.S. 38 (2007) (applying a deferential abuse of discretion standard on appeal concerning a district court's decision to "vary" from the applicable guideline range based on the characteristics of the offender and circumstances of the offense); *see also* Chapter 1 at 9.

[17] *See* Chapter 1 at 9–10.

[18] *See, e.g.*, United States v. Henderson, 649 F.3d 955 (9th Cir. 2011); United States v. Grober, 624 F.3d 592 (3d Cir. 2010); United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010); *but see* United States v. Miller, 665 F.3d 114 (5th Cir. 2011); United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008); *see generally* Chapter 8 at 238–41.

[19] Although Tables 6-1 and 6-2 make reference to the "present" version of the non-production guideline, that version, for all practical purposes, went into effect on November 1, 2004. *See* Chapter 1 at 2 & n.11.

[20] Possession offenses were previously referenced to USSG §2G2.4. Following the PROTECT Act, because of the increased base offense level and the changes in the types of enhancements available, the Commission deleted §2G2.4 and referenced all offenders convicted of non-production offenses to USSG §2G2.2. *See* Chapter 1 at 2 n.13.

[21] *See* USSG, Ch. 5, Part A - Sentencing Table. The Sentencing Table is reproduced at the end of this report in Appendix B.

offender who is in Criminal History Category I,[22] an increase from offense level 15 to offense level 17 raises the corresponding guideline minimum from 18 months to 24 months (a 33% increase), and an increase from offense level 17 to offense level 22 raises the corresponding guideline minimum from 24 months to 41 months (71%).

Not only have base offense levels increased during past two decades, new specific offense characteristics for non-production offenders have been added to increase guideline penalties. As reflected in Table 6–2 below, the specific offense characteristics applicable to both R/T/D and possession offenses have grown in number. In 1992, R/T/D offenders were eligible to receive enhancements for three specific offense characteristics, while possession offenders were eligible to receive enhancements for two specific offense characteristics. Over the years, the non-production guidelines were amended at various points to add new enhancements. By 2004, when §2G2.4 was merged with §2G2.2 and the new guideline encompassed all types of non-production offenses, both R/T/D offenders and possession offenders became eligible for enhancements based on six specific offense characteristics.[23] As a consequence, the corresponding guideline ranges for typical non-production offenders have increased substantially.[24]

Table 6–2
INCREASE IN SPECIFIC OFFENSE CHARACTERISTICS — NON-PRODUCTION GUIDELINES

		R/T/D Offenses		Possession	
SOCs[25]	**Impact[26]**	**Effective Date**	**End Date**	**Effective Date**	**End Date**
Pre-Pubescent Minor	+2	1987	Present	1991	Present
Distribution	+2 to +7	1987	Present	2004	Present
S&M	+4	1990	Present	2004	Present
Pattern of Activity	+5	1991	Present	2004	Present
Use of Computer	+2	1996	Present	1996	Present
At Least 10 Images	+2	N/A	N/A	1991	2004
Image Table	+2 to +5	2003	Present	2004	Present

[22] The typical child pornography offender is in Criminal History Category I. *See* Figure 6-13, *infra*.

[23] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 41-49.

[24] *See* Chapter 8 at 210–12 (discussing increases in typical guideline sentencing ranges during the past decade).

[25] The various specific offense characteristics are discussed *infra* at 137–41.

[26] The impact and application of some specific offense characteristics have changed since the start date, such as the distribution enhancement. *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 1-54. The information provided in this table concerns the current enhancements' impacts or a particular enhancement's impact as of its end date.

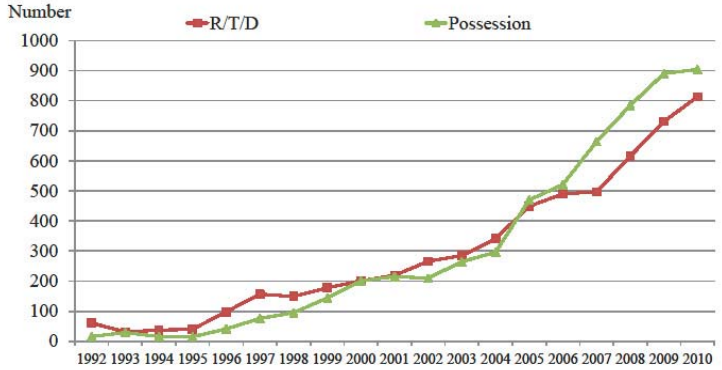
C. NON-PRODUCTION SENTENCING DATA DERIVED FROM THE COMMISSION'S ANNUAL DATAFILES

1. *Introduction*

The data analysis in this section relies primarily on the Commission's datafiles for non-production child pornography cases from fiscal years 1992 through 2010.[27] As shown below (in Figure 6–4, *infra*), average sentences for offenders sentenced under the non-production guidelines have increased significantly during those two decades — from an average sentence of 18 months in fiscal year 1992 to an average of 129 months in fiscal year 2010 for R/T/D offenders, and an average sentence of 11 months in fiscal year 1992 to an average of 63 months in fiscal year 2010 for possession offenders — although they have leveled off in recent years. While offenders' demographic characteristics have remained relatively stable, changes in the nature of offense conduct (*e.g.*, increased use of computers), corresponding sentencing enhancements, and increases in statutory penalty ranges have together contributed to higher average guideline ranges and substantially longer average sentences. Since the guidelines became advisory in 2005, the rate of within range sentences in non-production cases has steadily decreased, although average sentence lengths in fiscal year 2010 were significantly longer than in the pre-*Booker* period (as reflected in Figures 6–7 and 6–8, *infra*).

The number of cases in which offenders have been sentenced under the non-production guidelines has grown substantially both in total numbers and as a percentage of the total federal case load. As reflected in Figure 6–1, in fiscal year 1992, there were 61 R/T/D cases, which increased to 813 cases in fiscal year 2010. In fiscal year 1992, there were 16 possession cases, which increased to 904 cases in fiscal year 2010. In fiscal year 1992, non-production cases accounted for 0.2 percent of the 36,498 total federal criminal cases. By fiscal year 2010, such cases accounted for 2.0 percent of all 83,946 federal criminal cases.

Figure 6-1
Non-Production Cases
Fiscal Years 1992-2010

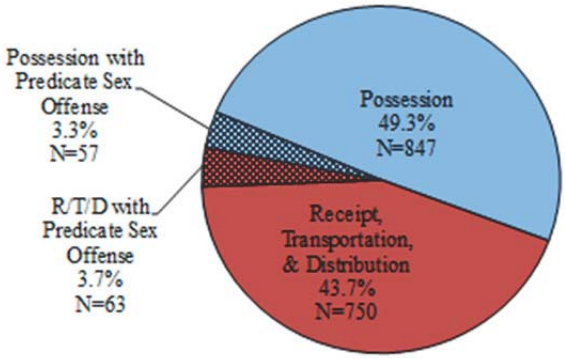


SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

[27] As discussed in Chapter 7, some offenders sentenced under the non-production guidelines were convicted of both production and non-production child pornography offenses. In such cases, the current non-production guideline (the version of USSG §2G2.2 in effect for offenses on or after November 1, 2004) yielded a higher penalty range for the non-production offense than the guideline range resulting from application of the production guideline (USSG §2G2.1). In such cases, an offender's case was deemed a "non-production" case for purposes of the Commission's data analysis because §2G2.2 was the "primary guideline" in the case. *See* Chapter 7 at 176 n.31.

Figure 6–2 below depicts the percentages of the two main categories of non-production child pornography cases in fiscal year 2010 (possession and R/T/D cases) as total percentages of the overall non-production caseload and also shows those offenders in each category who had predicate convictions for sex offenses.[28] Of all non-production offenders, 52.6 percent were convicted solely of possession, while 47.4 percent were convicted of R/T/D offenses. Possession cases in which offenders did not have predicate convictions for sex offenses were 49.3 percent of cases, while R/T/D cases in which offenders did not have predicate convictions were 43.7 percent of cases. The remaining cases, which are represented in the shaded portions of Figure 6–2, involved offenders whose sentences were enhanced based on predicate sex convictions. They constituted less than one-tenth of all non-production cases in fiscal year 2010.

Figure 6-2
Non-Production Offense Types (N=1,717)
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Non-production child pornography cases were prosecuted in every circuit and district, but the number of cases in each circuit and district varied substantially. Table 6–3 below displays non-production cases by circuit. Of the 1,717 cases in fiscal year 2010, 333 (19.4%) were from districts within the Ninth Circuit; 215 (12.5%) were from districts within the Eighth Circuit, 191 (11.1%) were from districts within the Eleventh Circuit; and 188 (10.9%) were from districts within the Sixth Circuit. Thus, 927 (54.0%) of the 1,717 non-production cases were from districts within those four circuits.

[28] As discussed in Chapter 2, offenders with predicate convictions for sex offenses face substantially higher penalties than offenders without such predicate convictions. *See* Chapter 2 at 25–26.

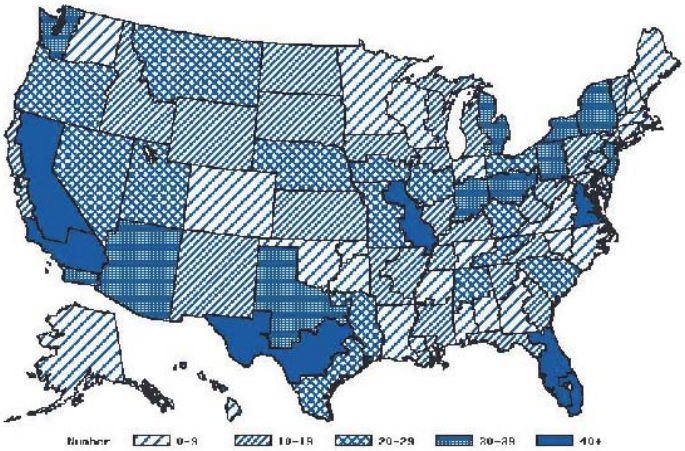
Table 6-3
Frequency of §2G2.2 Child Pornography Cases by Circuit
Fiscal Year 2010

	Total		R/T/D		Possession	
	N	%	N	%	N	%
D.C.	**13**	**0.8**	9	1.1	4	0.4
First	**23**	**1.3**	11	1.4	12	1.3
Second	**124**	**7.2**	58	7.1	66	7.3
Third	**107**	**6.2**	36	4.4	71	7.9
Fourth	**149**	**8.7**	77	9.5	72	8.0
Fifth	**178**	**10.4**	72	8.9	106	11.7
Sixth	**188**	**10.9**	111	13.7	77	8.5
Seventh	**113**	**6.6**	71	8.7	42	4.7
Eighth	**215**	**12.5**	104	12.8	111	12.3
Ninth	**333**	**19.4**	123	15.1	210	23.2
Tenth	**83**	**4.8**	22	2.7	61	6.8
Eleventh	**191**	**11.1**	119	14.6	72	8.0

This table excludes cases missing information for the variables required for analysis.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

With respect to the 94 districts, non-production cases occurred most frequently in the Eastern District of Missouri (72, 3.7% of all such cases), the Central District of California (70, 3.6%), the Middle District of Florida (60, 3.1%), the Eastern District of Virginia (54, 2.8%), the Western District of Texas (49, 2.5%), the Southern District of Florida (45, 2.3%), and the Eastern District of California (41, 2.1%). Those seven districts accounted for 20.3 percent of all non-production cases in 2010. Figure 6–3 depicts the distribution of non-production cases in all 94 federal judicial districts.

Figure 6-3
Frequency of Non-Production Offenses by District
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

2. *Sentence Length Data*

a. Probationary Sentences

For all non-production offenses committed before April 30, 2003, the effective date of the PROTECT Act, offenders who did not have a predicate conviction for a sex offense were statutorily eligible for probation. Such offenders did not face a mandatory minimum term of imprisonment and, in addition, the statutory classes of their offenses did not preclude probation under 18 U.S.C. § 3561(a)(1).[29] For offenses committed after the PROTECT Act, however, only those offenders convicted solely of possession remain statutorily eligible for probation (and only if they have no predicate convictions for a sex offense).[30] Possession offenders with predicate convictions and all offenders convicted of R/T/D offenses or production offenses are ineligible for probation because they face mandatory minimum terms of imprisonment.[31]

[29] Under 18 U.S.C. § 3561(a)(1), in cases where there is no mandatory minimum term of imprisonment, only defendants convicted of Class A or B felony offenses are ineligible for probation. Before the PROTECT Act, possession offenses had a statutory maximum of five years of imprisonment, while receipt, transportation, and distribution (R/T/D) offenses had a statutory maximum of 15 years of imprisonment. *See* Chapter 1 at 4 & n.26. Based on those maximum penalties, possession was a Class D felony, and R/T/D offenses were Class C felonies. *See* 18 U.S.C. § 3559(a). Such offenses thus were eligible for probation.

[30] After the PROTECT Act, offenders convicted of possession who have no predicate convictions for a sex offense are eligible for probation because their offense is a Class C felony. *See* 18 U.S.C. §§ 3559(a)(3) & 3561(a)(1).

[31] *See* Chapter 2 at 25–26.

Under the sentencing guidelines in effect before the enactment of the PROTECT Act, probationary sentences were generally unavailable for the vast majority of child pornography offenders — even those who were statutorily eligible for probation — because the guidelines, which were then mandatory, prohibited probation absent a downward departure. In particular, subsection (a) of USSG §5B1.1 (Imposition of a Term of Probation) prohibited probation unless an offender's sentencing range fell within Zones A or B of the guidelines' Sentencing Table. Even with generally lower sentencing ranges for offenders convicted of non-production offenses in the pre-PROTECT Act era,[32] such offenders' sentencing ranges fell within Zone C or D.[33] Thus, those offenders given probation in the pre-PROTECT Act era received it as a result of a court's downward departure to Zone A or B. In fiscal year 2002, the last full fiscal year before the PROTECT Act, 8.8 percent of all non-production offenders (42 of 476 cases) received probation.

In fiscal year 2010, nearly all offenders convicted of a non-production offense (1,688 of 1,715 or 98.4%)[34] were sentenced to a term of imprisonment. Only 27 (1.6%) were sentenced to probation, including either straight probation or probation with a condition of home or community confinement. Those 27 probationary sentences were spread throughout the country, in 17 different districts, and were imposed by 25 different district judges.

Of the 27 §2G2.2 offenders who received probation in fiscal year 2010, all were convicted only of possession, which did not carry a mandatory minimum term of imprisonment. All but one offender were in Criminal History Category I,[35] and none had a predicate conviction for a sex offense. All received downward departures or variances from their guideline ranges.

b. Sentences of Imprisonment

Since 1992, on a consistent basis, average sentences of imprisonment for offenders convicted of R/T/D offenses ("R/T/D offenders") have been longer than average sentences for offenders convicted only of possession ("possession offenders"), which reflects the different statutory and guideline provisions governing these offenses.[36] Average sentences for both types of offenders have risen significantly since the PROTECT Act of 2003, in response to the

[32] *See* Chapter 8 at 211–12.

[33] Prior to the PROTECT Act, the least severe base offense level in effect for non-production cases was 13 (applicable to possession offenders until the 2000 amendment to the possession guideline raised it to 15), *see* Table 6-1, *supra*, and the least severe final offense level was 11, assuming a 2-level reduction for acceptance of responsibility pursuant to subsection (a) at USSG §3E1.1 (Acceptance of Responsibility) and no enhancements based on application of the specific offense characteristics. Such an offender would not have been eligible for probation absent a downward departure. *See* USSG, Ch. 5, Part A - Sentencing Table (2002) (showing that an offender in Criminal History Category of I with final offense level of 11 was in Zone C, which precluded probation). In 2010, the Sentencing Table was amended so as to increase Zone B one level upward (*i.e.*, to offense level 11).

[34] Two of the 1,717 cases were missing sentence disposition information and thus were excluded from this analysis.

[35] One offender was in Criminal History Category III.

[36] *See* Chapter 2 at 25–27, 31–32.

enactment of new mandatory minimum sentences, increased statutory maximum sentences, and increases in guideline penalties (as reflected in Tables 6–1 and 6–2, s*upra*).[37]

The proportion of both R/T/D and possession offenders receiving prison only sentences steadily increased from fiscal years 1992 through 2010, as shown in Table 6–4.

Table 6–4
Type of Sentence Imposed on R/T/D and Possession Offenders
Fiscal Years 1992, 2004, and 2010

	R/T/D						Possession					
	1992		2004		2010		1992		2004		2010	
	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	**61**	**100.0**	**341**	**100.0**	**813**	**100.0**	**16**	**100.0**	**295**	**100.0**	**902**	**100.0**
Prison Only	37	60.7	331	97.1	812	99.9	6	37.5	276	93.6	863	95.7
Prison/ Community Split	4	6.6	1	0.3	1	0.1	0	0.0	8	2.7	12	1.3
Probation and Confinement	12	19.7	3	0.9	0	0.0	9	56.3	7	2.4	11	1.2
Probation Only	8	13.1	6	1.8	0	0.0	1	6.3	4	1.4	16	1.8

This table excludes cases missing information for the variables required for analysis. Percentages may not sum to 100.0% due to rounding. As shown here, a "split" sentence is a sentence in Zones B or C of the Sentencing Table of the *Guidelines Manual*, whereby a court substitutes community or home detention (as a condition of supervised release) for a portion of the term of imprisonment
SOURCE: U.S. Sentencing Commission, 1992, 2004, and 2010 Datafiles, MONFY92, USSCFY04, and USSCFY10.

In fiscal year 2010, 99.99 percent (812 of 813) of R/T/D offenders received a prison only sentence and 0.01 percent (1 of 813) received a split sentence of prison and some other type of confinement. In fiscal year 2010, 95.7 percent (863 of 902) of possession offenders received a prison only sentence; 1.3 percent (12 of 902) received split sentence of imprisonment and some other type of confinement;[38] 1.2 percent (11 of 902) received probation with the condition of some period of community confinement; and 1.8 percent (16 of 902) received a probation only sentence. The proportion of offenders convicted of non-production offenses who received prison only sentences exceeded the overall average for all federal offenses in fiscal year 2010. For all

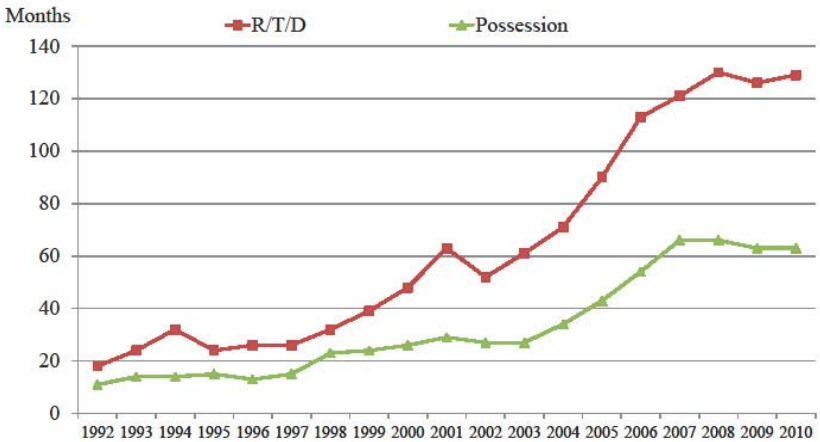
[37] *See* Chapter 1 at 4, 7–8.

[38] A "split sentence" is a sentence in Zone B or C of the Sentencing Table of the *Guidelines Manual*, whereby a court substitutes community or home detention (as a condition of supervised release) for a portion of the term of imprisonment that the court could otherwise impose. *See* USSG §5C1.1 (Imposition of a Term of Imprisonment); *see also* USSG §5D1.1 (Imposition of a Term of Supervised Release), comment. (n.4).

federal offenses in fiscal year 2010, the prison only rate was 87.4 percent, followed by probation only (7.3%), probation with a condition of some form of community confinement (2.8%), and a split sentence of imprisonment coupled with some form of community confinement (2.5%).

In general, as reflected in Figure 6–4 below, the average length of imprisonment increased substantially for both R/T/D and possession offenders during the past two decades. For R/T/D offenders, the average prison sentence rose from 18 months in fiscal year 1992, to 71 months in fiscal year 2004, and to 129 months in fiscal year 2010. For possession offenders, the average prison sentence rose from 11 months in fiscal year 1992, to 34 months in fiscal year 2004, and to 63 months in fiscal year 2010. Both types of offenders' average prison sentences were higher than the average prison sentence for all federal offenders in fiscal year 2010; the overall average length of imprisonment for all federal offenders was 53.9 months.[39]

Figure 6-4
Non-Production Sentences Over Time
Fiscal Years 1992-2010



Note: Average sentence length is shown as average total prison sentence excluding probation and months of alternative confinement.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Table 6–5 below displays §2G2.2 sentences within and outside the guideline range using a format that allows comparison pre- and post-*Booker*, and displays within range sentences, below range sentences based on a government-sponsored motion for departure pursuant to USSG §5K1.1 (Substantial Assistance to Authorities (Policy Statement)), all other government and non-government sponsored below range sentences, and above range sentences. In fiscal year 1992, the within range rate for R/T/D offenders was 58.0 percent; it rose to 82.5 percent by fiscal year 2004, before decreasing to 40.1 percent in fiscal year 2010. For possession offenders, 86.7 percent (13 of 15 offenders) received within range sentences in fiscal year 1992; the percentage of within range sentences thereafter fluctuated during the next decade or so but generally

[39] *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 30 (2010) (Table 14). "Average length of imprisonment" above refers to only cases in which some amount of imprisonment was imposed. Cases in which sentences of probation were imposed were excluded. *See id.* at 30 n.1.

remained well above 50 percent of cases. The within range rate for possession offenders decreased during post-*Booker* period to 39.5 percent by fiscal year 2010. Substantial assistance departures (§5K1.1) have been rare for all child pornography offenders. In fiscal year 2010, such departures occurred in 34 of 791 (4.3%) of R/T/D cases and in 17 of 886 (1.9%) of possession cases. Above range sentences have fluctuated but, like substantial assistance departures, have constituted a relatively small percentage of cases. In fiscal year 2010, above range sentences were imposed in 12 of 791 (1.5%) R/T/D cases and in 22 of 886 (2.5%) possession cases.

Table 6–5
Sentences Relative to the Guideline Range for R/T/D and Possession Offenders
Fiscal Years 1992, 2004, and 2010

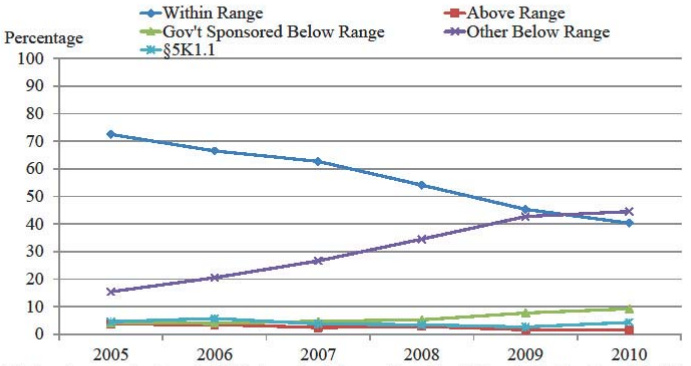
	R/T/D						Possession					
	1992		2004		2010		1992		2004		2010	
	N	%	N	%	N	%	N	%	N	%	N	%
TOTAL	**50**	**100.0**	**314**	**100.0**	**791**	**100.0**	**15**	**100.0**	**269**	**100.0**	**886**	**100.0**
Within Range	29	58.0	259	82.5	317	40.1	13	86.7	221	82.2	350	39.5
Above Range	1	2.0	13	4.1	12	1.5	0	0.0	10	3.7	22	2.5
§5K1.1 Substantial Assistance	2	4.0	7	2.2	34	4.3	0	0.0	8	3.0	17	1.9
Other Below Range	18	36.0	35	11.1	428	54.1	2	13.3	30	11.2	497	56.1

Note: Only cases with complete guideline application information are included in this analysis. Above Range includes upward departures and variances, if applicable. Other Below Range includes downward departures and variances, less Substantial Assistance departures.
SOURCE: U.S. Sentencing Commission, 1992, 2004, and 2010 Datafiles, MONFY92, USSCFY04, and USSCFY10.

The within range rate for all non-production offenses (40.0%) in fiscal year 2010 was lower than the within range for all federal offenses that year (55.0%). Similarly, the government sponsored and non-government sponsored below range rates (excluding substantial assistance departures) for non-production offenses (55%) was higher than these combined below range rates for all federal offenses (33.0%) in fiscal year 2010.

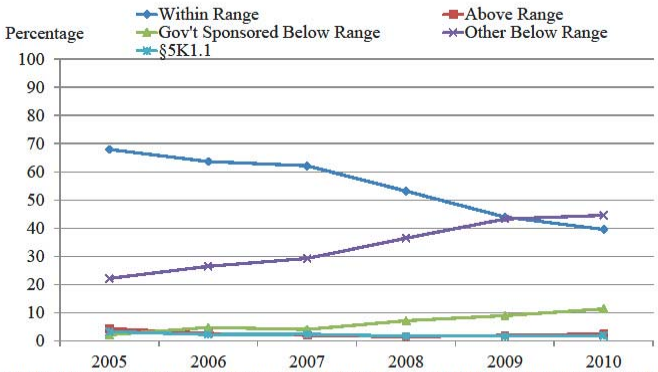
Figures 6–5 and 6–6 display sentences relative to the applicable guideline ranges during the period of 2005 through 2010. This period is displayed separately because, beginning in fiscal year 2005, the Commission changed its methodology in collecting information on sentence length relative to the applicable guideline range in response to *Booker*.[40] This change allows the below range sentences displayed in Table 6–5 to be divided between government sponsored below range sentences (other than for an offender's substantial assistance to the authorities pursuant to §5K1.1) and non-government sponsored below range sentences. Both government sponsored and non-government sponsored below range sentences increased after *Booker* for offenders sentenced under the non-production guidelines. As shown in Figure 6–5, in fiscal year 2005, 4.3 percent of R/T/D offenders received a government sponsored below range sentence (other than for substantial assistance under §5K1.1), and 15.3 percent received a non-government sponsored below range sentence. By fiscal year 2010, the number rose to 9.5 percent for government sponsored below range sentences (other than for an offender's substantial assistance), and 44.6 percent for non-government sponsored below range sentences. As shown in Figure 6–6, for possession offenses in fiscal year 2005, 2.1 percent received a government sponsored below range sentence (other than for an offender's substantial assistance), and 22.7 percent received a non-government sponsored below range sentence. By fiscal year 2010, the number had increased to 11.2 percent for government sponsored below range sentences (other than for an offender's substantial assistance) and 44.9 percent for non-government sponsored below range sentences.

Figure 6-5
Within Range and Out of Range Sentences: R/T/D Offenses
Fiscal Years 2005-2010



Note: Percentages may not sum to exactly 100% due to rounding. Only cases with complete guideline application information are included in this analysis.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 6-6
Within Range and Out of Range Sentences: Possession Offenses
Fiscal Years 2005-2010

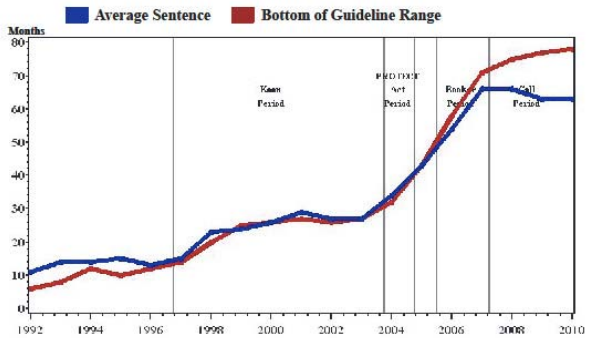


Note: Percentages may not sum to exactly 100% due to rounding. Only cases with complete guideline application information are included in this analysis.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10 and FY10 Child Pornography Plea Agreement Special Coding Project.

[40] This change took effect for cases in which offenders were sentenced on or after January 12, 2005, the date of the *Booker* decision. As a result, fiscal year 2005 is reported as the partial year from January 12, 2005, through September 30, 2005.

In fiscal year 2011, the trends apparent in Figures 6–5 and 6–6 continued. R/T/D offenders received within range sentences in only 38.3 percent of cases (down from 40.1% in fiscal year 2010). The rate of non-government sponsored below range sentences in such cases increased to 45.4 percent of cases (from 44.6% of cases in fiscal year 2010), and the rate of government sponsored below range sentences (other than for an offender's substantial assistance) increased to 11.5 percent (from 9.5% in fiscal year 2010). Possession offenders received within range sentences in only 27.3 percent of cases in fiscal year 2011 (down from 39.5 in fiscal year 2010). The rate of non-government sponsored below range sentences in such cases increased to 51.3 percent of cases (from 44.9% of cases in fiscal year 2010), and the rate of government sponsored below range sentences (other than for an offender's substantial assistance) increased to 17.6 percent of cases (from 11.2% of cases in fiscal year 2010).

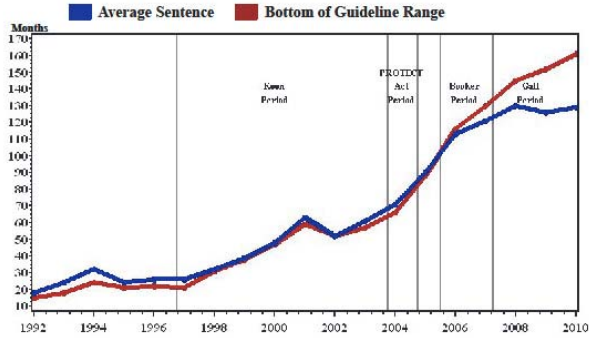
Figure 6-7
Average Guideline Minimum and Sentence Imposed: Possession Offenses
Fiscal Years 1992-2010



Note: Average sentence length is shown as average total prison sentence excluding months of alternative confinement.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figures 6–7 and 6–8 display the average sentence length and the average bottom of the guideline range (*i.e.*, guideline minimum) for the two categories of non-production offenses. Those two figures represent *all* cases in each category (*i.e.*, both those that received within range sentences and those that received sentences below or above the applicable ranges). Indicated on the figures are key periods discussed above: the post-*Koon* period; the PROTECT Act period; the post-*Booker* period; and the period after the Supreme Court's decisions in *Gall* and *Kimbrough*. As the figures demonstrate, in possession cases, the average sentence remained quite close to the average guideline minimum before *Booker*. After *Booker*, average prison sentences leveled off for possession offenses, while average guideline minimums continued to increase as a result of the higher base offense levels and increased frequency with which enhancements applied (Figure 6–7). R/T/D offenses followed a pattern that is

Figure 6-8
Average Guideline Minimum and Sentence Imposed: R/T/D Offenses
Fiscal Years 1992-2010



Note: Average sentence length is shown as average total prison sentence excluding months of alternative confinement.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

generally similar to possession cases but with higher average guideline minimums and higher average sentences. Average sentences for R/T/D offenses tracked the average guideline minimums closely pre-*Booker* but diverged post-*Booker* as the average guideline minimums continued to rise to historically high levels (Figure 6–8). In summary, average guideline ranges and sentence lengths have increased substantially over the period fiscal years 1992 through 2010, although average sentence lengths stopped increasing after 2007 (following the Supreme Court's decisions in *Gall* and *Kimbrough*).

Unlike the *rate* of downward departures and variances, which has steadily increased in non-production cases since *Booker*, the average *extent* of downward departures and variances — as expressed in the difference in percentage between the average guideline minimum and average sentence imposed in cases receiving below-range sentences — has remained basically stable in non-production cases each year since *Booker*. In fiscal year 2010, in R/T/D cases in which a below-range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 35.8 percent (or an average reduction of 63 months); the average extent of government sponsored downward departures and variances (other than for an offender's substantial assistance) was 32.5 percent (or an average reduction of 54 months). In possession cases in which a below range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 43.0 percent (or an average reduction of 32 months); and the average extent of government sponsored downward departures and variances (other than for an offender's substantial assistance) was 49.5 percent (or an average reduction of 42 months). Similar differences in percentage between the average guideline minimum and average sentence imposed occurred annually each year from fiscal year 2005 until fiscal year 2010 in non-production cases in which a below range sentence was imposed.

3. *Comparative Proportionality Analysis: Other Federal Sex Offenses*

As discussed in Chapter 1, critics of the current non-production penalty scheme contend that sentences for typical §2G2.2 offenders are disproportionately severe compared to sentences for typical offenders who engaged in sexual "contact" offenses with real-time victims (including minor victims).[41] Table 6–6 below compares mean guideline minimums and mean sentence lengths for §2G2.2 cases (possession and R/T/D cases considered together) with mean guideline minimums and sentence lengths for a variety of other federal sex offenses. Table 6–7 below compares the rates of sentences imposed within and outside guideline ranges for the same offense types. Data concerning §2G2.2 cases appear in bold in the two tables to facilitate comparison to data concerning the other sex offense types. Case types in the two tables appear in descending order from offense types with the highest mean guideline minimum to offense types with the lowest mean guideline minimum.

As Table 6–6 shows, the mean guideline minimum for §2G2.2 cases is lower than the mean guideline minimums for six other sex offense types but higher than the mean guideline minimum for four other sex offense types, including three with minor victims, *i.e.*, (1) traveling to engage in sexual contact with a minor 12 years old or older (USSG §2G1.3 (Promoting a Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Transportation of Minors to

[41] *See* Chapter 1 at 13.

Engage in a Commercial Sex Act or Prohibited Sexual Conduct; Travel to Engage in Commercial Sex Act or Prohibited Sexual Conduct with a Minor; Sex Trafficking of Children; Use of Interstate Facilities to Transport Information about a Minor));[42] (2) abusive sexual contact with a minor (*e.g.*, sexual fondling) (§2A3.4 (Abusive Sexual Contact or Attempt to Commit Abusive Sexual Contact)); and (3) statutory rape of a minor under 16 years of age (§2A3.2 (Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts)).

The Commission includes this data to permit a comparative proportionality analysis but cautions that general comparisons of §2G2.2 cases with other types of federal sex offenses are problematic because of the wide variety of offense behavior and other variables affecting guideline application and sentence lengths in these types of cases.

Table 6-6
Sex Offenses: Prison Sentences
Fiscal Year 2010

Primary Guideline	Mean Guideline Minimum (in months)	Mean Prison Sentence (in months)
§2G2.1, Production Child Pornography Offenses (N=200)	281	270
§2A3.1, Criminal Sexual Abuse (*i.e.*, forcible rape/sexual assault of minor younger than age 12) (N=27)	252	230
§2G1.3, Travel to Engage in Sexual Contact w/ Pre-Pubescent Minor (Minor younger than age 12) (N=21)	222	187
§2A3.1, Criminal Sexual Abuse (*i.e.*, forcible rape/sexual assault of minor age 12 or older) (N=10)	176	173
§2G1.3, Child Prostitution Offenses (N=34)	171	155
§2A3.1, Criminal Sexual Abuse (*i.e.*, forcible rape/sexual assault of adult) (N=39)	146	148
§2G2.2, Non-Production Child Pornography Offenses (N=1,643)	**118**	**95**
§2G1.3, Travel to Engage in Sexual Contact w/ Minor (Minor age 12 or older) (N=147)	101	104
§2A3.4, Abusive Sexual Contact (Minor) (*e.g.*, fondling) (N=21)	44	46
§2A3.2, Criminal Sexual Abuse of a Minor (Statutory Rape) (N=47)	32	37
§2A3.4, Abusive Sexual Contact (Adult) (*e.g.*, fondling) (N=16)	15	19

Note: Cases with insufficient documentation were excluded from the analysis. Twenty-nine cases with non-prison sentences were excluded from the analysis. Twenty-four cases from USSG §2A3.1 and ten cases from USSG §2G1.3 were excluded due to missing information. Primary guideline categories are shown from highest to lowest average guideline range minimum sentence.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

[42] USSG §2G1.3 covers other sex offense types (including child prostitution offenses and traveling to have sexual contact with minors under 12 years of age), which appear separately in Tables 6-6 and 6-7.

Table 6-7
Sex Offenses: Sentences Relative to the Guideline Range
Fiscal Year 2010

Primary Guideline	Within Range	Above Range	§5K1.1 Departure	Other Gov't Sponsored Below Range	Non-Gov't Sponsored Below Range
§2G2.1, Production Child Pornography Offenses (N=200)	56.5%	5.0%	3.5%	11.5%	23.5%
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of minor younger than age 12) (N=27)	55.6%	3.7%	–	22.2%	18.5%
§2G1.3, Travel to Engage in Sexual Contact with a Pre-Pubescent Minor (age 12 or younger) (N=21)	42.9%	9.5%	4.8%	14.3%	28.6%
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of minor age 12 or older) (N=10)	70.0%	–	–	10.0%	20.0%
§2G1.3, Child Prostitution Offenses (N=34)	50.0%	–	14.7%	14.7%	20.6%
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of adult) (N=39)	59.0%	10.3%	2.6%	12.8%	15.4%
§2G2.2, Non-Production Child Pornography Offenses (N=1,669)	**39.8%**	**1.9%**	**3.1%**	**10.4%**	**44.8%**
§2G1.3, Travel to Engage in Sexual Contact with a Minor (age 12 or older) (N=147)	70.8%	6.8%	3.4%	5.4%	13.6%
§2A3.4, Abusive Sexual Contact (e.g., fondling a minor) (N=21)	71.4%	9.5%	–	9.5%	9.5%
§2A3.2, Criminal Sexual Abuse of a Minor (e.g., Statutory Rape) (N=47)	66.0%	8.5%	–	8.5%	17.0%
§2A3.4, Abusive Sexual Contact (e.g., fondling an adult) (N=16)	75.0%	–	–	12.5%	12.5%

Note: Cases with insufficient documentation were excluded from the analysis.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

4. *Specific Offense Characteristics*

As discussed in Part B of this chapter, *supra*, the sentencing guidelines relating to both R/T/D and possession offenses contain six separate enhancements for specific offense characteristics that can substantially increase the guideline range above the "starting points" discussed in Chapter 2.[43] When the two non-production guidelines (§§2G2.2 and 2G2.4) were merged following the PROTECT Act into a new version of §2G2.2 that applied to both R/T/D and possession offenses (effective November 1, 2004), all offenders sentenced under the new version of §2G2.2 faced six potential enhancements.[44] As reflected in Figures 6–7 and 6–8, *supra*, the increasing availability and application of enhancements over the past two decades have resulted in significantly higher average guideline ranges and average sentence lengths. The four figures that appear below in this section show the impact of the various enhancements over the past two decades.

a. Prepubescent Minors and Use of a Computer

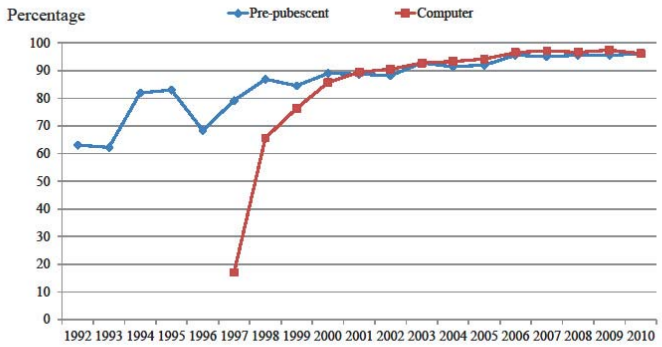
Two enhancements have been available for both R/T/D and possession offenders during most or all of the past two decades. The enhancement for images depicting a prepubescent minor (presently §2G2.2(b)(2)), which results in a 2-level increase, has been available for R/T/D offenses since the inception of §2G2.2 in 1987 (when that guideline only applied to such offenses) and to possession offenses since the former possession guideline, §2G2.4, was promulgated in 1991. The enhancement for use of a computer (presently §2G2.2(b)(6)), which also results in a 2-level increase, was added to both §2G2.2 and §2G2.4 on November 1, 1996.

[43] *See* Chapter 2 at 32.

[44] *See* HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 2, at 48-49.

These two enhancements remained in §2G2.2 when it was amended on November 1, 2004, to apply to both R/T/D and possession cases. Figure 6–9 demonstrates the steady increase in the application rate of these two enhancements in the non-production guidelines (considered together in the figure) from fiscal year 1992 until fiscal year 2010. As shown in Figure 6–9, both of these enhancements now apply to virtually all non-production offenders.

Figure 6-9
Application of Specific Offense Characteristics: Non-Production Offenses
Fiscal Years 1992-2010

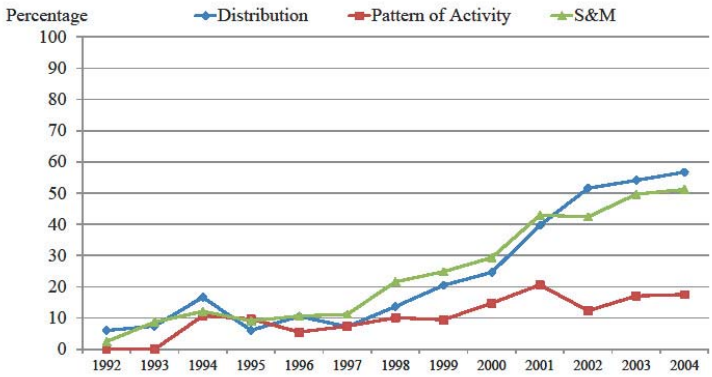


Note: Only cases with complete guideline application information are included in this analysis. The SOC for computer use was first introduced in Fiscal Year 1997.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

b. Other §2G2.2 Enhancements Predating the PROTECT Act

Three other enhancements were amended or added at different times before the PROTECT Act — distribution of child pornography (in the original 1987 guideline; presently §2G2.2(b)(3)), which results in incremental enhancements from 2 to 7 levels; images depicting sadistic or masochism conduct or other depictions of violence (added in 1990; presently §2G2.2(b)(4)), which results in a 4-level enhancement; and an offender's "pattern of activity involving the sexual abuse or exploitation of a minor" (added in 199l; presently §2G2.2(b)(5)), which results in a 5-level increase. None of these three enhancements was in the former §2G2.4 and all remained in §2G2.2 after the PROTECT Act amendments. Figure 6–10 below demonstrates the steady increase in the application rate of these three enhancements from their inception until fiscal year 2004, when the current version of §2G2.2 was promulgated.

Figure 6-10
Application of Specific Offense Characteristics: R/T/D Offenses
Fiscal Years 1992-2004

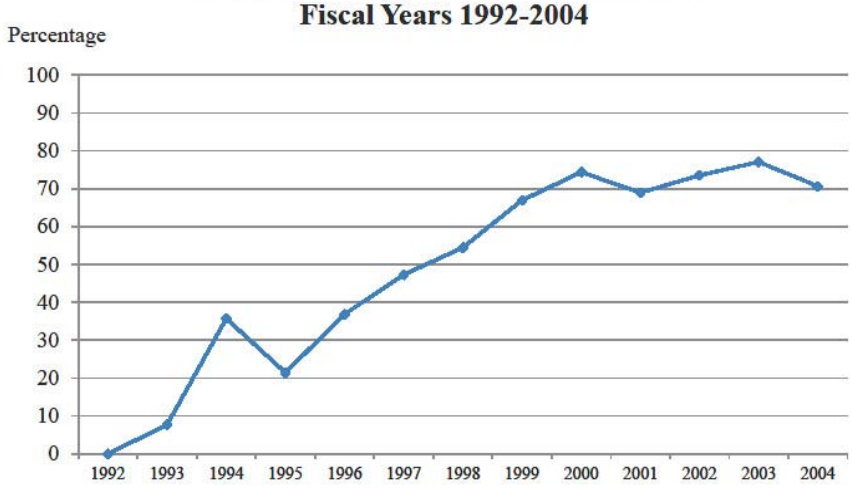


Note: Only cases with complete guideline application information are included in this analysis.
SOURCE: U.S. Sentencing Commission, 1992-2004 Datafile, USSCFY92-04.

c. The "Old" Number-of-Images Enhancement in §2G2.4

The former §2G2.4, unlike the version of §2G2.2 in effect before the PROTECT Act, contained a 2-level enhancement for possession of at least ten images, books, magazines, videotapes, or "other items" containing child pornography. That enhancement was added in late November 1991, less than one month after the original version of the guideline was promulgated. Figure 6–11 below shows the application rate of this enhancement in §2G2.4 cases from fiscal year 1992 until fiscal year 2004.

Figure 6-11
Application of Specific Offense Characteristics
Number of Images: Possession Offenses
Fiscal Years 1992-2004



Note: Only cases with complete guideline application information are included in this analysis.
SOURCE: U.S. Sentencing Commission, 1992-2004 Datafile, USSCFY92-04.

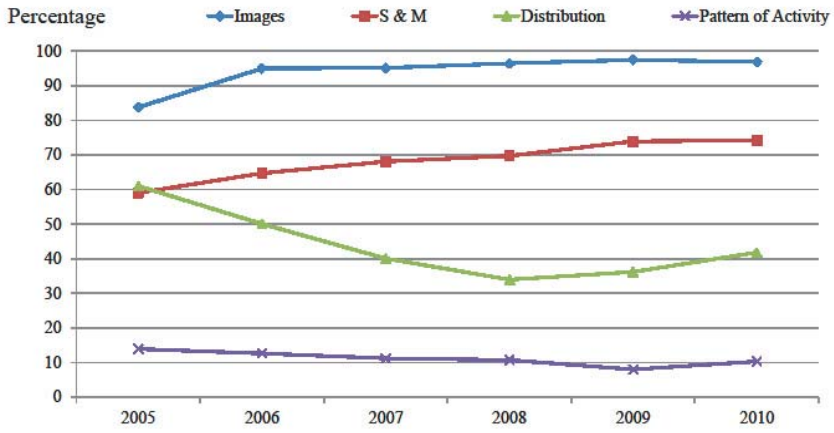
d. New Enhancements Added to §2G2.2 After the PROTECT Act

Effective November 1, 2004, §2G2.2 was amended in two ways: first, it applied to both R/T/D and possession offenders; and, second, a new "images table" was added that provided for incremental enhancements from 2 to 5 levels depending on the number of images possessed (presently §2G2.2(b)(7)). Figure 6–12 below shows the application rates of the images table enhancement as well as the previously existing three enhancements depicted in Figure 6–10 above (for distribution, sado-masochistic images, and a "pattern of activity") during the post-2004 period.[45] The application rates of the other two enhancements in the "new" version of

[45] The noticeable drop in the distribution enhancement's rate of application after fiscal year 2005 — from 60% in fiscal year 2005 to approximately 40% between fiscal years 2007 through 2010 — is a reflection of the fact that an increasing number of offenders convicted of possession after the PROTECT Act have been sentenced under the "new" version of USSG §2G2.2 (rather than under the former USSG §2G2.4). Although a significant percentage of offenders convicted of possession also distributed child pornography as well, that percentage is smaller than the percentage of offenders convicted of R/T/D offenses who distributed. *See* Figures 6–15 & 6–16, *infra*.

§2G2.2 from fiscal year 2005 until fiscal year 2010 — images depicting prepubescent minors and use of a computer — are depicted in Figure 6–9, *supra*.

Figure 6-12
Application of Specific Offense Characteristics:
Non-Production Offenses
Fiscal Years 2005-2010



Note: Only cases with complete guideline application information are included in this analysis.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

Notably, in fiscal year 2010, 1,602 of 1,654 offenders (96.9%) received an enhancement pursuant to §2G2.2(b)(7) based on the number of images that they possessed, and 1,115 of the 1,602 (69.6%) received the maximum 5-level enhancement based on possession of 600 or more images.

5. *Offender Characteristics*

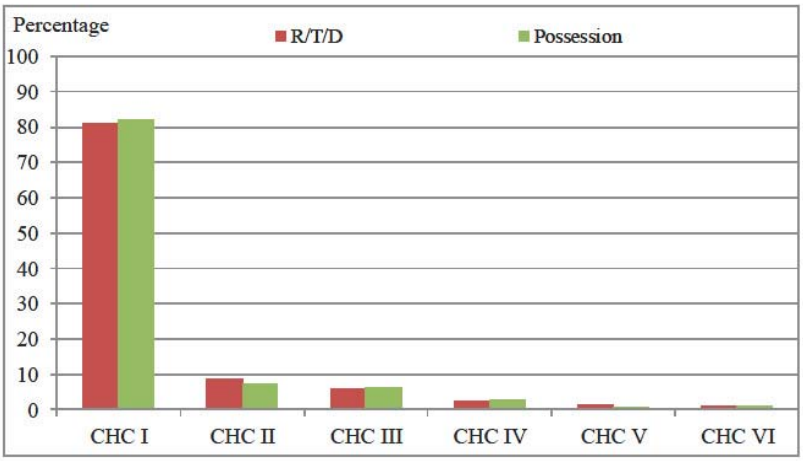
Data about offender characteristics in non-production cases are contained in Table 6–8 and Figure 6–13 below. Table 6–8 contains data about the demographic characteristics of non-production offenders over time, and Figure 6–13 shows the criminal histories of such offenders in fiscal year 2010. These data reflect a large degree of homogeneity among non-production offenders: the vast majority are white male United States citizens with little or no criminal history.

Table 6–8
Demographic Characteristics of Offenders Convicted of R/T/D and Possession Offenses
Fiscal Years 1992, 2004, and 2010

	R/T/D						Possession					
	1992		2004		2010		1992		2004		2010	
	N	%	N	%	N	%	N	%	N	%	N	%
Race/Ethnicity												
White	57	93.4	314	92.1	710	87.6	14	87.5	270	91.2	810	89.9
Black	3	4.9	4	1.2	29	3.6	1	6.3	5	1.7	21	2.3
Hispanic	0	0.0	16	4.7	54	6.7	1	6.3	15	5.1	53	5.9
Other	1	1.6	7	2.1	18	2.2	0	0.0	6	2.0	17	1.9
Total	61	100.0	341	100.0	811	100.0	16	100.0	296	100.0	901	100.0
Citizenship												
U.S. Citizen	60	98.4	332	97.7	794	97.7	15	100.0	291	98.3	878	97.1
Non-Citizen	1	1.6	8	2.4	19	2.3	0	0.0	5	1.7	26	2.9
Total	61	100.0	340	100.0	813	100.0	15	100.0	296	100.0	904	100.0
Gender												
Male	59	96.7	336	98.5	808	99.4	16	100.0	295	99.7	899	99.5
Female	2	3.3	5	1.5	5	0.6	0	0.0	1	0.3	5	0.6
Total	61	100.0	341	100.0	813	100.0	16	100.0	296	100.0	904	100.0
Average Age		42		41		42		48		44		43

This table excludes cases missing information for the variables required for analysis. Percentages may not sum to 100.0% due to rounding.
SOURCE: U.S. Sentencing Commission, 1992, 2004, and 2010 Datafiles, MONFY92, USSCFY04, and USSCFY10.

Figure 6-13
Non-Production Offense Characteristics: Criminal History Category
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

Section 2G2.2 offenders differ significantly from the general federal offender population with respect to race, gender, age, and criminal history. Nine out of ten §2G2.2 offenders (both possession and R/T/D offenders) in fiscal year 2010 were white males; by contrast, only 23 percent of the general federal offender population were white males.[46] Section 2G2.2 offenders also differ from the general federal population with respect to age and criminal history. The average age of all federal offenders in fiscal year 2010 was 35,[47] while the average age of R/T/D offenders was 42, and the average age of possession offenders was 43. The average age of all non-production offenders was 42. Offenders convicted of non-production offenses have less extensive criminal histories than the average federal offender. In fiscal year 2010, 81.1 percent of R/T/D offenders and 82.2 percent of possession offenders were in Criminal History Category I, as shown in Figure 6–13.[48] By contrast, 43.9 percent of all federal offenders were in Criminal History Category I, which applies to those offenders with the least serious criminal history.[49]

[46] *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 17 (2010) (Table 7).

[47] *See id.* at 16 (Table 6).

[48] From 1992 through 2010, the vast majority of non-production offenders have been in Criminal History Category I. For instance, in 1992, 92.0% were in Criminal History Category I; in 2000, 83.3% were in Criminal History Category I; in 2004, 82.9% were in Criminal History Category I; and in 2010, 82.0% were in Criminal History Category I.

[49] 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, *supra* note 46, at 46 (Table 21).

D. NON-PRODUCTION SENTENCING DATA DERIVED FROM THE COMMISSION'S SPECIAL CODING PROJECT

To provide a more complete profile of offense conduct and offender characteristics in cases in which offenders were sentenced under the non-production guidelines, the Commission undertook a comprehensive special coding project of non-production (§2G2.2) cases from fiscal year 2010. Reviewing the five sentencing documents sent to the Commission in each case by district courts pursuant to 28 U.S.C. § 994(w), the Commission coded and analyzed data concerning numerous personal characteristics of offenders and also aspects of their instant offense conduct and their prior criminal conduct. Those data are not contained in the Commission's regular annual datafiles of child pornography cases.[50]

The Commission reviewed all 1,654 fiscal year 2010 non-production cases in which courts imposed sentences pursuant to §2G2.2 in *Guidelines Manuals* effective on or after November 1, 2004 (reflecting the PROTECT Act amendments),[51] and for which courts submitted the requisite documents to the Commission pursuant to section 994(w).[52] The Commission coded those 1,654 cases for numerous variables, including: (1) the most serious offense of conviction in each case; (2) whether an offender engaged in knowing distribution or receipt of child pornography; (3) the specific types of distribution and receipt conduct (*e.g.*, peer-to-peer file-sharing, emailing); (4) whether an offender ever engaged in any criminal sexually dangerous behavior[53] in addition to or as part of committing the child pornography offense and, if so, the type of criminal sexually dangerous behavior; (5) several characteristics about the offender (including any military service record, substance abuse history, a reported history of sexual abuse as a child, net worth, and employment status); and (6) the content of plea agreements.

The results of the Commission's coding project of non-production cases are set forth below with respect to offense and offender characteristics. Data concerning criminal sexually

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[50] Pursuant to 28 U.S.C. § 994(w), courts are required to submit to the Commission copies of the charging instrument; the presentence report and any addenda; the statement of reasons form; the judgment and commitment order; and any written plea agreement in the case. A word of caution about the Commission's coding project should be given at the outset of the discussion of its results. The Commission typically receives only the five sentencing documents noted above and does not receive other relevant sources of information about the investigation, charging, adjudication, and sentencing processes (*e.g.*, police reports, transcripts of court proceedings). Thus, the sources of information about a particular case are limited to the information contained within those five documents. In some cases, that documentation did not provide complete information about a coding issue in a case (*e.g.*, the amount of an offender's assets), which resulted in potentially under-inclusive data for analysis in some instances.

[51] *See* Chapter 1 at 4, 7–8 (discussing the PROTECT Act amendments).

[52] Of the 1,717 cases sentenced pursuant to USSG §2G2.2 in fiscal year 2010, 38 cases were excluded for incomplete documentation. An additional 25 cases were excluded because they either were sentenced under a version of §2G2.2 in effect before the PROTECT Act in 2004 or were sentenced under the former version of USSG §2G2.4. Such cases were excluded from analysis because the base offense levels and specific offense characteristics of those former guidelines do not correspond to the current version of §2G2.2, which went into effect on November 1, 2004, and has remained essentially the same since that time (save for the addition of "morphing" offenses and for certain technical, miscellaneous, and conforming amendments that went into effect on November 1, 2009, *see* USSG, App. C, amend. 733, 736, and 737).

[53] Criminal sexually dangerous behavior is defined and discussed in Chapter 7.

dangerous behavior and the contents of plea agreements are discussed in Chapters 7 and 8, respectively.[54]

1. *Offense Conduct*

For the special coding project, the Commission analyzed fiscal year 2010 §2G2.2 cases to determine both the most serious offense of conviction and whether offenders had engaged in more serious conduct that apparently would have supported a conviction and sentence for a more serious child pornography offense. The Commission examined the indictments and judgments to determine the most serious offense of conviction. Information about the offenders' actual offense conduct generally was obtained from the "factual basis" sections of the plea agreements and the "offense conduct" sections of the presentence reports ("PSRs"). When data were extracted from the PSRs, only portions of the PSRs adopted by sentencing courts pursuant to Federal Rule of Criminal Procedure 32(i)(3) — as reflected in the statement of reasons form — were considered.[55]

In analyzing §2G2.2 cases for actual offense conduct, the Commission coded a case as involving knowing receipt or distribution conduct only if the PSR's recounting of the evidence and/or the parties' stipulation of the facts in plea agreements reflected readily provable conduct. In a typical §2G2.2 case, receipt and/or distribution conduct was deemed readily provable based on the manner in which law enforcement detected the offense. In nearly 90 percent of all fiscal year 2010 §2G2.2 cases, law enforcement detected an offender in one or more of three ways: (1) by accessing the offender's child pornography files through a peer-to-peer ("P2P") file-sharing program used by the offender; (2) by directly receiving child pornography from an offender via email or an instant-messaging service or by accessing images or videos posted by an identifiable offender in an Internet "newsgroup," "bulletin board," or similar Internet forum; or (3) by tracing an offender's purchase of child pornography from a commercial website (typically using his own name as well as an email address and credit card associated with his true identity).[56] In such cases, law enforcement typically would acquire information about an offender's Internet Protocol ("IP") address, obtain and execute a search warrant, and then engage in a forensic analysis of the offender's computer. In a typical case, the forensic evidence clearly established receipt and/or distribution conduct. In addition, in a typical case, the PSR indicated that the offender also confessed to knowingly receiving child pornography; in many cases, the offender also confessed to knowingly distributing child pornography. Finally, in many cases, the prosecution offered

[54] *See* Chapter 7 at 181–206; Chapter 8 at 219–23.

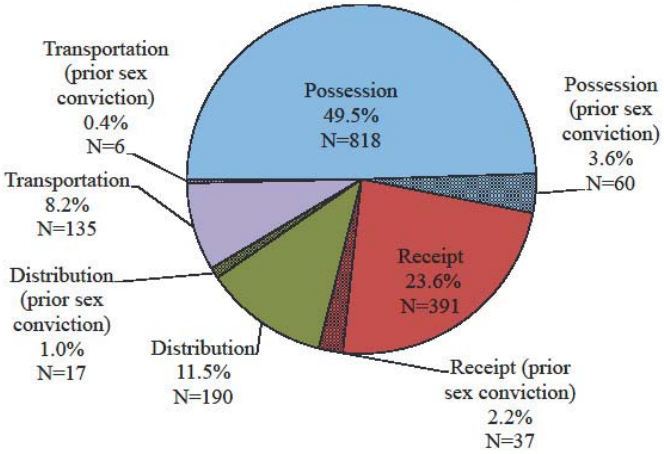
[55] The Commission cautions that, while the standard of proof for a conviction is proof beyond a reasonable doubt, the preponderance standard applies to judicial findings at sentencing, McMillian v. Pennsylvania, 477 U.S. 79, 81 (1986), and the rules of evidence applicable at trial are not applicable at sentencing. USSG §6A1.3 (Resolution of Disputed Factors (Policy Statement)), comment. Nevertheless, it is well accepted that, as a general matter, "a PSR bears sufficient indicia of reliability to permit a sentencing court to rely on it at sentencing." United States v. Ayala, 47 F.3d 688, 690 (5th Cir. 1995); *see also* United States v. Morillo, 8 F.3d 864, 872 (1st Cir. 1993) (same); United States v. Powell, 650 F.3d 388, 394 (4th Cir. 2011) (noting the "presumption of reliability" afforded to PSRs).

[56] The Commission's special coding project revealed that law enforcement detected offenders in 88.4% of cases in one or more of those three manners. *See also* Tables 6-9 & 6-10 (summarizing the various modes of receipt and distribution used by offenders).

uncontroverted evidence that the offender also had used computer search terms commonly associated with child pornography.[57]

Figure 6–14 below provides data concerning the most serious non-production offense of conviction in §2G2.2 cases.[58] The shaded portions of the figure represent cases in which offenders' sentences were enhanced based on predicate convictions for sex offenses.

Figure 6-14
Non-Production Offense Characteristics:
Nature of Most Serious Offense of Conviction
Fiscal Year 2010 (N=1,654)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Figure 6–14 shows that 53.1 percent (878) of the 1,654 child pornography offenders sentenced under §2G2.2 were convicted of possession (818, or 49.5%, had no predicate sex convictions, and 60, or 3.6%, had predicate sex convictions).[59] However, Figure 6–15 below

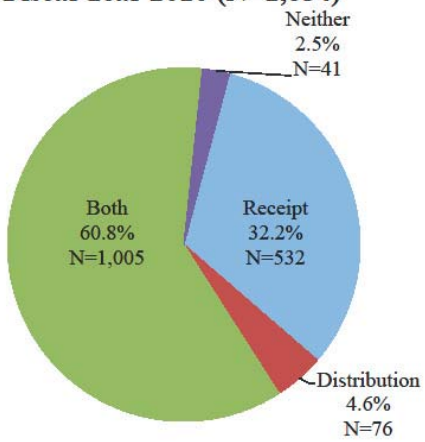
[57] *See* Chapter 3 at 50, 52 (discussing offenders' use of such search terms).

[58] As discussed in *supra* note 5, the order (from most serious offense to least serious offense in terms of the applicable penalty ranges) in non-production cases is: distribution; importation; transportation (including shipping and mailing); receipt; morphing; and possession. In fiscal year 2010, there were no cases in which importation or morphing offenses were the most serious offense of conviction. There were five cases with convictions for obscenity offenses (as the most serious offense of conviction) that were sentenced under USSG §2G2.2(a)(1). Those five obscenity cases — none of which had a mandatory minimum penalty — were treated as "possession" cases in the data analysis that follows. Note that in some §2G2.2 cases, offenders were convicted of both non-production offenses and other types of sex offenses (production, "travel," or enticement offenses); however, in such cases, the offenders' "primary" guideline was §2G2.2 because it yielded a higher guideline range than the guideline referencing the other sex offenses. *See supra* note 27. Only such offenders' most serious non-production offenses of conviction are represented in Figure 6-14.

[59] A predicate sex conviction increased a possession offender's statutory imprisonment range from zero to ten years to ten to 20 years. *See* Chapter 2 at 26 & n.39.

shows that the vast majority of all offenders sentenced under §2G2.2 (1,613, or 97.5%) actually engaged in knowing receipt[60] and/or distribution[61] conduct.

Figure 6-15
Non-Production Offense Characteristics:
Receipt and/or Distribution Conduct
Fiscal Year 2010 (N=1,654)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10. and FY10 Child Pornography Special Coding Project.

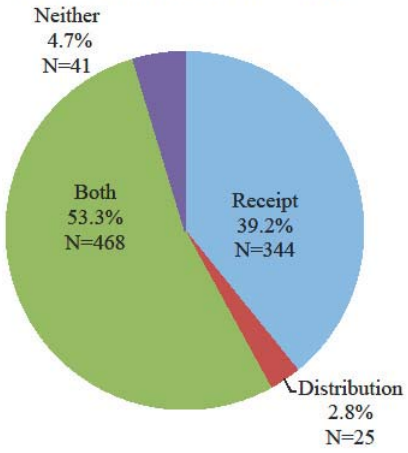
Figure 6–16 below shows the percentage of §2G2.2 offenders *convicted of possession* (as the most serious offense of conviction) who in fact engaged in knowing receipt and/or distribution conduct. The vast majority of possession offenders (95.3%) engaged in such conduct. If convicted of an R/T/D offense, these offenders would have faced a five-year

[60] As Judge Posner has noted, "possessors, unless they fabricate their own [child] pornography, are also receivers [at some earlier point in time]." United States v. Richardson, 238 F.3d 837, 839-40 (7th Cir. 2001). Although there may be some possessors who unwittingly received child pornography and later decided, upon its discovery, to maintain possession of it, United States v. Meyers, 355 F.3d 1040, 1042 (7th Cir. 2004) (describing this possibility), that percentage appears small. In none of the fiscal year 2010 cases reviewed by the Commission did a PSR find that an offender had unwittingly received child pornography and, after discovering it, decided to possess it. This is not to say that such cases do not exist, yet they are likely rare. *Cf.* United States v. Welton, 2009 WL 4507744, at *18-20 & n.209 (C.D. Cal. Nov. 30, 2009) ("Following receipt, the defendant may have culled from the stack [of pornography that he received] images of child pornography that were later found by law enforcement. Under these circumstances, the court would not be able to determine whether the defendant knowingly received child pornography unless it could ascertain that at the moment of receipt defendant knew the nature of the images he was receiving."); *see also* United States v. Kamen, 491 F. Supp.2d 142, 152-53 (D. Mass. 2007) (holding that the evidence offered at trial by the defendant — that he initially did not realize he had received child pornography and thereafter, only after discovering it was child pornography, he decided to maintain possession of it — entitled the defendant to a jury instruction on the lesser-included offense of possession).

[61] Because federal law requires sufficient proof that a defendant *knowingly* distributed child pornography in order to be guilty of distribution, *see* 18 U.S.C. §§ 2252(a)(2) and 2252A(a)(2), the Commission excluded cases as involving knowing distribution when a court found that a defendant who had used a P2P file-sharing program either "opted out" of the P2P program or unwittingly "opted in" to the P2P program. *See* Chapter 3 at 50 (discussing how users of certain P2P programs may opt in or opt out of the programs' file-sharing features).

mandatory minimum sentence of imprisonment if they did not have predicate sex convictions, and a 15-year mandatory minimum sentence of imprisonment if they had predicate sex convictions.[62]

Figure 6-16
Possession Offense Characteristics:
Receipt and/or Distribution Conduct
Fiscal Year 2010 (N=878)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

As depicted in Figure 6–16, 92.5 percent of fiscal 2010 possession cases involved knowing receipt by the defendant. In the remaining cases, the evidence recounted in the PSRs and plea agreements did not discuss the manner in which the defendants received the child pornography (either because the probation officers omitted discussion of such evidence where it existed or because the prosecution did not have such evidence).[63]

Table 6–9 below shows the types of receipt conduct by the 1,527 §2G2.2 offenders whose PSRs discussed the manner in which they knowingly received child pornography (through P2P file-sharing, by downloading from a website, from an email or instant-message with an attachment, or by "other" means, such via texting or mail).[64] Because some offenders received

[62] *See* Chapter 2 at 26.

[63] In a small percentage of possession prosecutions, because of computer forensic difficulties or other proof problems, the government cannot establish that a defendant who knowingly possessed child pornography previously knowingly received it.

[64] The cases depicted in Table 6–9 do not include the 127 cases in which PSRs and plea agreements did not discuss the manner in which receipt occurred. In ten of those cases, the defendants were convicted of receipt, yet their PSRs and plea agreements did not discuss the manner of receipt with enough detail to allow for classification of the specific mode of receipt. In the remaining 117 cases, offenders were not convicted of receipt and their PSRs and plea agreements did not discuss the manner in which they received child pornography.

child pornography in multiple ways, the percentages in Table 6–9 add up to more than 100 percent.

Table 6-9
Non-Production Offense Characteristics:
Types of Receipt Conduct
Fiscal Year 2010 (N=1,527)

Receipt Conduct	N	Percentage
P2P	857	56.1
Website	666	43.6
Email/IM	258	16.9
Other	91	6.0

Note: A single offender may appear in more than one category.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Nearly two-thirds of §2G2.2 offenders (1,081 of 1,654, or 65.4%) distributed child pornography, although the sentencing documentation in one of those cases does not reveal the manner in which the distribution occurred.[65] Table 6–10 below shows the specific modes of distribution conduct by the 1,080 §2G2.2 offenders whose PSRs discussed the manner in which they knowingly distributed child pornography (by P2P file-sharing; by emailing or instant-messaging (IM) with an attachment; by posting images in connection with an Internet bulletin board, newsgroup, chat room, or similar Internet "community" forum dedicated to child sexual exploitation; by a mode of non-Internet distribution, including mailing, texting, or hand-delivering an image; and by "other" modes, such as posting an image on a photo-sharing website such as Flickr.com or an offender's social networking site such as MySpace). Some offenders distributed in multiple ways. Therefore, the percentages in Table 6–10 add up to more than 100 percent. The most common manner of distribution was P2P file-sharing (used in 73.8% of cases in which distribution occurred). Significantly, the Commission's review of PSRs revealed that none of the fiscal year 2010 cases in which §2G2.2 offenders distributed child pornography involved traditional *commercial* distribution (*e.g.*, a commercial child pornography website operator). Rather, all distribution in the fiscal year 2010 cases was either gratuitous or involved bartering among offenders.

[65] In that case, the offender was convicted of distribution.

Table 6-10
Non-Production Offense Characteristics:
Types of Distribution Conduct
Fiscal Year 2010 (N=1,080)

Distribution Conduct	N	Percentage
P2P	797	73.8
Email/IM	333	30.8
Newsgroup, Bulletin Board, Chat Room	59	5.5
Hand, Text, Mail	33	3.1
Other	64	5.9

Note: A single offender may appear in more than one category. One case is missing type of distribution conduct.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Of the 797 cases in which offenders distributed child pornography using P2P file-sharing programs, 577 (72.4%) offenders solely used an "open" P2P program (*e.g.*, LimeWire)[66] and did not distribute in any other manner; 75 (9.4%) offenders solely used a "closed" P2P program (*e.g.*, Gigatribe) and did not distribute in any other manner; and the remaining 145 (18.2) offenders used one of the two types of P2P programs and also used some other mode of distribution.

Of the offenders in the 1,080 cases with a discussion of the manner of distribution, a majority (577, or 53.4%) solely engaged in "impersonal" anonymous distribution using an "open" P2P program such as LimeWire, with no two-way communication between the offender

[66] *See* Chapter 3 at 52–53 (discussing "open" and "closed" P2P file-sharing programs). In 293 of those 577 cases in which PSRs mentioned defendants' use of "open" P2P file-sharing programs, the offense conduct sections of the PSRs expressly stated that the offenders knowingly distributed child pornography using a P2P file-sharing program. In the remaining 284 cases, the PSRs did not expressly find that the offenders knowingly distributed child pornography using a P2P file-sharing program (and no enhancement was given for distribution under USSG §2G2.2(b)(3)). However, in such cases, law enforcement officials typically accessed child pornography images or videos on the defendants' computers via open P2P file-sharing programs, and there was no indication in the PSRs in those cases that the offenders had unwittingly "opted in" to the file-sharing programs when they had installed the P2P file-sharing software. *See* Chapter 3 at 50 (discussing the process of "opting in" or "opting out" of the file-sharing feature of open P2P programs such as LimeWire). In view of the nature of P2P file-sharing programs, it is reasonable to infer that those defendants knowingly distributed child pornography via open P2P file-sharing programs in such cases. *See* United States v. Dodd, 598 F.3d 449, 452 (8th Cir. 2010) ("[T]he purpose of a file sharing program is to share, in other words, to distribute. Absent concrete evidence of ignorance — evidence that is needed because ignorance is entirely counterintuitive — a fact-finder may reasonably infer that the defendant knowingly employed a file sharing program for its intended purpose."). In its review of cases, the Commission excluded 22 cases as not involving knowing distribution because the PSRs in those cases found that the defendants had unwittingly "opted in" to open file-sharing programs later accessed by a law enforcement officers.

who distributed and persons who obtained images or videos from the offender's computer.[67] Another group of offenders who distributed (445, or 41.2%, of the 1,080) engaged in "personal" distribution of child pornography to one or more adult offenders[68] (*e.g.*, emailing images or distributing them using a "closed" P2P program such as Gigatribe), which typically involved two-way communication between offenders about child pornography.[69] Such personal distribution suggests that such offenders likely either were involved in or were seeking to become involved in (or create) a child pornography "community" on the Internet.[70]

The rates of application of the guideline enhancements for distribution, §2G2.2(b)(3)(A) – (F), varied depending on whether offenders distributed in a personal or impersonal manner.[71] Of those 445 offenders who engaged in personal distribution to adults, 233 (52.4%) received an enhancement of 5 levels or more under one of the prongs of §2G2.2(b)(3); 146 (32.8%) received a 2-level enhancement under §2G2.2(b)(3)(F); and 66 (14.8%) received no guideline enhancement for their distribution.[72] Of the 577 offenders whose impersonal distribution conduct did not suggest active involvement in an Internet community, 69 (12.0%) received an enhancement of 5 levels or more under one of the prongs of §2G2.2(b)(3); 189 (32.8%) received a 2-level enhancement under §2G2.2(b)(3)(F); and 319 (55.3%) received no enhancement for

[67] Of those 577 offenders, 12 (2.1%) *received* child pornography from other adult offenders in a "personal" manner (*e.g.*, via email). That small subset of the 577 offenders appears to have been involved in an Internet-based child pornography "community," as evinced by their receipt conduct. The receipt and distribution conduct of the vast majority of the 577 offenders, however, did not indicate their involvement in such a community.

[68] An additional 40 offenders (3.7%) distributed child pornography to real or perceived minors (typically via email or Instant Messaging ("IM")) but did not appear from their PSRs to have distributed to adults or otherwise been involved in child pornography "communities." An additional 18 offenders (1.7%) only distributed child pornography in other manners (*e.g.*, posting images on a photo-sharing website such as Flickr.com), but it was unclear from the PSRs whether the persons with whom they intended to share images were adults or minors (and, thus, the Commission excluded them from presumptive membership in a "community" of offenders).

[69] *See* Chapter 3 at 52–53 (discussing "personal" and "impersonal" modes of distribution).

[70] *See* Chapter 4 at 92–99 (discussing child pornography "communities" on the Internet). The 445 offenders who engaged in personal distribution to other adult offenders represent slightly more than one-fourth (26.9%) of all 1,654 non-production offenders in fiscal year 2010.

[71] The different levels of enhancement for distribution — from 2 to 7 levels — depend on the type of distribution at issue. *See* USSG §2G2.2(b)(3)(A)-(F). For simple distribution to another adult (without an expectation of anything in return), an offender receives a 2-level increase under §2G2.2(b)(F). For distribution to another adult where an offender expected to receive something in return other than money (*e.g.*, bartering child pornography), the offender receives a 5-level increase under §2G2.2(b)(B). For distribution for pecuniary gain, additional levels may be added under §2G2.2(b)(A) depending on the financial value of the exchange. For distribution to a minor, an offender receives between 5 and 7 levels (depending on the circumstances). *See* USSG §2G2.2(b)(3)(C)-(E).

[72] 229 of 445 (51.5%) also were convicted of a distribution/transportation offense (and thus faced a five-year statutory mandatory minimum sentence or a 15-year minimum sentence in the case of defendants with predicate convictions for sex offenses).

their distribution.[73] Therefore, offenders who engaged in personal distribution generally received a greater enhancement than those who only engaged in impersonal distribution.

Finally, of the 1,081 defendants whose PSRs or plea agreements indicated that they knowingly distributed child pornography, 398 (36.8%) did not receive an enhancement under §2G2.2(b)(3). In addition, 116 of those 398 offenders were convicted of receipt (as their most serious offense) and received a 2-level decrease in their offense level pursuant to §2G2.2(b)(1), notwithstanding the fact that they knowingly distributed child pornography.[74]

2. *Fiscal Year 2012 (First Quarter) Supplemental Coding Project*

The Commission also examined all §2G2.2 cases from the first quarter of fiscal year 2012 for which the Commission had received sufficient documentation at the time of coding. There were 382 such cases. In a manner similar to the Commission's fiscal year 2010 coding project discussed above, the Commission examined these cases to determine certain offense characteristics not discernible in the Commission's regular datafile for §2G2.2 cases. In particular, the Commission coded for: (1) the nature of the most serious non-production offense of conviction (distribution, importation`, transportation (including shipping and mailing), receipt, morphing, and possession); (2) the types of distribution and receipt conduct, if any, that occurred (*e.g.*, "open" P2P file-sharing, "closed" P2P file-sharing, emailing); and (3) whether, and to what extent that, an offender had engaged in criminal sexually dangerous behavior before or concomitantly with his non-production child pornography offense.[75]

The Commission coded the first-quarter fiscal year 2012 cases in order to determine whether the ongoing changes in technology and offense behavior have resulted in significant differences in offender and offense characteristics since fiscal year 2010. As discussed below, with the exception of increasing use of P2P file-sharing programs to receive and distribute child pornography by offenders, little has changed during the ensuing two years. Data concerning the most serious offense of conviction and receipt/distribution conduct are discussed in this section. Data concerning criminal sexually dangerous behavior are discussed in Chapter 7.

a. Most Serious Offense of Conviction

As shown in Figure 6–17, and as was also apparent in the fiscal year 2010 cases, in slightly over half of all first-quarter fiscal year 2012 §2G2.2 cases possession was the most serious offense of conviction. An R/T/D offense was the most serious offense of conviction in the remaining cases.

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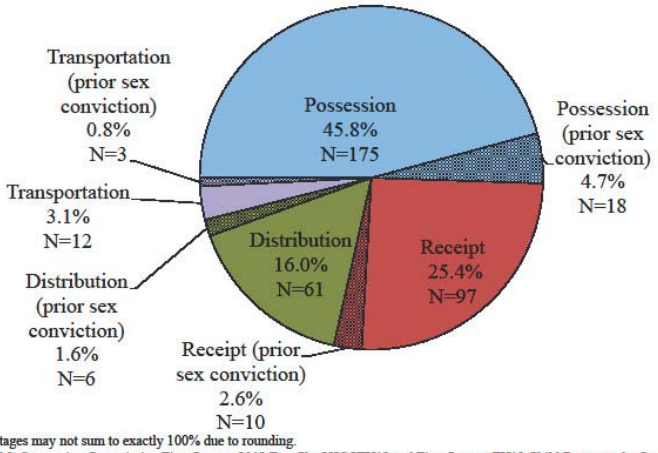
[73] 73 of the 577 (12.7%) also were convicted of a distribution/transportation offense (and thus faced a five-year statutory mandatory minimum sentence or a 15-year minimum sentence in the case of defendants with predicate convictions for sex offenses).

[74] Section 2G2.2(b)(1) applies if "the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor and . . . the defendant did not intend to traffic in, or distribute, such material . . . ." USSG §2G2.2(b)(1)(B) & (C).

[75] This supplemental coding project did not examine the offender characteristics (*e.g.*, military record, history of substance abuse) that were coded in the Commission's coding project of all fiscal year 2010 USSG §2G2.2 cases. Those offender characteristics are discussed in section D.3, *infra*.

Figure 6-17
Non-Production Offense Characteristics:
Nature of Most Serious Offense of Conviction
1st Quarter, Fiscal Year 2012 (N=382)

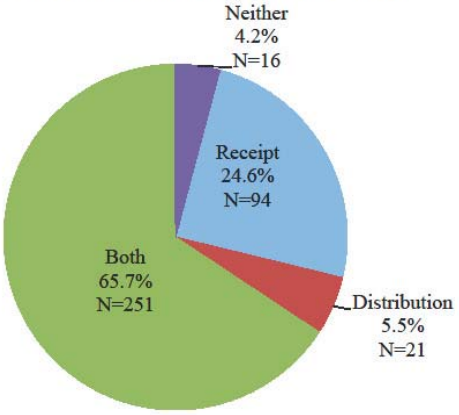


Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission First Quarter 2012 Datafile, USSCFY12 and First Quarter FY12 Child Pornography Special Coding Project.

b. Receipt and Distribution Conduct

As shown in Figure 6–18, and also similar to the fiscal year 2010 §2G2.2 cases, offenders in the vast majority of first-quarter fiscal year 2012 §2G2.2 cases — 95.8 percent — actually engaged in knowing receipt and/or distribution conduct notwithstanding the fact that slightly over half were only convicted of possession.

Figure 6-18
Non-Production Offense Characteristics:
Receipt and/or Distribution Conduct
1st Quarter, Fiscal Year 2012 (N=382)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, First Quarter 2012 Datafile, USSCFY12 and First Quarter FY12 Child Pornography Special Coding Project.

As reflected in Tables 6–11 and 6–12 below, and consistent with recent trends of offenders' increasing use of P2P file-sharing programs to receive and/or distribute child pornography,[76] three-fourths of offenders in the first quarter of fiscal year 2012 who received child pornography (257 of 345, or 74.5%) used P2P programs to do so; an even larger percentage of offenders who distributed (232 of 272, or 85.3%) used P2P programs to do so. Of 232 offenders who distributed using P2P programs, 129 (55.6%) solely used an "open" P2P program (*e.g.*, LimeWire) and did not distribute in any other manner; 67 (28.9%) solely used a "closed" P2P program (typically Gigatribe) and did not distribute in any other manner; and the remaining 36 (15.5%) used both types of P2P programs or used one of the types and also some other mode of distribution. The other common means of receiving child pornography (downloading from websites and transmissions via email or IM) and distributing child pornography (posting images in traditional Internet forums such as bulletin boards and transmissions via email or instant messaging (IM)) appear to have decreased somewhat since fiscal year 2010, as use of P2P file-sharing has increased.

Table 6-11
Non-Production Offense Characteristics:
Types of Receipt Conduct
1st Quarter, Fiscal Year 2012 (N=345)

Receipt Conduct	N	Percentage
P2P	242	70.1
Website	67	19.4
Email/IM	45	13.0
Other	26	7.5

Note: A single offender may appear in more than one category.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

[76] *See* Chapter 3 at 48–53 (discussing P2P file-sharing).

Table 6-12
Non-Production Offense Characteristics:
Types of Distribution Conduct
1st Quarter, Fiscal Year 2012 (N=272)

Distribution Conduct	N	Percentage
P2P	232	85.3
Email/IM	58	21.3
Newsgroup, etc.	13	4.8
Hand, Text, Mail	5	1.8
Other	17	6.3

Note: A single offender may appear in more than one category.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Because of the significant increase in the use of P2P file-sharing programs in just two years, the Commission examined federal non-production child pornography cases a full decade earlier, in fiscal year 2002, to determine what percentage of offenders then used P2P file-sharing programs in the commission of their non-production offenses (according to their PSRs). Of the 345 randomly selected fiscal year 2002 cases examined by the Commission, which represented 83.3 percent of all federal non-production cases in that fiscal year, *none* involved the use of P2P file-sharing programs by offenders, according the offense conduct sections of the PSRs.[77]

3. *Offender Characteristics*

The Commission analyzed the following offender characteristics in fiscal year 2010 §2G2.2 cases in order to provide a more complete profile of offenders than could be derived from the Commission's regular annual datafiles: (1) whether offenders reported being sexually

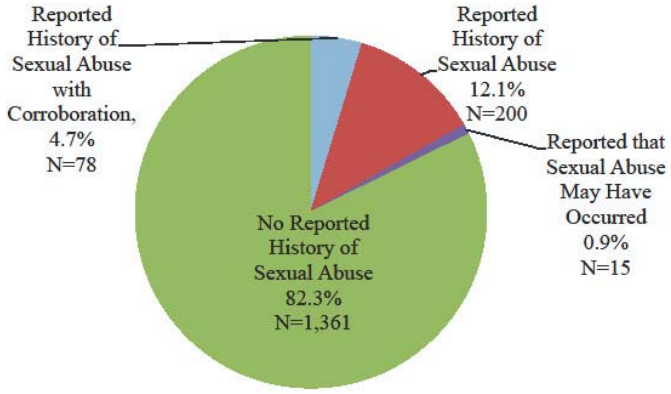
[77] According to a February 2003 report by the U.S. General Accounting Office, P2P file-sharing programs were then "emerging" as an Internet technology used by some child pornography offenders. *See* U.S. GENERAL ACCOUNTING OFFICE, FILE-SHARING PROGRAMS: PEER-TO-PEER NETWORKS PROVIDE READY ACCESS PORNOGRAPHY 8 (2003) ("Although peer-to-peer file-sharing programs are largely known for the extensive sharing of copyrighted digital music, they are emerging as a conduit for the sharing of child pornography images and videos.") (available at http://www.gao.gov/new.items/d03351.pdf). It should be noted that the offenders sentenced in the fiscal year 2002 non-production cases examined by the Commission typically committed their offenses well over a year before the date on which they were sentenced (some even in the mid to late 1990s). The Commission's data about P2P file-sharing use in fiscal year 2002 cases are consistent with the recent findings of the Crimes Against Children Research Center in their report, *Trends in Arrests for Child Pornography Possession: The Third National Juvenile Online Victimization Survey (NJOV-3)* 2 (April 2012) (finding that 61% of non-production child pornography offenders used P2P programs in 2009, 28% used P2P programs in 2006, and 4% used P2P programs in 2002), http://www.unh.edu/ccrc/pdf/ CV270_Child%20Porn%20Production%20Bulletin_4-13-12.pdf (last visited Nov. 20, 2012).

abused during their youth; (2) whether offenders reported having a history of substance abuse (drugs or alcohol); (3) offenders' military service records, if any (including being in the military at the time of the child pornography offense); (4) offenders' financial status at the time of sentencing; and (5) offenders' employment status at the time of their arrests for their child pornography offenses. By way of comparison, comparable statistical information about the general United States population (adult white males, in particular)[78] and the general federal prison population is noted (where it exists).[79]

a. History of Childhood Sexual Abuse

Figure 6–19 shows the percentage of offenders who, during the presentence investigation, reported a history of childhood sexual abuse.[80] A minority, 17.7 percent, reported such a history. Regarding those offenders who reported a history of childhood sexual abuse, Figure 6-19 also shows those cases in which some corroboration of the reported sexual abuse appeared in an offender's PSR (*e.g.*, a family member's statement that the offender was sexually abused).

Figure 6-19
Non-Production Offender Characteristics:
History of Childhood Sexual Abuse
Fiscal Year 2010 (N = 1,654)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

[78] As discussed *supra*, 90% of USSG §2G2.2 offenders are white and over 99% are male. *See* Table 6-8.

[79] As noted below, such comparative information usually was obtained from a source other than the Commission's datafiles.

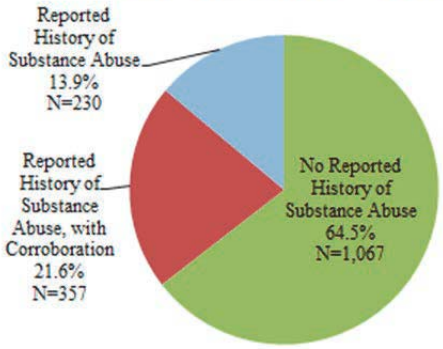
[80] The typical PSR did not define "sexual abuse." PSR writers presumably used the term as it is commonly understood.

According to several studies of childhood sexual abuse, approximately one in six males (14.2%) in the United States is sexually abused during childhood.[81] Thus, the percentage of §2G2.2 offenders reporting a history of childhood sexual abuse (17.7%) is comparable to the percentage of American males generally reporting such abuse in their childhoods.[82]

b. History of Substance Abuse

Figure 6–20 shows the percentage of §2G2.2 offenders who reported a history of substance abuse (involving either drugs or alcohol) and also shows the percentage of offenders whose substance abuse histories were corroborated by other sources.[83] Slightly over one-third of offenders (35.5%) reported a history of substance abuse.

Figure 6-20
Non-Production Offender Characteristics: History of Substance Abuse
Fiscal Year 2010 (N = 1,654)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

By comparison, according to the leading modern study of the "lifetime prevalence rate"[84] of a

[81] *See, e.g.*, Shanta R. Dube et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AMER. J. PREVENTATIVE MEDICINE 430, 433 (2005) (CDC-sponsored study finding that 16.0% of 7,970 American males who were interviewed reported childhood sexual abuse); J. Briere & D.M. Elliot, *Prevalence and Psychological Sequelae of Self-Reported Childhood Physical and Sexual Abuse in General Population Sample of Men and Women*, 27 CHILD ABUSE & NEGLECT 1205 (2003) (study finding that 14.2% of adult males in U.S. reported being sexually abused before turning 18 years of age); *id.* at 1216 (noting other studies showing that 14% of males reported childhood sexual abuse histories); Bolen, R.M. & M. Scannapieco, *Prevalence of Child Sexual Abuse: A Corrective Metanalysis*, 73 SOCIAL SERVICE REV. 281 (1999) (meta-analysis of other studies finding that 13% of boys experienced sexual abuse); D. Finkelhor et al., *Sexual Abuse in a National Survey of Adult Men and Women: Prevalence, Characteristics, and Risk Factors*, 14 CHILD ABUSE & NEGLECT 19 (1990) (study finding that 16% of American men were sexually abused as children). A more recent telephonic survey conducted by the CDC found a much lower prevalence rate for males (6.7%), yet that study noted several limitations resulting from its methodology (*e.g.*, only calling persons' "land line" phones in residences). *See* Centers for Disease Control, *Adverse Childhood Experiences Reported by Adults – Five States, 2009* (Dec. 17, 2010), http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5949a1.htm?s_cid=mm5949a1_w (last visited Nov. 26, 2012).

[82] Studies are contradictory concerning whether the incidence of childhood sexual abuse among whites is less than among other races. *See* E. Douglas & D. Finkelhor, *Childhood Sexual Abuse Fact Sheet*, CRIMES AGAINST CHILDREN RESEARCH CENTER, UNIVERSITY OF NEW HAMPSHIRE ("The findings about race are . . . inconclusive. Several national studies have found that black and white children experienced near-equal levels of sexual abuse. Other studies, however, have found that found that both blacks and Latinos have an increased risk for sexual victimization.") (internal citations omitted), http://www.unh.edu/ccrc/factsheet/pdf/CSA-FS20.pdf (last visited Nov. 27, 2012).

[83] The Commission found corroboration in cases with reliable evidence of a substance abuse history (*e.g.*, a criminal history involving driving while intoxicated; a finding that the offender underwent substance abuse treatment as a condition of his pretrial release on bond).

[84] A "lifetime prevalence rate" refers to the rate among the general population (or a specific part of the population) that a particular disorder or event occurred at least once during the lifetimes of that population. *See* B. Vincente et al., *Lifetime and 12-Month Prevalence of DSM-III-R Disorders in Chile Psychiatric Prevalence Study*, 163 AMER. J.

substance abuse disorder (including either drug abuse or alcoholism), that rate is 14.6 percent among English-speaking United States citizens aged 18 years or older.[85]

c. History of Military Service

The Commission has heard concerns about whether persons with military service records are disproportionately represented among child pornography offenders and also that some courts are imposing below range sentences based on offenders' military service.[86] Therefore, the Commission examined the military service records of §2G2.2 offenders. Figure 6–21 shows the percentage of §2G2.2 offenders who served in any branch of the United States military (including in the military reserves or National Guard) at some point prior to their arrest for their

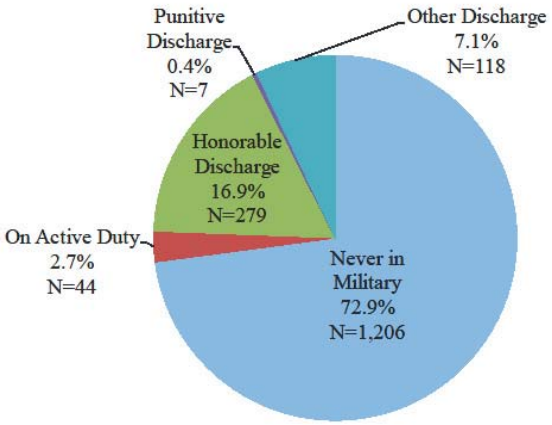
PSYCH. 1362 (2006) ("The lifetime prevalence rate is defined as the proportion of the sample who ever experienced the disorder . . . .").

[85] *See* R.C. Dressler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES OF GEN. PSYCH. 593, 595 (2005). That study did not list separate prevalence rates for males and females. However, the U.S. Department of Health and Human Services' most recent *National Survey on Drug Use and Health: Summary of the National Findings* (2010), available at http://oas.samhsa.gov/NSDUH/2k10NSDUH/2k10Results.htm#7.1.3 (last visited Nov. 27, 2012), shows that males in the United States 12 years of age and older have twice the 12-month prevalence rate of "substance dependence or abuse" (including abuse of illicit drugs, prescription drugs, and alcohol) compared to females 12 years of age and older. *See id.* at Sec. 7.1 (Substance Dependence or Abuse) (noting rate for males was 11.6%, while rate for females was 5.6%). That study also shows that the 12-month prevalence rate for whites is comparable to such a rate for the general population. *See id.* (rate for whites was 8.8%, while the rate for the general population was 8.7%). Assuming that the lifetime prevalence rate for white males is substantially higher than the 14.6% rate for the general population, which seems reasonable in view of marked gender differences in the 12-month prevalence rate, it still would appear lower than the 35.5% reported rate for §2G2.2 offenders. Regardless, it is notable that the lifetime prevalence rate for §2G2.2 offenders is substantially lower than the rate of substance abuse disorders among federal prisoners generally. The Federal Bureau of Prisons reports that, of as 2007, "45% of the federal prison population met the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV) diagnostic criteria for a drug abuse disorder." FEDERAL BUREAU OF PRISONS, *ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS: FISCAL YEAR 2010* (available at http://www.bop.gov/inmate_programs/docs/annual_report_fy_2010.pdf); *accord* BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 (2006) (available at http://bjs.ojp.usdoj.gov/content/pub/pdf/dudsfp04.pdf). These Bureau of Prisons and Bureau of Justice Statistics publications do not specify additional percentages of federal inmates who suffered from an alcohol addiction disorder only. An earlier Bureau of Justice Statistics study showed that nearly four out of five federal prisoners either reported a history of drug and/or alcohol abuse or reported being under the influence of drugs and/or alcohol at the time of their federal offenses. *See* BUREAU OF JUSTICE STATISTICS, SUBSTANCE ABUSE AND TREATMENT: STATE AND FEDERAL PRISONERS, 1997 (Revised Mar. 11, 1999) (available at http://bjs.ojp.usdoj.gov/content/pub/pdf/satsfp97.pdf).

[86] *See, e.g.*, United States v. Jager, No. Cr. 10-1531, 2011 WL 831279, at *11, *14 (D. N.M. Feb. 17, 2011) ("The Court . . . has trouble squaring Jager's excellent military record with the crime here. Because Jager's circumstances fall into a pattern the federal courts encounter with some frequency, the Court does not think this case falls outside the heartland of cases [and, thus, no downward departure is warranted under USSG §5H1.11 (Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (Policy Statement))] . . . . [Nevertheless,] [t]he Court believes that a [downward] variance is appropriate here. While Jager does not fall outside of the heartland of [USSG §2G2.2] cases, his military service is relevant to granting him a variance. His service, with the exception of this crime, has been superior and uniformly outstanding. . . . The Court realizes he has brought shame upon the military with his crime, but with the exception of his crime, he has served with honor, and the Court thinks his service justifies a considerable variance from the guideline sentence.").

child pornography offenses.[87] It also shows the type of discharge (honorable, dishonorable, or "other" discharge) for veterans. Over a quarter of offenders (27.1%) had a record of military service.

Figure 6-21
Non-Production Offender Characteristics:
U.S. Military Service (Active Duty or Veteran)
Fiscal Year 2010 (N=1,654)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

By comparison, in the general population of the United States in 2010, there were 22.7 million veterans,[88] 1.43 million active duty military personnel,[89] and approximately one million members of the National Guard and military reserves.[90] Thus, out of a total population of 308.7 million people in 2010,[91] slightly over eight percent were either currently or formerly in some component of the military (7.4% veterans and 0.8% in the active military, National Guard, or reserves). Looking only at those statistics in isolation, the much larger percentage of §2G2.2 offenders who either were veterans (24.4%) or in the military (2.7%) at the time of their child pornography offenses would suggest a significant overrepresentation of such offenders with military service records.

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[87] The above-mentioned federal offenders include those who were in the military at the time of their child pornography offenses; such offenders were prosecuted in federal district court rather than in military courts. *See* United States v. Talbot, 825 F.2d 991, 997 (6th Cir. 1987) (noting that "military and civilian courts enjoy concurrent jurisdiction to prosecute armed forces personnel for criminal wrongdoing").

[88] *See* National Center for Veterans Analysis and Statistics, *Veteran Population*, http://www.va.gov/vetdata/Veteran_Population.asp (last visited Nov. 28, 2012).

[89] *See* U.S. Dep't of Defense, *Active Duty Military Personnel Strengths by Regional Area and by Country* (Sept. 30, 2010), http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst1009.pdf (last visited Nov. 28, 2012).

[90] *See* Lawrence Kapp, Congressional Research Service, *Reserve Component Personnel Issues: Questions and Answers* (July 20, 2010), http://www.fas.org/sgp/crs/natsec/RL30802.pdf (last visited Nov. 28, 2012).

[91] *See* U.S. Census Bureau, *Population and Distribution Change, 2000-2010,* http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf (last visited Nov. 28, 2012).

However, as discussed below, comparing the specific offender population at issue — the vast majority of whom are white male United States citizens between 18 and 75 years of age[92] — to persons with such characteristics in the general population, the percentage of §2G2.2 offenders with a military service record is not as overly representative as it initially would appear. According to United States Census Bureau estimates from 2010, when considering only white males who were 18 years and older in the general population, 19.9 percent of such persons were then veterans.[93] Such a percentage reflects the fact that past and present members of the military are overwhelmingly white[94] and male,[95] and a majority of living veterans today served in the Vietnam era or earlier.[96]

Among younger §2G2.2 offenders, however, the extent of overrepresentation is more pronounced, as reflected in Figure 6–22 below.[97] That figure compares the age distribution of §2G2.2 offenders who were veterans to the age distribution of veterans among adult white male citizens in the general population in 2010. The lowest rate of military participation and largest overrepresentation were in the 18 to 34 age group (11.7% for child pornography offenders versus 4.3% for the general population group), while the highest rate of military participation and smallest overrepresentation were in the 65 and older age group (72.0% for child pornography offenders versus 54.2% for the general population group).

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[92] *See* Table 6-8, *supra*. The age range of §2G2.2 offenders in fiscal year 2010 was 19 to 82 years of age.

[93] *See* U.S. Census Bureau, *2010 American Community Survey*: *Sex by Age by Veteran Status for the Civilian Population 18 Years and Older (White Only)*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_1YR_B21001A&prodType=table (last visited Nov. 28, 2012). That percentage was derived by dividing the total population of veteran white males 18 or older in the U.S. population (17,231,186) by the total number of white males 18 or older in the U.S. population (86,588,368) in 2010.

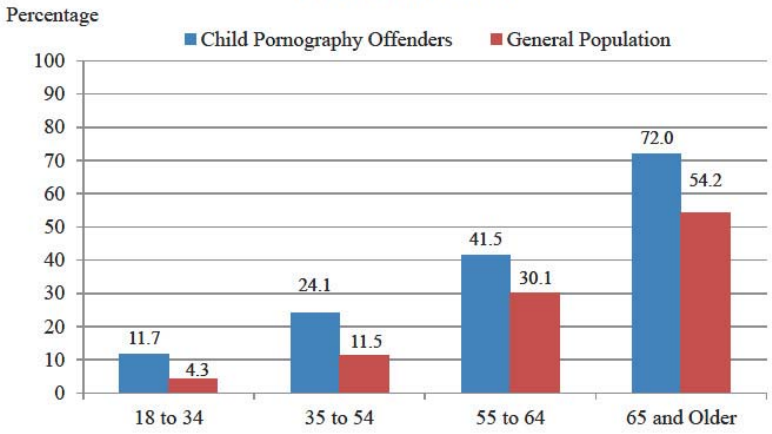
[94] *See* U.S. Dep't of Veterans Affairs, *Profile of Veterans: 2009* 6 (noting that 82.0% of male veterans were white, while 64.6% of U.S. male non-veterans were white), http://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2009_FINAL.pdf (last visited Dec. 20, 2012); U.S. Dep't of Defense, *Representation of Racial and Ethnic Groups in the U.S. Military* (showing that, as of 2008, approximately three-quarters of enlisted members of the military were white and over four-fifths of officers were white), http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2008/summary/chap5.pdf (last visited Dec. 20, 2012).

[95] Ninety-three percent of veterans are male. *See* U.S. Dep't of Veterans Affairs, *Profile of Veterans*: *2009*, available at http://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2009_FINAL.pdf (last visited Nov. 28, 2012). Between 15 and 18 percent of active and inactive military forces are female. *See* U.S. Dep't of Defense, *Active Military Personnel by Rank/Grade (Women Only)* (Sept. 30, 2009) (noting 203,375 members of the active military were female as of the end of fiscal year 2009), http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0909f.pdf (last visited Dec. 20, 2012); *see also* Women in Military Service for America Memorial Foundation, *Statistics on Women in the Military* (data as of Sept. 30, 2011), http://www.womensmemorial.org/PDFs/StatsonWIM.pdf (last visited Dec. 20, 2012) (reporting 14.6% of "active duty" military were female and 17.7% of reservists and national guard members were female).

[96] *See* U.S. Dep't of Veterans Affairs, *Profile of Veterans: 2009*, *supra* note 94, at 14 (noting that at least 53.7% of the living veterans in 2009 had served during the era of the Vietnam conflict or earlier).

[97] Figure 6-22 only includes data about veterans and does not include data about persons who were then in the military. The lack of data about active duty military members reflects the fact that the U.S. Census Bureau data about age distributions in the adult white male population only concerned "civilians" (and, thus, excluded active military members).

Figure 6-22
Military Veterans by Census Age Group for Non-Production Offenders and the General Population
Fiscal Year 2010



Note: This chart includes the 1,444 child pornography offenders who were adult, white male citizens of the U.S.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project and US Census data.

Similarly, the percentage of §2G2.2 offenders in the military (including the National Guard or reserves) at the time of their offenses (2.7%), while significantly higher than the percentage of the entire United States population currently in the military (0.8%), appears more consistent with the percentage of white male adults currently in the military (approximately 1.8%).[98]

There is no reported data concerning the percentage of federal prisoners in 2010 who were veterans. Studies of federal prisoners from 1986 to 2004 show that the percentage of veterans among federal prisoners declined from 24.9 percent to 9.8 percent during that 18-year period.[99] Therefore, the percentage of §2G2.2 offenders with military service records is

[98] The U.S. Census Bureau does not report demographics for active military members in the manner that it does for veterans. However, the military's own data allow for a similar calculation: multiplying the approximate total population of active duty military members, national guard members, and reservists in 2010 (2.4 million, *supra* notes 89 & 90) by 0.75 (the approximate percent of whites in the military, *see supra* note 94) and further by 0.85 (the approximate percentage of males in the military, *see supra* note 95), the result is 1.53 million. Dividing 1.53 million by the total white male U.S. population in 2010 (86.6 million, *see supra* note 93) results in 1.8%.

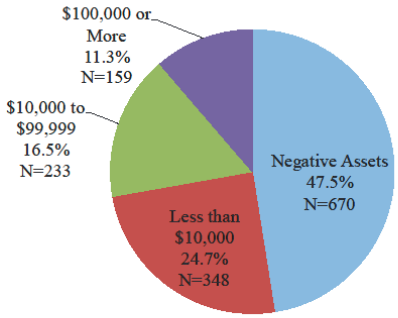
[99] BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON OR JAIL 1 (Jan. 2000) (from 24.9% in 1986 to 14.5% in 1997) (available at http://bjs.gov/content/pub/pdf/vpj.pdf); BUREAU OF JUSTICE STATISTICS, VETERANS IN STATE AND FEDERAL PRISON 2004 (2007) (the percentage dropped from 14.5% in 1997 to 9.8% in 2004) (available at http://www.bjs.gov/content/pub/pdf/vsfp04.pdf). The steady decline from 1986 to 2004 appears to be a function of both a net decrease of veterans in the general population (because of attrition of World War II, Korea, and Vietnam era veterans not offset by the addition of younger generations of veterans from more recent military conflicts), *see* BUREAU OF JUSTICE STATISTICS, VETERANS IN PRISON OR JAIL 2 (Jan. 2000) (noting the "stead[y] declin[e]" in the number of veterans from 28.0 million in 1985 to 25.1 million in 1998), and a significant increase in the number of non-citizen offenders in federal prison during the past two decades. *See* U.S. SENT'G COMM'N, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING 2 (2008) (noting that the percentage of federal offenders who were non-citizens increased from 22.7% of the offender population in fiscal year 1991 to 37.4% in fiscal year 2007). Although certain non-citizens are eligible to serve in the U.S. military, the requirements for enlisting and serving as a non-citizen have

significantly higher than the percentage of the overall federal offender population with military service records.

d. Financial and Employment Status

Figures 6–23 and 6–24 below contain information about the net worth and employment status of §2G2.2 offenders. Slightly less than half of the offenders reported a negative net worth during the presentence investigation.[100] Only 15.0 percent were unemployed (other than because of a disability or retirement) at the time of their arrests for their child pornography offenses.

Figure 6-23
Non-Production Offender Characteristics:
Offender Net Worth at Time of Conviction
Fiscal Year 2010 (N=1,410)

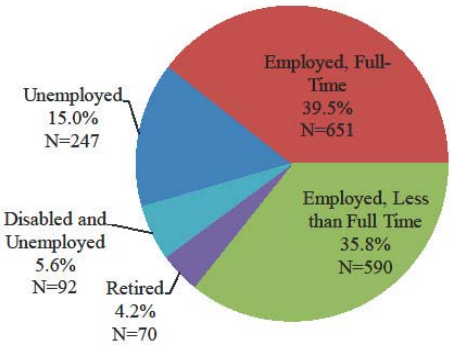


Note: Of the 1,654 cases, 244 cases were excluded for missing asset information. Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

the practical effect of excluding large numbers of non-citizens (*e.g.*, a recruit must be a lawful permanent resident and demonstrate English proficiency; certain occupational restrictions apply once a non-citizen joins the military). See Molly F. McIntosh et al., *Non-Citizens in the Enlisted U.S. Military* 19-21 (Nov. 2011), http://www.cna.org/sites/default/files/research/Non%20Citizens%20in%20the%20Enlisted%20US%20Military%20D0025768%20A2.pdf (last visited Nov. 28, 2012). Based on the declining number of older veterans and the continuing increase of non-citizen federal offenders in the years since 2004, see U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 19 (2010) (noting that 47.5% of federal offenders that year were non-citizens), there is no reason to believe that the percentage of veterans in the federal prison population in 2010 was higher than it was in 2004 and, indeed, likely decreased even more since that time.

[100] Information about assets and liabilities in the PSRs pertained to financial information provided during the presentence interviews of defendants by federal probation officers (and was reported in that manner because the purpose of that information in a PSR is to assist the court in determining what monetary penalty, if any, is appropriate). A typical offender's net worth likely was significantly higher at the time of his arrest for two reasons: first, the offender may have lost his employment as the result the arrest (particularly, if he was denied bail, as 57% of USSG §2G2.2 offenders were in fiscal year 2010); and second, some offenders retained private counsel and spent significant assets on attorneys' fees. Thus, the percentage of offenders who reported a negative net worth during the presentence interview was likely higher than the percentage of such offenders with a negative net worth at the time of their arrests.

Figure 6-24
Non-Production Offender Characteristics:
Offender Employment at Time of Arrest
Fiscal Year 2010 (N=1,650)



Note: Of the 1,654 cases, four cases were excluded for missing employment information. Percentages may not sum to exactly 100% due to rounding. "Employed, less than full time" includes cases in which the offender was employed, but it was unclear whether the employment was full time or part time.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Data concerning the pre-arrest employment status and pre-sentencing financial status of federal (or state) inmates generally are sparse.[101] The most recent such data comes from the Bureau of Justice Statistics' 2004 survey of state and federal prisoners, which revealed that 72.4 percent of federal prisoners then reported being employed (full- or part-time) before their arrest, and the median amount of personal monthly income reported was between $1,000–1,999 (which equates to a yearly income of between $12,000–24,000).[102] Although the basis for comparison is inexact,[103] the large percentage of employed §2G2.2 offenders (less than half of whom had negative assets) indicates that the typical §2G2.2 offender may occupy a higher socio-economic status than federal offenders generally (as judged by all federal offenders' lower average employment rates and average income levels). This conclusion is supported by data on offenders' pre-arrest education levels, which serve as a proxy[104] for socio-economic status; those data reveal that §2G2.2 offenders have a much higher educational level on average than federal offenders generally.[105]

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[101] *See* Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L.& CRIMINOLOGY 31, 32 (2011) (noting that data on federal and state offenders' "economic status" is "almost nonexistent").

[102] *See* Bureau of Justice Statistics, *Employment and Income of State and Federal Prisoners, By Gender*, (unpublished data provided to the Commission by the Bureau of Justice Statistics using data from its 2004 prisoner survey).

[103] The Commission's special coding project did not code for pre-arrest income levels, and the Bureau of Justice Statistics data did not include information on assets.

[104] *See* Hashimoto, *supra* note 101, at 55-62 (analyzing data concerning inmates' pre-arrest education levels as a "proxy" for socio-economic status and concluding that there "is sufficient data to establish that low-income people constitute a disproportionate percentage of criminal defendants" in the state and federal criminal justice systems).

[105] *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 18 (2010) (Table 8) (showing that only 10.4% of child pornography defendants did not graduate from high school, while 51.4% of all federal inmates did not graduate from high school).

E. CONCLUSION

The Commission's analysis of data concerning offense and offender characteristics in cases in which offenders were sentenced under the non-production guidelines from fiscal year 1992 through fiscal year 2010 yields the following conclusions:

- The annual number of federal prosecutions for non-production offenses grew substantially from fiscal year 1992 (77 cases) to fiscal year 2010 (1717 cases). The growth rates of possession cases and R/T/D cases were comparable until 2006 — when higher statutory and guideline penalty levels associated with the PROTECT Act applied to most cases being brought — at which point possession cases began to slightly exceed R/T/D cases annually. In fiscal year 2010, 52.6 percent of non-production offenders were only convicted of possession, and 47.4 percent were convicted of R/T/D offenses.

- The overwhelming majority of §2G2.2 offenders in fiscal year 2010 were white male United States citizens in Criminal History Category I. The average age of such offenders was 42. The typical offender was employed at the time of the offense, had at least some college education, and had a positive net worth at the time of sentencing. The vast majority of non-production offenders reported neither a history of childhood sexual abuse nor a history of substance abuse. Over one-quarter of non-production offenders had a record of military service.

- The typical non-production offender differs in many significant respects from the general federal offender population today. The typical federal offender is non-white, has less than a high school education, has a criminal history, and possesses fewer assets and is less likely to be employed than the typical non-production offender. Less than one in ten of all federal offenders have a military service record.

- Both the percentages of offenders receiving prison only sentences (in both possession cases and R/T/D cases) and average sentence lengths (in both possession cases and R/T/D cases) grew substantially from fiscal year 1992 to fiscal year 2010. Especially in the years after the PROTECT Act of 2003, average sentence lengths increased rapidly; average sentence lengths nearly doubled between fiscal year 2004 and fiscal year 2010. In fiscal year 2004, the last year when most offenders were not subject to the PROTECT Act's increased statutory and guideline penalty levels, the average prison sentence for offenders convicted solely of possession offenses was 34 months, and the average prison sentence of offenders convicted of R/T/D offenses was 71 months. By fiscal year 2010, the average prison sentence for offenders convicted solely of possession offenses was 63 months, and the average prison sentence of offenders convicted of R/T/D offenses was 129 months.

- Only 27 of 1,654 (1.6%) non-production offenders received probation in fiscal 2010; all such offenders were only convicted of possession. In fiscal year 2002,

the last full fiscal year before the PROTECT Act was enacted, 8.8 percent of non-production offenders received probation.

- In fiscal year 2010, slightly over half of all non-production offenders faced a statutory mandatory minimum sentence. The vast majority of such offenders faced a five-year statutory mandatory minimum sentence.

- In fiscal year 2010, the typical non-production offender (in both R/T/D and possession cases) received four enhancements under §2G2.2(b) — for use of a computer, possession of images depicting a prepubescent minor, possession of images depicting sado-masochistic sexual conduct, and possession of 600 or more images — which together accounted for 13 offense levels. A substantial minority of non-production offenders (40.9%) also received an enhancement for distribution of child pornography (usually 2 or 5 offense levels). A decade earlier, only two enhancements — use of a computer and possession of images depicting prepubescent minors, which together a accounted for only 4 offense levels — applied to the typical non-production offender. Typically, a 2-level increase in an offender's offense level results in a 20 to 30 percent increase in the applicable guideline minimum, and a 5-level increase results in a 70 to 80 percent increase in the applicable guideline minimum.

- The rate of non-production cases in which sentences were imposed within the applicable guideline range steadily fell from its high point in fiscal year 2004, at 83.2 percent of cases, to 40.0 percent of cases in fiscal year 2010, and to 32.7 percent of cases in fiscal year 2011.

- The difference between the average guideline minimum and the average sentence imposed increased steadily after the Supreme Court's decision in *Booker* (2005) and even more so after its decisions in *Kimbrough* and *Gall* (2007). That growing gap reflects an increasing *rate* of downward departures and variances since *Booker*, a rate that has continued to increase in recent years. In fiscal year 2010, in R/T/D cases, the rate of non-government sponsored below range sentences was 44.6 percent, and the rate of government sponsored below range sentences (other than for a defendant's substantial assistance to the authorities) was 9.5 percent. In possession cases, the rate of non-government sponsored below range sentences was 44.9 percent, and the rate of government sponsored below range sentences (other for a defendant's substantial assistance to the authorities) was 11.2 percent. In fiscal year 2011, in R/T/D cases, the rate of non-government sponsored below range sentences was 45.4 percent, and the rate of government sponsored below range sentences (other than for a defendant's substantial assistance to the authorities) was 11.5 percent. In possession cases, the rate of non-government sponsored below range sentences was 51.3 percent, and the rate of government sponsored below range sentences (other for a defendant's substantial assistance to the authorities) was 17.6 percent.

- Unlike the *rate* of downward departures and variances in non-production cases, which increased steadily each year after *Booker*, the average *extent* of downward departures and variances — as expressed in the difference in percentage between the guideline minimum and average sentence imposed in cases with below range sentences — has remained basically stable in non-production cases each year since *Booker*. In fiscal year 2010, in R/T/D cases in which a below range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 35.8 percent (or an average reduction of 63 months); the average extent of government sponsored downward departures and variances (other than for an offender's substantial assistance) was 32.5 percent (or an average reduction of 54 months). In possession cases in which a below range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 43.0 percent (or an average reduction of 32 months); the average extent of government sponsored downward departures and variances (other than for an offender's substantial assistance) was 49.5 percent (or an average reduction of 42 months).

- While 97.5 percent of §2G2.2 offenders engaged in knowing receipt and/or distribution conduct according to their PSRs and/or plea agreements, less than half of §2G2.2 offenders were convicted of an R/T/D offense in fiscal year 2010. The remainder (53.1%) were convicted only of possession.

- According to their PSRs or plea agreements, nearly two-thirds of all §2G2.2 offenders in fiscal year 2010 knowingly distributed child pornography to others. Of those offenders who distributed child pornography, slightly less than two-thirds (63.2%) received a guideline enhancement for distribution.

- A majority (53.4%) of offenders who distributed child pornography solely engaged in "impersonal" distribution by using "open" P2P file-sharing programs such as LimeWire. A substantial minority (41.1%) of offenders who distributed, however, engaged in "personal" distribution to one or more other adult offenders (*e.g.*, emailing images to another offender or posting images on an Internet bulletin board dedicated to child sexual exploitation). Such personal distribution suggests some level of participation in a child pornography "community." The offenders who engaged in "personal" distribution had substantially higher rates of application of both the statutory mandatory minimum penalty for distribution and the guideline enhancement for distribution compared to offenders who engaged only in "impersonal" distribution.

- Offenders' use of P2P file-sharing programs to receive and distribute child pornography has steadily increased in recent years. By the first quarter of fiscal year 2012, 74.5 percent of §2G2.2 offenders who received child pornography used P2P programs to do so, and 85.3 percent who distributed child pornography used P2P programs to do so. The typical offender who used a P2P program used an "open" program that did not involve direct two-way communication between the offender and others who participated in the P2P network. The Commission's

examination of a large sample of 345 federal non-production cases in which offenders were sentenced a decade earlier, in fiscal year 2002, revealed that no offenders sentenced that year appeared to have used P2P file-sharing programs during the commission of their non-production offenses (according to their PSRs).

Chapter 7

PRIOR CRIMINAL SEXUALLY DANGEROUS BEHAVIOR BY OFFENDERS SENTENCED UNDER THE NON-PRODUCTION CHILD PORNOGRAPHY GUIDELINES

This chapter is concerned with the prevalence rate[1] of criminal sexually dangerous behavior ("CSDB")[2] among child pornography offenders.[3] As discussed below, social scientists have examined this issue and have come to varying conclusions as the result of differing methodologies, operative definitions, and study samples (including several studies of foreign child pornography offenders). The Commission thus conducted its own study of 1,654 federal offenders sentenced under the non-production guideline, USSG §2G2.2 (Receipt, Transportation, Distribution, and Possession of Child Pornography), in fiscal year 2010 and 382 offenders sentenced under §2G2.2 in the first quarter of fiscal year 2012. To allow for a comparison of the prevalence rates of CSDB in federal non-production cases over time, the Commission additionally studied 660 offenders sentenced under §2G2.2 (or the former §2G2.4, the separate guideline for simple possession cases) in fiscal years 1999 and 2000.

It should be noted that offenders' acts of CSDB occurring *after* they reentered the community following sentencing for their federal non-production offenses are analyzed separately in Chapter 11, which addresses *recidivism*.[4] The current chapter only concerns CSDB occurring *before* an offender's prosecution for his federal non-production child pornography offense — referred to as "precidivism" in this report. Although related concepts, precidivism and recidivism should be analyzed separately. Furthermore, as discussed in Part C below, although the Commission's coding project was limited to *criminal* sexually dangerous behavior, the Commission believes that an offender's sexually deviant behavior may be relevant regarding the offender's sexual dangerousness even if such behavior does not rise to the level of a criminal offense.

The remainder of this chapter will: (1) explain CSDB's relevance in child pornography cases; (2) discuss relevant social science research; (3) define CSDB and also discuss the methodology used in the Commission's study and its limitations; and (4) present the findings of the Commission's study.

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[1] *See* Chapter 6 at 157 & n.84 (defining prevalence rate as the rate among the general population or a specific part of the population that a particular disorder or event occurred at least once during their lifetime).

[2] CSDB is defined below in Part C, *infra*. It includes both "contact" and "non-contact" sex offenses committed by a child pornography offender before his arrest and prosecution on child pornography charges as well as an offender's commission of a prior non-production child pornography offense separated from the instant child pornography offense by an arrest or other official law enforcement intervention known to the offender.

[3] Chapter 4 of this report addressed social science research concerning sexual dangerousness and deviance as a significant differentiating characteristic among non-production child pornography offenders. *See* Chapter 4 at 99–104.

[4] That chapter includes the findings of the Commission's recidivism study of the 660 offenders sentenced in fiscal years 1999 and 2000. *See* Chapter 11 at 299–303.

A. RELEVANCE OF SEXUALLY DANGEROUS BEHAVIOR IN CHILD PORNOGRAPHY CASES

Although there is a lack of consensus among social scientists and others about the historical prevalence rate of CSDB among child pornography offenders convicted of a non-production offense,[5] there appears to be general agreement that offenders who in the past or concomitantly with their non-production offenses also engaged in CSDB are qualitatively different from child pornography offenders who never engaged in CSDB.[6] There are three primary reasons for this distinction.

First, non-production offenders with histories of CSDB pose a greater risk of sexual recidivism than non-production offenders without any history of CSDB.[7] Second, non-production offenders with a known history of at least one act of CSDB are more likely to have engaged in *other*, as yet undetected acts of CSDB in the past.[8] Third, offenders with histories of

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[5] *See infra* note 13.

[6] *See, e.g.*, United States v. Apodaca, 641 F.3d 1077, 1083 (9th Cir. 2011) ("Not only is the failure to distinguish between contact and possession-only offenders questionable on its face, but it may go against the grain of a growing body of empirical literature indicating that there are significant, [28 U.S.C.] § 3553(a)-relevant differences between these two groups."); Jesse P. Basbaum, *Inequitable Sentencing for Possession of Child Pornography: A Failure to Distinguish Voyeurs from Pederasts*, 61 HASTINGS L.J. 1281 (2010); Prepared Statement of Deirdre D. von Dornum, Federal Defenders of New York (on behalf of the federal defender community), to the Commission, at 11 (Feb. 15. 2012) ("The least culpable offenders on the spectrum [of child pornography offenders] are the [simple] possessors, followed by distributors, producers, and child molesters [who also commit child pornography offenses]") ("von Dornum Statement"); *id.* at 12 (contending that "the harshest sentences [should be for those child pornography offenders] who directly harm children"); *cf.* Testimony of U.S. Chief District Judge M. Casey Rodgers (N.D. Fla.)(on behalf of the Criminal Law Committee of the Judicial Conference of the United States Courts), to the Commission, at 372 (Feb. 15, 2012)("The issue of [a child pornography offender's sexual] dangerousness . . . is what keeps many [of] us judges awake at night . . . .").

[7] *See, e.g.*, Angela Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-Up Study*, 35 LAW & HUM. BEHAV. 466, 472–73, 475 (2011); Jerome Endress et al., *The Consumption of Internet Child Pornography and Violent Sex Offending*, 9 BMC PSYCHIATRY 43 (2009); Michael Seto & Angela Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. OF RES. & TREATMENT 201, 207 (2005); *see also* United States v. Garthus, 652 F.3d 715, 720 (7th Cir. 2011) (Posner, J.) ("A pedophilic sex offender who has committed both a child-pornography offense and a hands-on sex crime is more likely to commit a future crime, including another hands-on offense, than a defendant who has committed only a child-pornography offense.") (citing Drew A. Kingston et al., *Pornography Use and Sexual Aggression: The Impact of Frequency and Type of Pornography Use on Recidivism Among Sexual Offenders*, 34 AGGRESSIVE BEHAV. 1, 9 (2008); Seto & Eke, *supra*, at 207). Although social science research concerning sexual recidivism is primarily concerned with offenders' prior "contact" sexual offenses, an offender's history of "non-contact" or "hands-off" sexual offenses also appears to be a risk factor for sexual recidivism. *See* Andrew Harris et al., *STATIC-99 Coding Rules Revised — 2003*, STATIC 99, 4–5, 13–15 (2003), http://www.static99.org/pdfdocs/static-99-coding-rules_e.pdf (stating that the STATIC-99 risk assessment for sex offenders may be used on offenders with a known history of "contact" or "non-contact" sex offenses involving an identifiable victim, *e.g.*, voyeurism and exhibitionism). The Static-99 assessment is not applicable to offenders whose only sex offense is a non-production child pornography offense. *See id.* at 5. However, for an offender with a history of a "contact" or "non-contact" sex offense with an identifiable victim, that offender's commission of a non-production child pornography offense is a risk factor for future sex offenses. *See id.* at 14–15.

[8] Researchers have found that child pornography offenders who engaged in one type of CSDB in the past (*e.g.*, soliciting a minor on-line for sex) were more likely than other child pornography offenders also to have engaged in

CSDB are more culpable for having engaged in CSDB in addition to having committed their instant non-production offenses — in the same manner that any offender who has committed multiple related offenses is generally more culpable than an otherwise similarly situated offender who committed only a single offense.[9] Thus, from the perspective of an offender's dangerousness and culpability, whether an offender has ever engaged in CSDB in addition to his non-production child pornography offense is a salient issue.

Furthermore, policy-makers and courts need reliable data about the overall prevalence rate of CSDB among all §2G2.2 offenders. Such data is one of several considerations relevant to the determination of whether penalty levels are generally proportionate for non-production offenders. Some critics have contended that the current penalty ranges in non-production cases are inappropriately based in significant part on the notion that an offender's possession of child pornography is a "proxy" for detected and undetected prior sexual abuse of children. In a related vein, they contend that harsh punishments are imposed to incapacitate offenders for a lengthy period of time in order to prevent them from committing future sexual abuse offenses.[10] These critics contend that, because some non-production offenders have not engaged in CSDB in the past and will not engage in CSDB in the future, it is unfair to punish them based on what other non-production offenders have done in the past or may do in the future.[11]

As discussed in Chapter 12, the Commission believes that a non-production offender's sexual dangerousness — demonstrated on a case-by-case basis — is one of three primary aggravating factors relevant to sentencing in non-production cases.[12] In addition, reliable data about the prevalence of sexual dangerousness among all non-production offenders is one factor that policy-makers should consider in deciding whether *overall* penalty levels are generally proportionate for the entire class.

B. EXISTING SOCIAL SCIENCE RESEARCH

Social scientists, both academics and government-employed social scientists, have studied the prevalence rate of prior sex offenses (typically looking only at "contact" sex offenses

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past "contact" CSDB. *See* Testimony of Dr. Gene G. Abel, to the Commission, at 96 (Feb. 15, 2012); Testimony of Dr. Jennifer A. McCarthy, Assistant Director and Coordinator, Sex Offender Treatment Program, New York Center for Neuropsychology, to the Commission, at 118 (Feb. 15, 2012); *see also* Jennifer McCarthy, *Internet Sexual Activity: A Comparison Between Contact and Non-Contact Child Pornography Offenders*, 16 J. SEXUAL AGGRESSION 181, 190, 192 (2010).

[9] *Cf.* USSG §4A1.3(a)(2)(E) (Departures Based on Inadequacy of Criminal History Category (Policy Statement)) (authorizing an upward departure based on "[p]rior similar adult criminal conduct not resulting in a criminal conviction").

[10] *See, e.g.*, United States v. C.R., 792 F. Supp. 2d 343, 377 (E.D.N.Y. 2011); United States v. Johnson, 588 F. Supp. 2d 997, 1005 (S.D. Iowa 2008); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 870–72, 880–83 (2011); Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 548 (2011).

[11] *See* Hessick, *supra* note 10, at 870–72, 880–83; Hamilton, *supra* note 10, at 548; *see also* Von Dornum Statement, *supra* note 6, at 24–25.

[12] *See* Chapter 12 at 320, 324–25 .

but sometimes also considering non-contact sex offenses and prior child pornography offenses) among child pornography offenders. These studies have found substantially different prevalence rates.[13] The studies, which varied in their methodologies,[14] operative definitions,[15] and study samples (with respect to time periods, size of sample, and nationality of offenders studied),[16]

[13] *See, e.g.*, Richard Wollert et al., *Federal Internet Child Pornography Offenders — Limited Offense Histories and Low Recidivism Rates*, *in* THE SEX OFFENDER: CURRENT TRENDS IN POLICY & TREATMENT PRACTICE Vol. VII (Barbara K. Schwartz ed., 2012) (based on a study of 72 federal child pornography offenders in the United States who were treated by the authors during the past decade, the authors found that 20, or 28%, had prior convictions for a contact or non-contact sexual offense, including a prior child pornography offense); Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE 22, 33–34 (2011) (finding, based on 2006 data from surveys of approximately 5,000 law enforcement officials throughout the United States, that 21% of cases that began with investigations of child pornography possession "detected offenders who had either committed concurrent sexual abuse [offenses] or been arrested in the past for such crimes"); Michael Seto et al., *Contact Sex Offending by Men With Online Sexual Offenses*, 23 SEXUAL ABUSE 124 (2011) (meta-analysis of 24 international studies, which found that approximately one in eight "online offenders" — the vast majority of whom were child pornography offenders — had an "officially known contact sex offense history," but estimating that a much higher percentage, approximately one in two, in fact had committed prior contact sexual offenses based on clinical "self-report" data); Michael L. Bourke & Andres E. Hernandez, *The "Butner Study" Redux: A Report on the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183 (2009) (study of 155 federal child pornography offenders in the United States who participated in the residential sex offender treatment program at FCI Butner from 2002–05; finding that official records, including the offenders' presentence reports in their child pornography cases, revealed that 26% had previously committed a contact sex offense, yet finding that "self reports" of the offenders in therapy revealed that 85% had committed prior "hands on" sex offenses); Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending,* 9 BMC PSYCHIATRY 1 (2009) (study of 231 Swiss child pornography offenders; finding that only 1.0% had prior convictions for "hands-on" sex offenses and an additional 3.5% had prior convictions for possession of child pornography); Caroline Sullivan, *Internet Traders of Child Pornography: Profiling Research — Update,* N.Z. Dep't of Internal Affairs (Dec. 2009), http://www.dia.govt.nz/pubforms.nsf/URL/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf/$file/InternetTradersOfChildPornography-ProfilingResearchUpdate-December2009.pdf (last visited Dec. 21, 2012) (finding that approximately 10% of 318 New Zealand child pornography offenders prosecuted from 1993–2007 "have been found to have criminal histories involving a sexual offence against a male or female under the age of 16 years").

[14] Some studies have considered only prior convictions for sex offenses; others have also considered any "official record" of adjudicated or alleged sex offenses; and still others have also considered "clinical self reports" by offenders outside of the law enforcement context. *Compare, e.g.*, Wollert et al., *supra* note 13 (prior convictions), *with* Bourke & Hernandez, *supra* note 13 (prior convictions, information in presentence reports, and clinical self-admissions).

[15] Some studies have considered only "hands on" or "contact" sex offenses, while others have considered "non-contact" sexual offenses and prior child pornography offenses as well. *Compare, e.g.*, Wollert et al., *supra* note 13 (considering contact and non-contact offenses), *with* Bourke & Hernandez, *supra* note 13 (considering only "hands on" sexual offenses). Some studies have looked only at prior sexual misconduct against minors, while others considered prior sex offenses against adult as well as minor victims. *Compare, e.g.*, Wolak, *supra* note 13, at 33 (minor victims or undercover officers posing as minors), *with* Seto et al., *Contact Sexual Offending, supra* note 13 (minor and adult victims, although noting that most victims were children).

[16] Virtually all studies considered offender populations that were predominately white males who were older than the general offender populations.

thus provide significantly inconsistent results about the correlation between offenders' viewing child pornography and their prior or concomitant commission of other sex offenses.[17]

In order to better evaluate the prevalence of child pornography offenders who also have committed "contact" child sex offenses, Canadian researchers in 2010 conducted a "meta-analysis" of numerous studies involving offender populations from several different countries. They identified 24 studies of offenders whose instant offense was an Internet sex offense (the vast majority were child pornography offenses) where researchers attempted to determine how many offenders also had committed contact sex offenses.[18] Of the total sample of 24 studies with 4,697 offenders, 17.3 percent of offenders (812) were known to have committed a prior contact sex offense, mostly against children. Of the 24 studies, 18 used "official" reports (*e.g.*, convictions or arrest records), and six used offenders' "self reports" (typically made during therapy) to determine the prevalence rate of prior contact sex offending. The 18 official report studies, when considered collectively, found a rate of 12.2 percent. The six self-report studies taken together reported a rate of 55 percent.[19]

The much higher percentage of prior contact sex offending found by the "self-report" studies is in large part attributable to the fact that many of the self-reported prior child sex offenses were not captured by official reports.[20] Studies show that only an "estimated 1 in 20 cases of child sexual abuse is reported or identified" and that "an arrest was made in only 29% of reported juvenile sexual assaults."[21] This research demonstrates that a very large percentage of child sex abuse is unreported. As such, regardless of whether one relies on official reports, self-

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[17] *See* Hamilton, *supra* note 10, at 579–80 (after reviewing several studies, the author concluded that "[s]ocial science studies considering the correlation between viewing child pornography and contact sexual offenses against children are not consistent"); *see also C.R.*, 792 F. Supp. 2d at 375–77 (reviewing the conflicting studies and concluding that "[r]eliable empirical evidence on this issue is lacking"). The studies' findings ranged from an 85% prevalence rate (Bourke & Hernandez, *supra* note 13), to a 4.5% prevalence rate (Endrass et al., *supra* note 13). The studies based on "official records" (typically convictions and arrests records) have found considerably less than 50% of child pornography offenders (typically 10% to 20%) had official records of prior sex offenses, while studies of clinical self-reports have found significantly higher rates of prior sex offenses (ranging from 32.3% to 85.4%). *See generally* Seto et al., *Contact Sexual Offending, supra* note 13, at 128–30 (Table I).

[18] Seto et al., *Contact Sexual Offending*, *supra* note 13, 128–30 (Table I).

[19] *See id.* at 125–40. The meta-analysis of studies relying on self-reports included a study conducted at the Federal Correctional Institute at Butner, North Carolina (where federal child pornography offenders participated in a sex offender treatment program) — often referred to as the "Butner Study." The Butner study involved 155 federal offenders, 84.5% of whom admitted during treatment that they had committed at least one prior "hands on" sex offense. Polygraph examinations were used in conjunction with self reporting in an effort to insure cooperation and accuracy. *See* Bourke & Hernandez, *supra* note 13. The Butner study has been criticized for a variety of reasons, including selection bias. The meta-analysis observed that the Butner study's finding is a statistical "outlier" among self-report studies. Seto et al., *supra* note 13, at 133. After excluding the Butner study, the meta-analysis showed that the remaining self-report studies, when considered collectively, found that approximately 42.5% of offenders had committed prior contact offenses. *See* Seto et al., *Contact Sexual Offending*, *supra* note 13, at 134.

[20] See Seto et al., *Contact Sexual Offending*, *supra* note 13, at 134. Neither self-reports nor official criminal records are a perfect measure of prior contact sex offending, and therefore neither number derived from their meta-analysis should be regarded as definitive.

[21] *See* Ryan C. Hall & Richard C. W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 460–61 (2007).

reports, or a combination, "[t]he key point, that some child pornography offenders have committed officially undetected contact offenses[,] is not controversial."[22]

C. THE COMMISSION'S STUDY: DEFINITION, METHODOLOGY, AND LIMITATIONS

1. *Definition of Criminal Sexually Dangerous Behavior*[23]

For purposes of the Commission's study, "criminal sexually dangerous behavior" ("CSDB") by offenders sentenced under the non-production child pornography guidelines comprises three different types of criminal sexual conduct:

- **"Contact" Sex Offenses:** any illegal sexually abusive, exploitative, or predatory conduct involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender's commission of a non-production child pornography offense;

- **"Non-Contact" Sex Offenses:** any illegal sexually abusive, exploitative, or predatory conduct not involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender's commission of a non-production child pornography offense; and

- **Prior Non-Production Child Pornography Offenses:** a non-production child pornography offender's prior commission of a non-production child pornography offense if the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender.

The first two types of CSDB are sex offenses against "real-time" victims (*i.e.*, victims other than the ones depicted in the child pornography for which the offenders were convicted in federal court). Offenders who committed such CSDB thus engaged in two types of victimization: they victimized the children depicted in the child pornography that the offenders collected or distributed,[24] and they also victimized the other, real-time victims of their CSDB.

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[22] Prepared Statement of Michael C. Seto, Ph.D, Directorof Forensic Rehabilitation Research, Royal Ottowa Health Care Group, to the Commission, at 3 (Feb. 15, 2012).

[23] The term "sexually dangerous behavior" has not appeared with much frequency in either the legal or academic contexts regarding child pornography offenders. Rather, the term primarily has been used in the broader context of civil commitment of "sexually dangerous persons." *See, e.g.*, Laxton v. Bartow, 421 F.3d 565, 572 (7th Cir. 2005) ("While Laxton disputed that he lacked control over his sexually dangerous behavior, the evidence presented at the commitment trial firmly established the requisite nexus between Laxton's mental disorder and his dangerousness."); 18 U.S.C. § 4248 (authorizing the civil commitment of "sexually dangerous" persons). This use of the term is appropriate in the specific context of child pornography offenders because it captures a primary concern of policy-makers, judges, and law enforcement officers, *i.e.*, whether child pornography offenders have engaged in sexually dangerous behavior involving abusive, exploitative, or predatory sexual conduct in addition to their non-production child pornography offenses.

[24] *See* Chapter 5 at 112–14 (discussing how child pornography offenders victimize the minors depicted in child pornography).

The third type of CSDB does not involve a real-time victim and, instead, involves a §2G2.2 offender's repeated commission of a non-production child pornography offense, so long as the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention (*e.g.*, a law enforcement officer's seizure of the offender's computer pursuant to a search warrant for child pornography) known to the offender.[25] Consistent with child pornography recidivism studies, the Commission decided to treat such repeat non-production child pornography offenses as CSDB because persistent engagement in child pornography offenses even after being officially investigated demonstrates an offender's strong and persistent sexual deviancy and willingness to continue to break the law despite known official intervention.[26] In this regard, the Commission's data analysis (set forth below in this chapter) shows that nearly half of offenders who had engaged in such repeat non-production child pornography offenses also had engaged in one or both of the other two types of CSDB mentioned above.[27] As discussed below, the subset of CSDB offenders who only engaged in repeat non-production offenses is small (51 of 581 CSDB offenders).[28]

As described above, CSDB is a broad categorization that encompasses not only illegal sexual contact with a victim (*e.g.*, child molestation involving rape or sexual assault)[29] but also non-contact sex offenses (*e.g.*, illegally enticing a minor to engage in sexual conduct remotely via a webcam).[30] CSDB also includes production of child pornography, which itself may involve contact with the victim (*e.g.*, an offender videotaped himself having sexual contact with a minor)

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[25] Instances of past child pornography offenses that did not result in a conviction or a criminal investigation of which an offender was aware were not treated as CSDB. Only instances in which an offender was arrested or otherwise put on notice that he was being criminally investigated for a child pornography offense and thereafter continued to offend (typically by collecting new images after his computer was seized by law enforcement) were treated as CSDB. In fiscal year 2010 cases, out of the 581 cases with evidence of CSDB, there were 51 cases in which a prior non-production child pornography offense was the offender's only CSDB. Of those 51 cases, 39 involved prior non-production child pornography convictions and 12 involved judicial findings of an offender's prior commission of a non-production offense separated from the instant non-production offense by an arrest or other official intervention. See Figure 7–2, *infra*.

[26] *See, e.g.*, Eke et al., *Examining the Criminal History and Future Offending, supra* note 7, at 466, 468; Wollert et al., *supra* note 13. Moreover, 18 U.S.C. §§ 2252(b) and 2252A(b) treat convictions for such conduct as a basis for a recidivist enhancement in the same manner as convictions for the other types of CSDB. *See, e.g.*, United States v. Jennings, 652 F.3d 290, 293–96 (2d Cir. 2011) (defendant convicted of possessing child pornography received an enhanced sentence under § 2252A(b)(2) based on his prior conviction for possessing child pornography).

[27] *See* Table 7–1 & Figure 7–1, *infra* (of the 90 USSG §2G2.2 offenders who had the second type of CSDB shown in Table 7–1, 39, or 43.3%, also had engaged in the other types of CSDB, as reflected in Figure 7–1).

[28] *See* Figure 7–1, *infra.*

[29] Sexual assault offenses included "statutory rape." Where necessary, the Commission researched applicable state law to determine the age of consent. As discussed in footnote 59 *infra*, statutory rape offenses involving otherwise consensual sexual activity between an offender and a sexually mature victim were extremely infrequent in the instances of CSDB coded by the Commission. Only two such cases were identified.

[30] *Cf.* Eke et al., *Examining the Criminal History and Future Offending, supra* note 7, at 466, 468 (2011) (examining both "contact" and "noncontact" sexual offenses); Wollert, et al., *supra* note 13 (same).

and acts that do not involve contact (*e.g.*, an offender solicited self-produced sexual images of a minor via the Internet or a cellular phone but did not engage in sexual contact with the minor).[31]

In its analysis of non-production cases, the Commission only coded an offender's sexually deviant conduct as CSDB if it was illegal under federal or state penal laws.[32] Common examples of such non-criminal yet sexually deviant behavior discussed in presentence reports ("PSRs") included: (1) a defendant's Internet "chat" with a real or perceived minor during which the defendant asked sexually-oriented questions of the minor or expressed general desires to have sex with the minor in the future but did not actually solicit sex, send obscene images, or otherwise engage in illegal conduct toward the minor; (2) a defendant's collection of children's underwear associated with his collection of child pornography; (3) a defendant's "diary" or "journal" containing graphic descriptions of his purported sexual acts with minors (where a subsequent law enforcement investigation determined that such sexual acts did not occur) or obvious fantasies about such acts; (4) a defendant's Internet "chat" with another adult in which the defendant claimed to have engaged in illicit sex with a minor (where a subsequent law enforcement investigation determined that such sexual acts did not occur) or expressed his desires to engage in such illicit sex;[33] and (5) a defendant's surreptitious photographing or videotaping of clothed minors in a public setting that were produced for the purpose of the defendant's sexual gratification.[34]

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[31] Child pornography *production* cases, *i.e.*, those in which offenders were sentenced pursuant to USSG §2G2.1, are discussed in Chapter 9. In the *non-production* cases discussed in this chapter, offenders whose CSDB involved production of child pornography were sentenced pursuant to USSG §2G2.2 as their primary guideline. In some of those cases, an offender's production of child pornography occurred concomitantly with his non-production offense, but his non-production offense yielded a sentencing range under USSG §2G2.2 that was higher than the sentencing range under §2G2.1 for his production offense. In other cases, offenders who committed both production and non-production offenses were sentenced under §2G2.2 rather than §2G2.1 for reasons that are not apparent from reviewing the sentencing documents in their cases.

[32] Two commonly recurring types of sexually-oriented criminal offenses were excluded as CSDB for purposes of the Commission's study: (1) an offender's creation of a "morphed" image of the head of an identified underage friend or family member superimposed on a sexually-explicit photograph of the nude body of an unidentified child; and (2) prostitution offenses (other than child prostitution). While both are criminal offenses, *see, e.g.*, 18 U.S.C. §§ 2252A(a)(5)(B) & 2256(8)(C) (criminalizing "morphing"); N.Y.P.L. § 230.00 (criminalizing prostitution), neither were considered sufficiently similar in seriousness to CSDB such as child molestation, production of actual child pornography, Internet solicitation or enticement of a minor, or sexual voyeurism or exhibitionism offenses.

[33] Routinely, when an offender made such statements in a diary or during Internet "chat," law enforcement officers investigated to determine whether such sexual abuse actually occurred. In several cases reviewed by the Commission, law enforcement officers determined that offenders who had claimed to have sexually abused their own relatives did not have such relatives. In other cases, offenders made claims that were not facially incredible (*e.g.*, an offender claimed to have sexually abused a neighborhood child known to exist). If a PSR indicated that a law enforcement investigation substantiated the offender's claim, the Commission treated the case as a finding of CSDB or as an unresolved allegation (depending on the results of the investigation and the findings in the PSR).

[34] According to PSRs, some offenders were polygraphed either after law enforcement seized their computers or arrested the offenders for their non-production offenses and typically asked if they had committed other sex offenses. The Commission excluded as CSDB findings by a polygraph examiner that an offender was "deceptive" in denying that he had sexually abused a minor (as recounted in a PSR) when there was no independent proof of such sexual abuse.

The Commission limited its study to *criminal* sexually dangerous behavior because it proved impractical to code non-criminal sexually deviant behavior indicating sexual dangerousness toward children without an objective and clear standard (such as the criminality of an offender's conduct). An offender's non-criminal sexually deviant behavior, however, may be reflective of the offender's sexual dangerousness and increased culpability.[35]

Although the vast majority of CSDB coded by the Commission constituted felony offenses under state or federal law (*e.g.*, sexual assault, Internet enticement of a minor, production of child pornography), *see* Table 7–1, *infra*, some of the CSDB constituted misdemeanor offenses under the penal laws of the relevant jurisdictions (*e.g.*, most indecent exposure and sexual voyeurism offenses). The Commission included as CSDB both adult sex offenses and sex offenses committed when §2G2.2 offenders were juveniles. Although juvenile offenses are sometimes excluded as criminal history under the sentencing guidelines,[36] social science research shows that an adult sex offender's history of committing sex offenses as a juvenile is a significant risk factor in predicting sexual recidivism because it indicates antisociality.[37] The Commission's coding project revealed that the vast majority of known CSDB committed by offenders occurred when they were adults, as reflected in Figure 7–5, *infra*.[38]

In addition to attempted and completed acts of CSDB involving actual victims, the Commission counted as CSDB attempted criminal conduct[39] involving perceived (but non-existent) minors. The Commission reviewed many PSRs that recounted instances in which §2G2.2 offenders engaged in sexually-oriented Internet "chat" with undercover law enforcement officers posing as minors. Frequently, such offenders solicited sex from the perceived minors or

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[35] *See, e.g.*, United States v. Cunningham, 669 F.3d 723, 727, 735–36 (6th Cir. 2012) (finding that a sentencing court did not err in considering a USSG §2G2.2 offender's "legal" self-recorded "rape fantasy," involving the defendant's filming "himself masturbating to [non-pornographic, legal] photographs of . . . a young child" and "sen[ding] [the] video to another offender . . . along with lascivious audio commentary of the act"); *see also id.* at 735 ("By any measure, the video depicting Defendant acting out a rape fantasy with a child is probative of Defendant's 'history and characteristics' and 'the need . . . to protect the public from further crimes' by Defendant. 18 U.S.C. § 3553(a)(1), (2)(C)."); Michael Seto, *Assessing the Risk Posed by Child Pornography Offenders,* U.N.C. Injury Prevention Research Center 6 (Apr. 6–7, 2009), http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf (last visited Dec. 20, 2012) (suggesting that future sexual risk assessment instruments for child pornography offenders will consider the extent of an offender's "sexual interest in children"); *see also* Seto et al., *Contact Sexual Offending*, supra note 13, at 137 (noting that current risk assessment instruments for "contact" sex offenders consider the extent of an offender's "sexual deviance").

[36] *See* USSG §4A1.2(d) (Definitions and Instructions for Computing Criminal History) (setting forth limitations on consideration of juvenile criminal history of federal offenders).

[37] *See* Chapter 10 at 285-87 (discussing risk assessments of sex offenders).

[38] *See infra* at 185 (noting mean age of "contact" CSDB offenders was 31 years old at time of the CSDB).

[39] The Commission deemed an offense to be a criminal attempt if the offender intended to commit the offense and also took a "substantial step" toward the commission of the offense (*e.g.*, an offender mailed a webcam to a minor with whom he had been chatting on the Internet with instructions for the minor to engage in sexual activity in front of the webcam, but the minor ultimately decided not to comply with the offender's request). *See* United States v. Resendiz-Ponce, 549 U.S. 102, 106–07 (2007) (noting that the traditional requirements for proving criminal attempt are evidence of both intent to commit the offense and a "substantial step" toward the commission of the offense).

attempted to entice the perceived minors to self-produce child pornography and send it to the offenders via email or instant message (IM) attachments or to engage in real-time sexual conduct via webcam (commonly called "cybersex"). Although the perceived minors with whom the offenders communicated did not exist, these offenders nevertheless committed a criminal act.[40] If an offender arranged to meet a fictional minor for sexual contact, such conduct was classified as an attempted "travel" offense (contact CSDB).[41] If the offender attempted to entice a perceived minor to engage in sexual conduct outside of the offender's physical presence or sight (*e.g.*, encouraging the minor to engage in mutual masturbation with the offender while the two "chatted" via IM or email or over the telephone), such conduct was deemed a non-contact "enticement" offense (non-contact CSDB).[42] If an offender requested self-produced sexual images or a video from the fictional minor (to be made in response to the offender's request), such conduct was deemed attempted production of child pornography (non-contact CSDB). If the offender transmitted either child pornography or sexual images of himself to a perceived minor, such conduct was treated as non-contact CSDB (either distributing obscenity to a minor or indecent exposure).

2. *Methodology*

As discussed above, social scientists have studied the historic prevalence rates of CSDB among child pornography offenders, and these studies vary in significant ways, including their sources of data, operative definitions, and study samples (with respect to time periods, size of sample, and nationality of offenders).[43]

The Commission's study of CSDB in §2G2.2 cases synthesizes the methodological approaches of many of these earlier studies. First, as noted above, the Commission's findings concerning CSDB are divided into three general categories: (1) "contact" CSDB; (2) "non-contact" CSDB, and (3) repeat non-production child pornography offenses.

Second, the Commission's findings specify whether victims of the offenders' CSDB were adults or minors and, in the case of "contact" CSDB, the Commission's study notes the ages and genders of the victims as well as the average number of victims per offender. CSDB involving adult victims of criminal sex offenses is considered relevant because it indicates that an offender convicted of a non-production *child* pornography offense also has a history of sexually abusive,

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[40] *See, e.g.*, United States v. Hughes, 632 F.3d 956 (6th Cir. 2011) (defendant convicted of Internet enticement after arranging to meet a perceived 14-year old for sex; purported minor was in fact an undercover officer).

[41] *See* Chapter 2 at 30 (discussing "travel" offenses under federal law).

[42] *See id.* (discussing "enticement" offenses under federal law). Although the Seventh Circuit has held that such conduct not involving actual or attempted physical presence or physical contact by the offender does not violate the federal enticement statute, *see* United States v. Taylor, 640 F.3d 255 (7th Cir. 2011); *but see* United States v. Fugit, ___ F.3d___, 2012 WL 6734787, at *5-*6 (4th Dec. 31, 2012) (disagreeing with *Taylor*), the penal laws in many states (such as those prohibiting an adult from taking indecent liberties with a minor or corrupting a minor's morals) would criminalize such conduct even without physical presence or physical contact by the offender. *See Taylor*, 640 F.3d. at 262 & nn.5–7 (Manion, J., concurring) (citing cases and statutes from several jurisdictions). The Commission thus treated such conduct as non-contact CSDB.

[43] *See supra* notes 13–15 and accompanying text.

predatory, or exploitative conduct that may recur with an adult *or* minor victim.[44] As discussed below, the vast majority of CSDB offenders (94.3%) abused minor victims.[45]

Third, the Commission's study was based only on "official records," *i.e.*, PSRs in the offenders' §2G2.2 cases. A PSR contains two potential sources of information about an offender's CSDB: (1) an offender's criminal history (discussions of prior convictions or arrests for sex offenses); and (2) findings in other parts of the PSR (typically in the "offense conduct" section) that an offender engaged in CSDB but was not convicted of such illegal conduct.[46]

The Commission's study includes separate findings concerning unadjudicated allegations of CSDB where sentencing courts did not resolve such allegations recounted in PSRs.[47] As the analysis below reveals, such allegations were only a small fraction of all cases involving CSDB.[48] Some of the allegations resulted in arrests or formal investigations by a child protection agency, while others were simply mentioned in the PSR (*e.g.*, an offender's adult daughter told the probation officer who wrote the PSR that the offender had molested her when she was a child but the offender was never investigated or arrested for such alleged conduct). The Commission reports prior convictions, CSDB findings in PSRs, and the allegation-only cases separately in most of the data analyses that appear below in Part D.

3. *Limitations*

Because the Commission's findings were based only on *known* CSDB that was recounted in PSRs, the Commission's findings should be regarded as a conservative estimate of the actual rate of CSDB among offenders who were sentenced under the non-production guidelines. It is widely accepted that the actual rate of criminal CSDB among child pornography offenders is higher than the "known" or "official" rate for the simple reason that sexual offenses, particularly

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[44] *See* Chapter 4 at 77–78 (discussing sexually deviant child pornography offenders whose deviancy is not limited to children).

[45] *See infra* note 55.

[46] The Commission was limited to coding such information from PSRs because sentencing courts do not send the Commission other documents concerning offenders that may contain relevant information concerning CSDB (*e.g.*, transcripts of court proceedings).

[47] In several cases, a PSR contained allegations of an offender's CSDB but did not find the allegations to be true or untrue (*e.g.*, a PSR simply listed an offender's prior arrest for a child molestation offense but did not find whether the alleged underlying conduct was true or untrue). In some cases, a defendant objected to the allegations but the court did not resolve the objection because the court stated that it would not consider the allegations at sentencing. A sentencing court need not rule on a defendant's objection to some portion of a PSR if the "the matter will not affect sentencing or [if] the court will not consider the matter at sentencing." Fed. R. Crim. P. 32(i)(3)(B). In other cases, the defendant did not object to such an allegation (which did not affect his guideline range) and the court adopted the PSR in the statement of reasons form.

[48] As set forth in Figure 7–2 *infra*, of the 581 cases, the vast majority (520, or 89.5%) involved either a prior conviction or a finding of CSDB in the PSR. The Commission identified an additional 61 cases (10.5%) in which one or more unresolved allegations of CSDB had been made against an offender. An additional 37 cases had unresolved allegations in addition to prior convictions or findings of *unrelated* CSDB.

against children, are systemically underreported to law enforcement.[49] Furthermore, PSRs do not always include complete "official" criminal histories of offenders.[50]

Unlike other studies of CSDB, which examined samples of child pornography offenders, the Commission's study of CSDB was based on virtually the entire populations of federal offenders sentenced under the non-production guidelines in fiscal years 1999, 2000, and 2010.[51] For this reason, the Commission's study is not subject to any limitation concerning selection bias[52] and allows for a comparison of the rates of CSDB over a decade-long period. As discussed below, the rates of CSDB remained stable over time.

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[49] *See supra* notes 20 –22 & accompanying text; *see also* PEGGY HEIL & KIM ENGLISH, CAL. DEP'T OF CORR. AND REHAB., PRISON SEX OFFENDER TREATMENT: RECOMMENDATIONS FOR PROGRAM IMPLEMENTATION 40 (2007) ("Official record data are woefully inadequate when it comes to reflecting an offender's sex crime history.") (citing Peggy *Heil* et al., *Integration of Polygraph Testing with Sexual Offenders in the Colorado Department of Corrections*, 29 POLYGRAPH 26–35 (2002)); *cf.* United States v. McIlrath, 512 F.3d 421, 425 (7th Cir. 2008) (Posner, J.) ("Estimates of recidivism are bound to be too low when one is dealing with underreported crimes such as sex offenses.").

[50] For instance, an offender's juvenile criminal record is sometimes not included in a PSR because a federal probation officer was not given access to the offender's sealed juvenile record.

[51] As discussed in Chapter 1, the only cases that the Commission did not examine from those three fiscal years were cases lacking sufficient documentation and, in the case of fiscal year 2010 cases, those in which offenders were sentenced under the former USSG §2G2.4 or a version of USSG §2G2.2 in effect before November 1, 2004. *See* Chapter 1 at 17& n.89. The Commission also studied a sample of offenders from fiscal year 2012. *See infra* at 201-04.

[52] *Cf.* Melissa Hamilton, *The Child Pornography Crusade and its Net Widening Effect*, 33 CARDOZO L. REV. 1679, 1706–07 (2012) (criticizing the "Butner Study" for selection bias resulting from, *inter alia*, the fact that only certain federal child pornography offenders participated in FCI Butner's residential sex offender treatment program). The Commission's study results are not necessarily representative of *all* child pornography offenders in the United States because the population studied comprised only federal offenders. The Commission's study also may not be reflective of future populations of federal child pornography offenders, in that law enforcement techniques and offender and offense characteristics may change over time. For example, the rate of known CSDB could rise in future years if USSG §2G2.2 offenders are selected for prosecution based on evidence that they also engaged in CSDB.

D. FINDINGS OF COMMISSION'S FISCAL YEAR 2010 STUDY

1. *Findings Concerning All Types of CSDB*

Of the 1,654 §2G2.2 cases in fiscal year 2010 that the Commission studied, 520 (31.4%) had a prior conviction for a sex offense or finding in a PSR that an offender had engaged in CSDB. Considering allegation-only cases as well, 581 (35.1%) involved evidence or allegations of CSDB. Table 7–1 below lists various subcategories of CSDB. An offender who falls in different subcategories in relation to different offenses (*e.g.*, an offender with a prior rape offense and a prior indecent exposure offense) or the same offense (*e.g.*, an offender who committed a contact offense during the course of a travel offense and who produced child pornography with the victim) appears more than once, so the total number of behavior types substantially exceeds the 581 CSDB offenders.[53] Table 7–1 does not include the number of times an offender engaged in a particular type of CSDB. For example, an offender who was convicted of multiple sexual assaults with child victims will only appear once in the subcategory conviction for a contact offense with a child victim. As a result, Table 7–1 underestimates the total number of victims.

Table 7-1
Number of CSDBs for §2G2.2 Offenders
Fiscal Year 2010

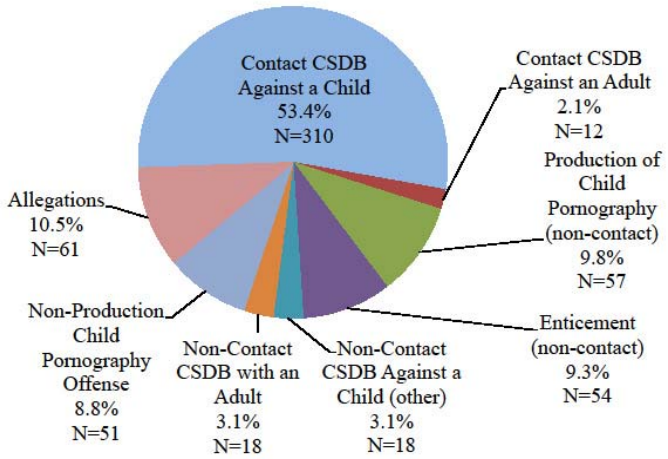
Type of Behavior	N	Percent (total of 581 cases)
Contact CSDB against a child (forcible sex offenses and "statutory rape")	310	53.4
Contact CSDB against an adult	18	3.1
Production of child pornography (contact and non-contact)	127	21.9
Actual or attempted travel to meet a child for sexual contact after meeting on-line ("travel" offenses)	102	17.6
Solicited production of sexually-oriented images of a minor from their adult caretaker	19	3.3
Non-contact Internet "enticement" (other than "travel" – e.g., "cyber sex" via webcam)	124	21.3
Non-contact CSDB with a child	133	22.9
Non-contact CSDB with an adult	36	6.2
Prior non-production child pornography offense	90	15.5
Allegations of criminal sexually dangerous behavior (three-quarters were "contact" offense allegations)	100	17.2

Note: A single offender may appear in more than one category.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

[53] Table 7–1 includes cases regardless whether an offender was convicted or found in a PSR to have engaged in a particular type of CSDB.

Figure 7–1 below shows only the most *serious* type of CSDB in which offenders engaged. All 581 offenders appear in only one category below (the most serious applicable one) despite the fact that they may have engaged in multiple types of behavior.[54]

Figure 7-1
§2G2.2 Offense Characteristics: Most Serious CSDB
Fiscal Year 2010 (N=581 of 1,654)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

As reflected in Figure 7–1, the vast majority of CSDB (94.3%) involved victims who were children,[55] and over half (53.4%) of all fiscal year 2010 non-production cases with CSDB involved a sexual contact offense against a child.

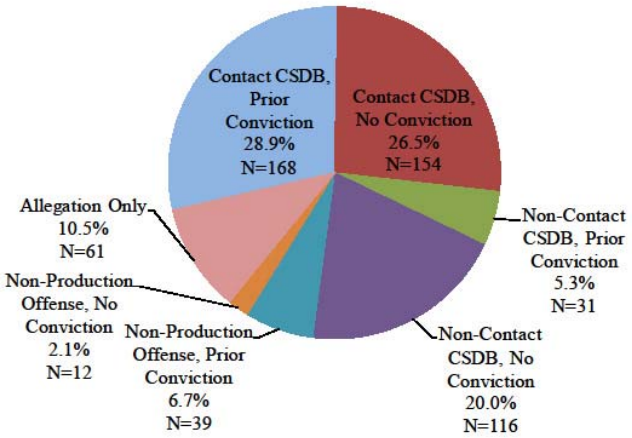
Figure 7–2 below divides the types of CSDB by both the manner in which the CSDB was proved (or alleged) at sentencing (by conviction, PSR finding, or unresolved allegation), and by the nature of the type of behavior. The categories from most to least severe are: (1) a prior conviction for "contact" CSDB ("contact CSDB, prior conviction"); (2) a PSR finding of "contact" CSDB ("contact CSDB, no conviction"); (3) a prior conviction for "non-contact" CSDB ("non-contact CSDB, prior conviction"); (4) a PSR finding of "non-contact" ("non-contact CSDB, no conviction"); (5) a prior conviction for a non-production child pornography offense ("non-production offense, prior conviction"); (6) a PSR finding of a prior non-production

[54] The Commission used the following order of ranking by seriousness in Figure 7–1: contact offenses against children (including production and travel offenses involving actual or attempted contact); contact offenses against adults; production of child pornography (non-contact); Internet enticement offenses (non-contact); other non-contact offenses against a child; non-contact offenses against an adult; and prior non-production child pornography offenses. Figure 7–1 separately reports unresolved allegations of CSDB.

[55] Of the 61 cases involving allegations-only, 60 cases involved allegations of offenses against minors. As reflected in Figure 7–1, 30 of the remaining 520 cases involved adult victims. Therefore, of all 581 CSDB cases, 550 (94.7%) involved minor victims. In some cases, the PSRs did not indicate the ages of the victims. In such cases, the Commission assumed that the victims were adults rather than minors.

offense ("non-production offense, no conviction"); and (7) an unresolved allegation of "contact" or "non-contact" CSDB ("allegation only").[56] An offender who falls in multiple categories of CSDB appears only once, in the category corresponding to their most severe conduct (*i.e.*, contact before non-contact sex offense) and strongest evidence of crime (*i.e.*, a conviction before a finding in a PSR without a conviction).

Figure 7-2
§2G2.2 Offense Characteristics: Categories of CSDB
Fiscal Year 2010 (581 of 1,654 cases)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

2. *Findings Concerning "Contact" CSDB*

Figure 7–3 below, which is based on cases with evidence or allegations of CSDB, shows the different types of contact CSDB (child molestation;[57] attempted "travel" offenses not resulting in actual contact with a child;[58] "other" contact offenses against children, such as fondling a child's breasts or buttocks; and adult contact offenses). The vast majority of contact CSDB cases (81.8%) involved child molestation.

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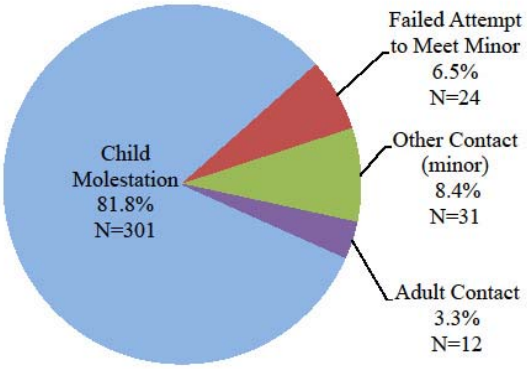
[56] Of the 61 offenders who had only unresolved allegations of CSDB, 75.4% of such offenders (46 of 61) had allegations of "contact" sex offenses. Of the remaining 15 offenders, none had allegations of prior non-production offenses; all 15 were alleged to have engaged in some type of "non-contact" CSDB (*e.g.*, sexual exhibitionism).

[57] "Child molestation" offenses include the following categories of sexual contact: oral to genital or anal; genital to genital or anal; digital to genital or anal; object to genital or anal, with an actual child. The Commission did not include as "child molestation" attempted "travel" offenses that did not result in sexual contact. Such cases were deemed "failed attempt to meet minor." The Commission also did not include as "child molestation" cases in which an offender sexually fondled only a minor's breasts or buttocks (as opposed to the minor's genitals or anus). The Commission classified such cases, which were rare, as "other" contact offenses.

[58] *See* Chapter 2 at 30 (discussing "travel" offenses). Such offenses almost always involved an undercover law enforcement officer pretending to be a minor whom an offender met on-line and with whom the offender arranged to meet in order to have sexual relations.

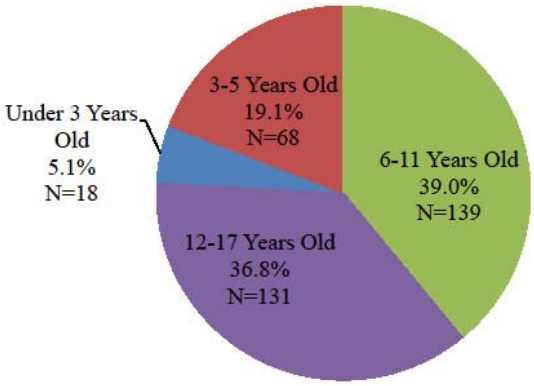
Figure 7-3
§2G2.2 Contact CSDB Offense Characteristics:
Nature of Contact
Fiscal Year 2010 (N=368)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Figure 7–4 shows the ages of the victims in cases of contact offenses against minors. Of the 356 cases, 225 (63.2%) involved victims who typically were prepubescent (under 12).

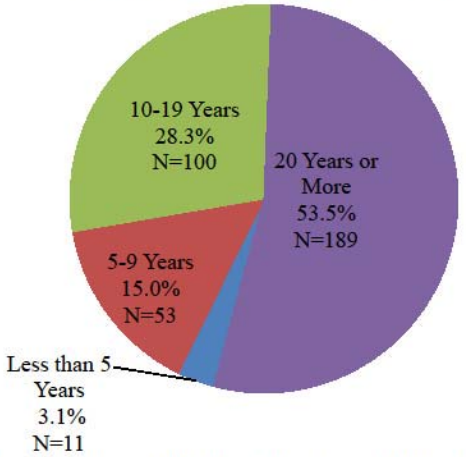
Figure 7-4
§2G2.2 Contact CSDB Offense Characteristics:
Age of Youngest Victim at Time of Offense
Fiscal Year 2010 (N=356)



Note: Percentages may not sum to exactly 100% due to rounding. Of the 368 cases, twelve cases were excluded where the youngest victim was an adult.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Figure 7–5 below shows the differences in age between the offenders and their minor victims in cases with contact CSDB (less than five years; five or more years but less than ten years; ten or more years but less than 20 years; 20 or more years). The majority of offenders (53.5%) were at least 20 years older than their victims.[59]

Figure 7-5
§2G2.2 Contact CSDB Offense Characteristics:
Offender-Victim Age Differential at Time of Offense
Fiscal Year 2010 (N=353)



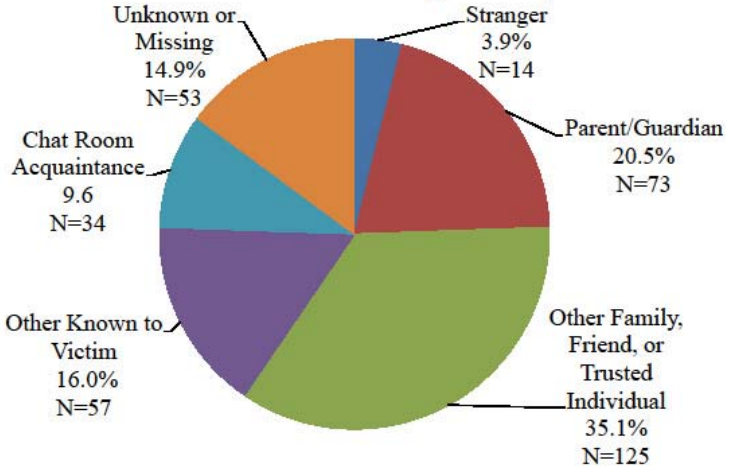
Note: Percentages may not sum to exactly 100% due to rounding. Of the 368 cases, three cases were excluded for missing information and twelve cases were excluded where the youngest victim was an adult.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

The mean age of offenders who engaged in such contact CSDB with minor victims was 31 years old at the time of the CSDB (which may or may not have been earlier than the date of the federal child pornography offense, as some offenders engaged in CSDB concomitantly with their child pornography offenses). The mean age of the minor victims in those cases was nine years old. The average number of victims per offender with a history of contact CSDB was 2.1 victims. Of the cases with victims of contact CSDB whose gender was documented, 66.7 percent of the cases had only female victims, 23.1 percent of the cases had only male victims, and 10.2 percent of the cases involved victims of both genders.[60]

[59] Of the 11 cases involving less than five years of age difference between the offender and minor victim, two involved what appear to have been "statutory rape" between the offender and a sexually mature yet underage victim (*i.e.*, otherwise apparently consensual sexual activity that was illegal because the victim was below the legal age of consent). The remaining nine cases involved forcible rape or non-consensual sex with intoxicated or mentally impaired victims.

[60] In 4.7% of cases, the PSRs did not indicate the gender of the minor victims.

Figure 7-6
§2G2.2 Contact CSDB Offense Characteristics:
Offender-Victim Relationship
Fiscal Year 2010 (N=356)



Note: Percentages may not sum to exactly 100% due to rounding. Of the 368 cases, twelve cases were excluded where the youngest victim was an adult.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Figure 7–6 above shows the relationship between offenders and minor victims (parent/guardian; other family member or adult friend; "other" known to victim (*e.g.*, coach); an acquaintance from an Internet "chat-room"; or stranger). The vast majority of victims (at least 71.6%, with 14.9% cases missing relevant data) had preexisting relationships with the offenders.

E. THE ASSOCIATION BETWEEN CSDB AND OFFENSE AND OFFENDER CHARACTERISTICS

Because a substantial proportion of §2G2.2 offenders have known histories of CSDB, the Commission analyzed fiscal year 2010 §2G2.2 cases to determine whether there was an association between particular offender and offense characteristics relevant to sentencing (*e.g.*, the most serious non-production offense of conviction or an offender's Criminal History Category under the guidelines) and CSDB.[61]

At the outset, it should be noted that some offenders' histories of CSDB are expressly taken into consideration in the guideline's "pattern-of-activity" enhancement, §2G2.2(b)(5), and/or the statutory enhancement in 18 U.S.C. §§ 2252(b)(1) or 2252A(b)(1) for offenders with

[61] As explained in Chapter 2, the guideline penalty range for a non-production child pornography offender is established through a combination of a mandatory minimum penalty (if applicable), an offender's "starting point" under USSG §2G2.2, aggravating factors in six specific offense characteristics, and the offender's Criminal History Category. *See* Chapter 2 at 25–26, 31–32.

predicate convictions for sex offenses.[62] Those two enhancements do not apply in every §2G2.2 case with CSDB because the criteria for the enhancements' application exclude some cases with CSDB. The pattern of activity enhancement applies only if a court finds that an offender engaged in two separate acts involving "the sexual abuse or exploitation of a minor" in addition to the offender's non-production child pornography offense.[63] The statutory enhancement applies only if an offender has a prior conviction for an enumerated sex offense.[64] According to the Commission's fiscal year 2010 datafile, 13.9 percent (230) of all 1,654 §2G2.2 offenders received one or both of these enhancements. Considering the subset of 520 offenders with known CSDB histories established through prior convictions or findings in PSRs, 44.2 percent of such offenders (230 of 520) received the guideline enhancement and/or the statutory enhancement.[65] The remaining 55.8 percent of offenders with CSDB histories (290 of 520) did not receive either enhancement based on their CSDB typically because it both did not qualify as the requisite "pattern of activity" for the guideline enhancement and also did not result in a conviction as required for the statutory enhancement.

The extent of any association between CSDB and other offender and offense characteristics relevant to sentencing will be examined below. Such analysis is intended to assess how the current sentencing scheme in child pornography cases punishes §2G2.2 offenders with known histories of CSDB compared to §2G2.2 offenders without known histories of CSDB.

1. *Association Between CSDB and Offense Characteristics*

a. Association Between CSDB and Most Serious Offense of Conviction

As discussed in Chapter 2, §2G2.2 offenders are convicted of a variety of non-production statutory offenses ranging from possession to distribution, and the offense of conviction plays a significant role in determining an offender's punishment in that it affects the statutory range of punishment as well as an offender's "starting point" under §2G2.2.[66]

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[62] *See* Chapter 2 at 25–26, 32 (discussing the two enhancements).

[63] USSG §2G2.2(b)(5). Application Note 7 following USSG §2G2.2 provides that "[i]f the defendant engaged in the sexual abuse or exploitation of a minor at any time . . . and subsection (b)(5) does not apply, an upward departure may be warranted." USSG §2G2.2, comment. (n.7). Unlike §2G2.2(b)(5), that upward departure provision does not require two acts of CSDB. Of the §2G2.2 cases in fiscal year 2010 in which courts did not apply the pattern-of-activity enhancement, a court in a single case upwardly departed from the applicable guideline range pursuant to Application Note 7. In addition, courts in two other §2G2.2 cases "varied" upwardly pursuant to 18 U.S.C. § 3553(a) for similar reasons in cases in which the pattern-of-activity enhancement was not applied.

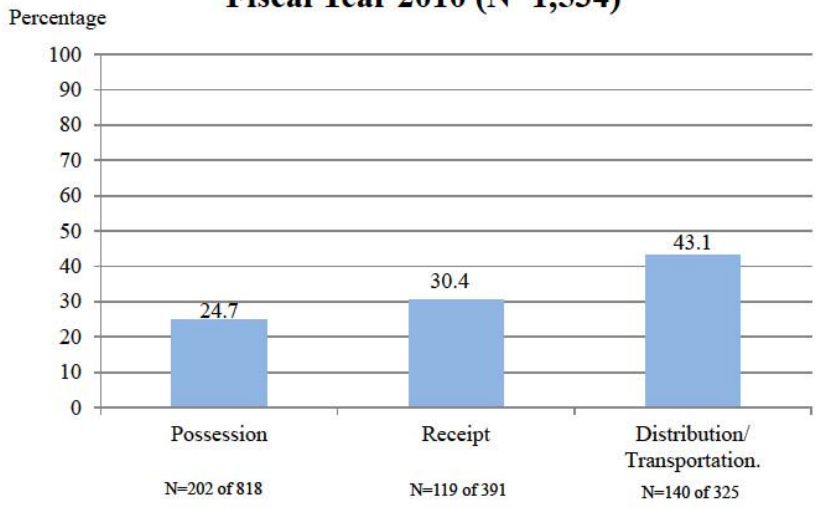
[64] 18 U.S.C. §§ 2252(b)(1) or 2252A(b)(1).

[65] Of those 230 offenders, 58 received both the guideline and statutory enhancements, 110 received only the guideline enhancement, and 62 received only the statutory enhancement.

[66] *See* Chapter 2 at 31–32.

The Commission thus analyzed §2G2.2 cases to determine the degree of association between the different offenses of conviction and the rates of CSDB among offenders convicted of those offenses. A total of 1,534 §2G2.2 cases without predicate convictions for sex offenses[67] were divided into three categories based on the most serious offense of conviction: (i) possession;[68] (ii) receipt; and (iii) distribution/transportation.[69] Figure 7–7 below shows the rates of CSDB in these three categories.

Figure 7-7
CSDB for §2G2.2 Offenses by Offense Type
Fiscal Year 2010 (N=1,534)



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Figure 7–7 shows that the rate of CSDB was highest in distribution/transportation cases (140 of 325 cases, or 43.1%) and lowest in possession cases (202 of 818 cases, or 24.7%), with receipt cases falling in between the two other types of cases (119 of 391 cases, or 30.4%). These differences are consistent with the relative levels of gravity for the three types of offenses in §2G2.2's sentencing scheme (*i.e.*, the different "starting points" for distribution, receipt, and possession).[70]

[67] The 120 offenders whose sentences were enhanced under 18 U.S.C. §§ 2252(b)(1) or 2252A(b)(1) based on a predicate conviction for a sex offense necessarily were punished more severely based on their CSDB. Thus, only cases without such predicate convictions were analyzed.

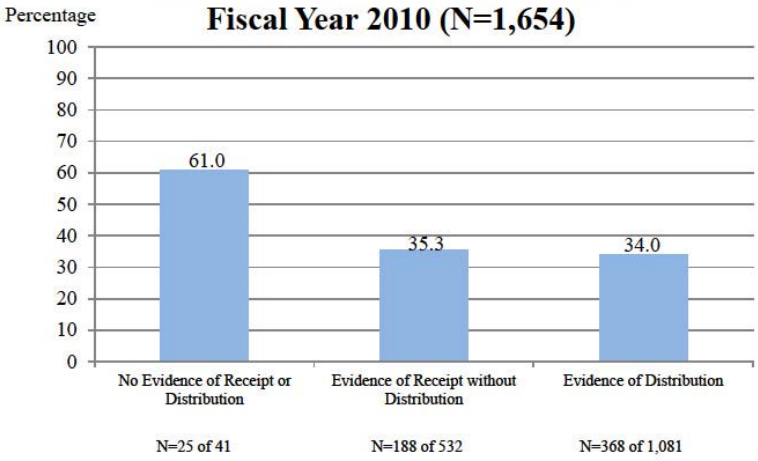
[68] For purposes of this analysis, the five obscenity cases sentenced under USSG §2G2.2 in fiscal year 2010 were treated as possession cases.

[69] Transportation and distribution offenses were combined for this analysis. As noted in *infra* note 72, the vast majority of offenders convicted of transportation (88.7%) in fact distributed child pornography to another person.

[70] *See* Chapter 2 at 32.

As discussed in Chapter 6, the most serious offense of conviction often does not reflect the actual conduct of offenders; in particular, many offenders who knowingly received or distributed child pornography were convicted solely of possession.[71] Figure 7–8 (below) therefore depicts the rates of CSDB based on the most serious actual conduct of offenders as recounted in PSRs and/or plea agreements (distribution, receipt, or no evidence of receipt or distribution) regardless of their offense of conviction.[72] It shows that the rates of CSDB were very similar for receipt and distribution offenders (35.3% and 34.0%); however, the 41 offenders whose PSRs and plea agreements contained no evidence of receipt or distribution conduct (and, instead, only recounted evidence of simple possession) had a substantially *higher* rate of CSDB (61.0%) than offenders whose PSRs found that they engaged in receipt and/or distribution conduct.

Figure 7-8
CSDB for §2G2.2 Offenders by Receipt and Distribution Conduct
Fiscal Year 2010 (N=1,654)



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

The higher rate of CSDB for the 41 possession-only offenders appears to relate to the fact that a majority of these offenders initially were investigated by law enforcement officers for reasons other than suspicion of child pornography. Typically, officials investigated such offenders based on allegations of sexual abuse against a minor or as part of supervision of the offenders as registered sex offenders. During such investigations, law enforcement officers

[71] *See* Chapter 6 at 146–48.

[72] Although the Commission coded cases based on *convictions* of transportation, the Commission did not separately code transportation as a distinct type of offender behavior (in addition to distribution or receipt conduct). Prosecutors charged transportation (rather than distribution) under 18 U.S.C. §§ 2252(a)(1) or 2252A(a)(1) in 141 USSG §2G2.2 cases in fiscal year 2010. *See* Chapter 6 at 146. However, only a small percentage of such offenders simply transported child pornography without the intent of distributing to another. The vast majority of such offenders (125, or 88.7%) engaged in knowing distribution to another, according to their PSRs and/or plea agreements.

located child pornography in the offenders' possession (sometimes on media other than computer hard drives), but there was an apparent absence of proof that the offenders had knowingly received or distributed the child pornography. Thus, the manner in which many of these child pornography offenses were detected was different from the typical manner in which non-production offenders were detected (*e.g.*, law enforcement officers' accessing the offenders' computer files using P2P file-sharing programs). The typical manner of detection necessarily involved receipt or distribution conduct by the vast majority of offenders, while the manner in which the 41 possession-only offenders were detected did not.

b. Association Between CSDB and Aggravating Factors in Specific Offense Characteristics

The Commission also analyzed the rates of CSDB with respect to three aggravating factors contained in specific offense characteristics in §2G2.2(b) — distribution, sado-masochistic images, and the number of images. The remaining three aggravating factors — prepubescent images, use of a computer, and "pattern of activity" — were excluded from the analysis because virtually all non-production cases had two of those factors (prepubescent images and use of a computer) present,[73] and every case with the pattern of activity enhancement necessarily involved CSDB. Although the enhancement for the number of images occurs in virtually all cases,[74] the incremental levels contained within that enhancement based on how many images were possessed — §2G2.2(b)(7)(A)–(D) — applied at varying rates. The analysis that follows thus examines whether particular numbers of images possessed by offenders are associated with increased or decreased rates of CSDB.

i. Distribution enhancement

Of the 1,654 non-production offenders, 683 offenders (41.3%) received an enhancement for distribution under §2G2.2(b)(3). Of those 683 offenders, 256 (37.5%) had a history of CSDB. By comparison, 971 offenders (58.7% of all 1,654 offenders) did not receive an enhancement under §2G2.2(b)(3). Of those 971 offenders, 325 (33.5%) had a history of CSDB. Thus, offenders who received the enhancement had only a slightly higher rate of CSDB than offenders who did not receive the enhancement.[75]

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[73] *See* Chapter 8 at 209 (96.3% of fiscal year 2010 cases received an enhancement under USSG §2G2.2(b)(2) for prepubescent images and 96.3% of such cases also received an enhancement under §2G2.2(b)(6) for use of a computer).

[74] *See* Chapter 8 at 209 (96.9% of fiscal year 2010 cases had the enhancement under USSG §2G2.2(b)(7)).

[75] Section 2G2.2(b)(3) has six different subsections providing for incremental enhancements based on the type of distribution conduct ((A) through (F)). Although enhancements of 5 to 7 additional levels can occur for offenders who distributed to minors, see USSG §2G2.2(b)(3)(C),(D) & (E) — which constitutes CSDB — those enhancements are infrequently applied. The 5- or 2-level enhancements under §2G2.2(b)(3)(B) & (F), which do not require distribution to minor in order to apply, are much more commonly applied. In fiscal year 2010, of the 683 offenders who received an enhancement under §2G2.2(b)(3), 620 (90.8%) receive a 2- or 5-level enhancement under §2G2.2(b)(3)(B) & (F), while 50 (7.3%) received a 5-, 6- or 7-level enhancement under §2G2.2(b)(3)(C), (D), or (E). Of the remaining 13 cases, two received an enhancement under §2G2.2(b)(3)(A) for distribution for pecuniary gain (*e.g.*, posting sexual images of a child prostitute on Craigslist.com as an advertisement), and the remaining 11 cases had insufficient documentation to permit a determination of which subsection of §2G2.2(b)(3) applied.

As discussed in Chapter 6, a substantial number of non-production offenders (398) actually engaged in knowing distribution conduct but did not receive an enhancement under §2G2.2(b)(3).[76] Therefore, the Commission compared the CSDB rate of *all* 1,081 offenders who actually distributed child pornography with the CSDB rate of the 573 offenders who did not distribute. Of the 1,081 offenders who distributed, 368 (34.0%) had a history of CSDB. Of the 573 offenders who did not distribute, 213 (37.2%) had a history of CSDB. Both percentages are similar to the overall CSDB rate for all §2G2.2 offenders (35.1%). Therefore, distribution conduct, one of the primary legal factors in the current non-production penalty scheme (in both the penal statutes and guidelines), is generally not associated with a higher rate of CSDB.

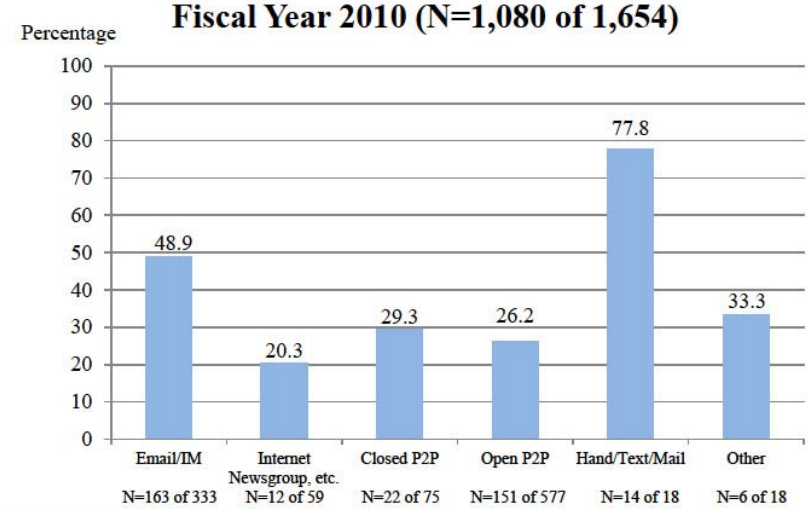
Although the general act of distribution is not associated with a higher rate of CSDB, the *specific manners* of distribution are associated with different rates of CSDB. In Chapter 6, the various modes of distribution are set forth in Table 6–10.[77] Figure 7–9 below reflects the CSDB rates for the different modes of distribution described in the 1,080 cases where PSRs showed the specific manner of distribution. If an offender distributed child pornography in more than one way (*e.g.*, by both "open" P2P file-sharing and email), Figure 7–9 depicts only the primary mode of distribution used by offenders. The primary mode was selected based on the following order of ranking: "personal" modes of Internet distribution, followed by "impersonal" Internet distribution (which exclusively was "open" P2P file-sharing), and followed by finally non-Internet modes (hand-delivery, mailing, or texting, all of which were "personal").[78] "Personal" Internet distribution modes were ranked in the following order: (1) emailing or instant-messaging (IM) with an attachment; (2) posting or otherwise distributing images in connection with Internet chat-rooms, bulletin boards, newsgroups, or similar Internet forums; and (3) "closed" P2P file-sharing (*e.g.*, Gigatribe). Eighteen cases solely involved "other" modes of Internet distribution that could not be classified in any of the other groups. Such cases typically involved an offender's posting child pornography images on his own social networking site (*e.g.*, Facebook or MySpace) or on a commercial photo-hosting service (*e.g.*, Photobucket.com or Flickr.com). The intended recipient(s) of the child pornography in those 18 cases could not be determined from PSRs. They are thus treated separately.

[76] *See* Chapter 6 at 152.

[77] *See id.* at 150.

[78] *See* Chapter 3 at 52–53 (discussing "personal" and "impersonal" distribution).

Figure 7-9
CSDB for §2G2.2 Offenders by Type of Distribution
Fiscal Year 2010 (N=1,080 of 1,654)



This figure excludes one case with missing information.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Although the CSDB rate for offenders who solely distributed by hand, mail, or texting with a cell phone — *i.e.*, not using the Internet — was the highest rate (77.8%) among the different modes of distribution, that rate represented a very small number of offenders (only 18 of 1,080 offenders) and must be viewed with caution for that reason.

As Figure 7–9 shows, the most common primary mode of distribution was P2P file-sharing, with 577 offenders using an "open" P2P program, and 75 offenders using a "closed" P2P program as their primary modes of distribution.[79] The rates of CSDB were similar for these two groups — 26.2 percent for "open" P2P offenders, and 29.3 percent for "closed" P2P offenders.

The second most popular mode of distribution, email and IM, was associated with a higher rate of CSDB than both "open" and "closed" P2P file-sharing programs. Of the 333 offenders whose primary distribution mode was email or IM, 163 (or 48.9%) had known histories of CSDB. However, 98 of those 163 cases (60.1%) involved email or IM distribution concomitantly with an "enticement" or "travel" offense (during which the offenders typically were detected by law enforcement in Internet "sting" operations after offenders distributed child pornography to the perceived minors as part of the "grooming" process).[80] The vast majority of such offenders (nearly 80%) appear to have committed no other unrelated CSDB in addition to

[79] *See* Chapter 6 at 150 (discussing fiscal year 2010 offenders' use of P2P file-sharing programs).

[80] *See* Chapter 4 at 77, 102 & n.173 (discussing "grooming").

their enticement or travel offenses.[81] Excluding those 98 cases, the CSDB rate for offenders who used email or IM (65 of 235 cases, or 27.7%) is comparable to the CSDB rate for the other modes of Internet distribution (185 of 711 cases, or 26.0%). Thus, it does not appear that email or IM distribution is more associated with CSDB outside of the particular context of Internet enticement or travel cases that also involved the distribution of child pornography.

Finally, the Commission compared the CSDB rate of the 445 offenders who engaged in one or more "personal" modes of distribution[82] to one or more adults[83] with the CSDB rates of (1) the 577 offenders whose distribution was limited to "impersonal" distribution (*i.e.*, those who only used "open" P2P programs such as LimeWire); and (2) the 573 offenders who did not distribute child pornography to anyone. The Commission conducted this analysis in order to assess whether offenders' apparent involvement in child pornography "communities" — as reflected in their "personal" distribution of child pornography to other adult offenders[84] — was associated with a higher CSDB rate than the rates of offenders who did not appear to have been involved in such communities.[85]

Of the 445 offenders who engaged in one or more "personal" modes of distribution of child pornography to other adults (presumptive "community" members), the CSDB rate was 38.4 percent. Of the 577 offenders whose distribution was "impersonal" only, the CSDB rate was 26.2 percent. The CSDB rate for the 573 offenders who did not distribute to anyone was 37.2 percent. Therefore, the CSDB rate for the 445 presumptive "community" members was significantly higher than the 577 offenders who distributed only using an "impersonal" mode of distribution but very similar to the 573 offenders who did not distribute child pornography to anyone. The combined CSDB rate for the 577 "impersonal" distributors and the 573 non-distributors was 31.7 percent. Comparing the 38.4 percent CSDB rate of the 445 presumptive "community" members to the 31.7 percent CSDB rate of all offenders with no apparent community involvement, it appears that community involvement was associated with a somewhat higher CSDB rate.

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[81] The Commission examined 40 randomly selected cases (of the 98) in which offenders distributed via email or IM and also engaged in "travel" or "enticement" offenses. Of those 40 cases, 33 (78%) had no CSDB besides the travel or enticement offenses.

[82] *See* Chapter 6 at 151 (discussing how those 445 offenders were classified as "personal" distributors). Such offenders distributed by using one or more of the following modes: Internet newsgroups, bulletin boards, chat-rooms, or similar Internet forums; email or IM; "closed" P2P file-sharing; and hand-delivery, mail, or texting.

[83] Those 445 offenders do not include the 40 offenders whose PSRs indicated that they distributed child pornography *solely* to minors (and who did not have any involvement in a child pornography "community" of adult offenders) and those 18 offenders whose intended recipients could not be determined from their PSRs (*i.e.*, those offenders who engaged in "other" Internet distribution modes discussed above). *See* Chapter 6 at 151 & n.68.

[84] *See id.* at 151 (explaining that an offender's "personal" distribution of child pornography to another adult suggested some degree of involvement in a child pornography "community").

[85] As discussed in Chapter 4, existing social science research is inconclusive concerning whether community involvement is associated with higher rates of criminal sexually dangerous behavior by child pornography offenders. *See* Chapter 4 at 94. Nevertheless, regardless whether involvement in a community is associated with higher CSDB rates, such communities normalize and validate child sexual exploitation and do encourage at least some offenders to commit new sex offenses against children. *See id.* at 96, 98.

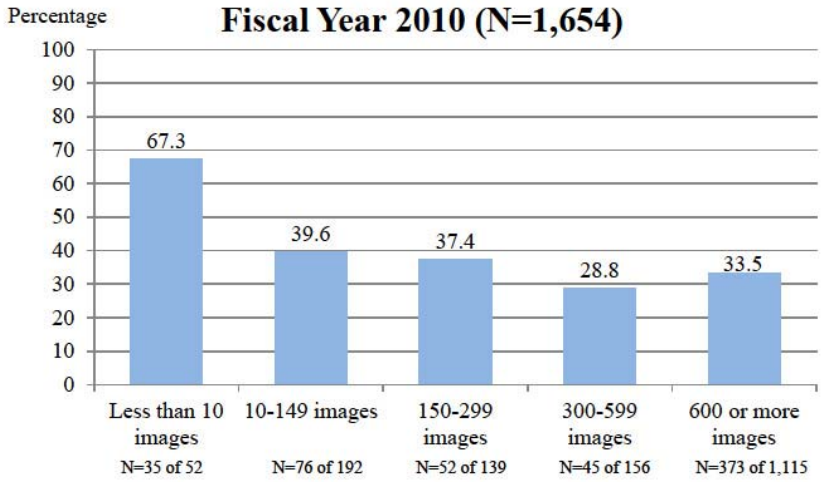
ii. Sado-Masochistic Images

The possession of sado-masochistic images does not appear to be associated with a higher rate of CSDB. Of the 1,227 cases in which the sado-masochism enhancement in §2G2.2(b)(4) was applied, 427 cases (34.8%) involved CSDB. That rate was almost identical to the CSDB rate in cases without the sado-masochistic enhancement (154 of 427 cases, or 36.1%) and the overall CSDB rate in all §2G2.2 cases (35.1%, as noted above).

iii. Number of Images

Figure 7–10 compares the rates of CSDB for the different levels of enhancement in the guideline's specific offense characteristic for the number of images possessed (*see* §2G2.2(b)(7)(A)–(D)).

Figure 7-10
CSDB for §2G2.2 Offenders by Number of Images SOC
Fiscal Year 2010 (N=1,654)



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Notably, the rate of CSDB was highest for those offenders who possessed less than ten images and thus received no enhancement under §2G2.2(b)(7) (which requires a minimum of ten images for the minimum 2-level enhancement to apply). The likely explanation is that many such offenders were selected for prosecution based on their criminal sexually dangerous behavior as opposed to the content or size of their child pornography collections. Thirty-five of the 52 offenders (67.3%) who possessed less than ten images engaged in CSDB related to production of child pornography and/or travel or enticement offenses (whereby they typically sent child pornography images to a real or perceived minor as part of the "grooming" process). Such offenders were detected in a manner other than the typical manner for detecting non-production offenders today (whereby offenders are detected when law enforcement officers access their

illegal files using peer-to-peer file sharing programs, which often yield large volumes of child pornography).[86] With respect to offenders who possessed ten or more images, analysis of the different levels of enhancements in §2G2.2(b)(7)(A) through (D) did not indicate that possession of increasingly larger collections of images was associated with increasingly higher rates of CSDB.

2. *Association Between CSDB and Offender Characteristics*

The extent of any association between certain offender characteristics, including criminal history and personal characteristics, and the rate of CSDB in §2G2.2 cases will be examined below.

a. Association Between CSDB and Guideline Criminal History Scores

Eighty-two percent of §2G2.2 offenders in fiscal year 2010 (1,356 of 1,654) were in Criminal History Category I.[87] Of those 1,356 offenders in Criminal History Category I, 376 (27.7%) had a history of CSDB (including offenders with allegations of CSBD), while 980 (72.3%) did not have a history of CSDB. The significant percentage of offenders with CSDB histories who fell in Criminal History Category I is explained by three factors: (1) some offenders with histories of CSDB were never convicted of the conduct constituting their CSDB; (2) some offenders' CSDB resulting in a conviction was concomitant with their federal child pornography offenses (*e.g.*, production, travel, or enticement offenses), and their convictions for such CSDB were not treated as "prior" convictions under §4A1.2(a)(1);[88] and (3) some offenders with prior convictions for CSDB did not have their convictions counted under §4A1.2(e) because of the "staleness" of the convictions.

Of the 298 non-production offenders in Criminal History Category II through VI, 205 (68.8%) had a history of CSDB.[89] Yet of those 298 offenders, 119 (39.9%) did not have prior *convictions* for sex offenses; instead, their CSDB was established through findings in the PSRs. Thus, 39.9 percent of the offenders in Criminal History Category II through VI had criminal records unrelated to CSDB.

Although higher Criminal History Categories in non-production cases are associated with higher rates of CSDB, a majority of offenders with CSDB are in Criminal History Category I,[90] as a result of both the operation of certain provisions in Chapter Four of the *Guidelines Manual*

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[86] *See* Chapter 6 at 145, 149-50.

[87] *See id.* at 143 n.48.

[88] As discussed in *supra* note 31, such offenders' "primary guideline" was USSG §2G2.2 because it yielded a higher penalty range than any other applicable guideline.

[89] Offenders in Criminal History Category II through VI are analyzed collectively because a clear majority (59% or higher) of the offenders in each Criminal History Category had a history of CSDB.

[90] As noted above, 376 such offenders were in Criminal History Category I, while 205 were in Criminal History Categories II–VI.

discussed above and the fact that many offenders were not previously convicted of their CSDB conduct.

b. Association Between CSDB and Other Offender Characteristics

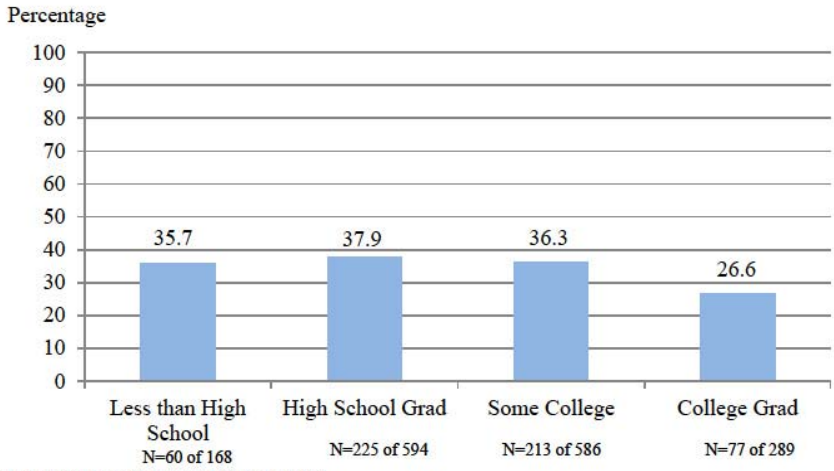
The Commission also examined several other offender characteristics that are commonly addressed in PSRs — reported history of childhood sexual abuse, education level, employment status, race, age, history of substance abuse, and military record — with respect to their degree of association with CSDB.

Of those 293 offenders with reported histories of sexual abuse in their own childhoods, 128 (43.7%) had a history of CSDB. Of those 1,361 offenders with no reported history of childhood sexual abuse, 453 (33.3%) had a history of CSDB. Thus, offenders with a self-reported history of childhood sexual abuse had a noticeably higher rate of CSDB than offenders with no reported history of childhood sexual abuse.

Offenders' different levels of education were associated with different rates of CSDB in only one respect. College graduates had a somewhat lower rate of CSDB than the offenders with lower education levels, all of whom had comparable rates of CSDB, as shown in Figure 7–11.

With respect to employment status, offenders who were unemployed at the time of their non-production offenses had a higher level of CSDB (106 of 247, or 42.9%) than employed

Figure 7-11
CSDB for §2G2.2 Offenders by Education Level
Fiscal Year 2010 (N=1,637)



Note: This figure excludes 17 cases with missing information.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

offenders (402 of 1,241, or 32.4%).[91] Retired offenders had the lowest rate of CSDB (28.6%, 20 of 70), while those offenders considered "disabled" had the highest rate (49 of 92, 53.3%). Similarly, with respect to offenders' financial assets at the time at sentencing, offenders with net assets worth greater than $10,000 had a lower rate of CSDB than less affluent offenders. The CSDB rates by level of assets were 36.0 percent for offenders with negative assets (241 of 670), 37.9 percent for offenders with positive assets less than $10,000 (132 of 348), and 27.8 percent for offenders with assets greater than $10,000 (109 of 392).[92]

The remaining offender characteristics — race, age, substance abuse history, and military service record — showed no significant associations with higher or lower rates of CSDB in §2G2.2 cases.[93]

3. *Association Between CSDB and Geographic Location of Prosecutions*

The different geographical locations where federal non-production child pornography offenders were prosecuted appeared associated with different rates of CSDB. Such differences likely are explained at least in part by the charging policies of the 94 U.S. Attorneys' offices. As a federal prosecutor testified before the Commission, certain offices prioritize "high risk" non-production offenders for federal prosecution to a greater extent than other offices.[94]

Offenders with a history of CSDB were prosecuted across all circuits, although there was some variation in the concentration of CSDB offenders, as shown in Figure 7–12. The highest proportion of CSDB offenders among all §2G2.2 offenders in 2010 (excluding the First and D.C. Circuits because of the small numbers of cases in those two circuits)[95] occurred in Seventh and Tenth Circuits (40.5%). The lowest proportion of CSDB offenders occurred in the Third Circuit (27.7%).

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[91] The higher rate of CSDB histories for unemployed offenders may reflect that some such offenders had prior convictions for a sex offense, which made it more difficult for such offenders to obtain employment.

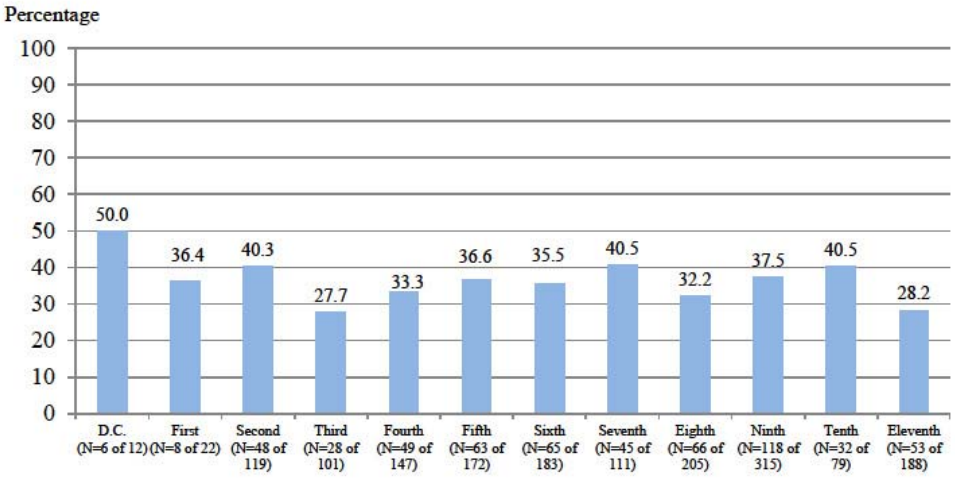
[92] An additional 244 cases had PSRs with no information on assets. The CSDB rate for the offenders in those cases was 40.9%. Because of the higher CSDB rate in those cases, for which no asset data was available, caution should be exercised in interpreting the CSDB rates in the cases with known asset information.

[93] The CSDB rates by race were 35.6% for Whites and 31.5% for non-Whites. (The numbers of Hispanic, Black, and Other offenders were too small for discrete analyses by those races.) The CSDB rates by age were 31.2% for offenders age 25 or younger, 30.1% for those age 26 through 30, 30.8% for those age 31 through 35, 37.0% for those age 36 through 40, 36.5% for those age 41 through 50, and 36.5% for those age 50 and older. The CSDB rate for offenders with a reported history of substance abuse was 35.4%, and the CSDB rate for offenders with no reported history of substance abuse was 35.0%. The CSDB rates by military service record were 34.3% for those without a military service record, and 37.5% for those with a military service record.

[94] *See* Testimony of Steven DeBrota, Assistant United States Attorney (Northern District of Indiana), to the Commission, at 246–49 (Feb. 15, 2012).

[95] D.C. Circuit (12 cases) and First Circuit (22 cases).

Figure 7-12
CSDB for §2G2.2 Offenders by Circuit
Fiscal Year 2010 (N=581)



Note: The D.C. Circuit had a total of 12 cases and the First Circuit had a total of 22 cases making them too small to draw conclusions.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Geographical differences by district were more pronounced than differences by circuit; however, the number of CSDB offenders within any given district was small, so conclusions must be viewed with that limitation. Among districts with at least 30 §2G2.2 cases,[96] the highest rates of CSDB in §2G2.2 cases appeared in Northern New York (58.3%), Western Texas (42.9%), Southern Florida (39.5%), and Western New York (40.0%). Among districts with at least 30 §2G2.2 cases, the lowest rates of CSDB in §2G2.2 cases appeared in Eastern Missouri (20.8%), Middle Florida (23.7%), Central California (23.8%), and Western Pennsylvania (28.6%).

F. ASSOCIATION BETWEEN CSDB AND SENTENCE LENGTH

The Commission analyzed fiscal year 2010 §2G2.2 cases to determine the extent to which offenders' known histories of CSDB were associated with higher sentence lengths. Of the 520 offenders with CSDB established by a prior conviction or a finding in a PSR,[97] 518 received a sentence of imprisonment; two of the 520 offenders received sentences of probation.[98]

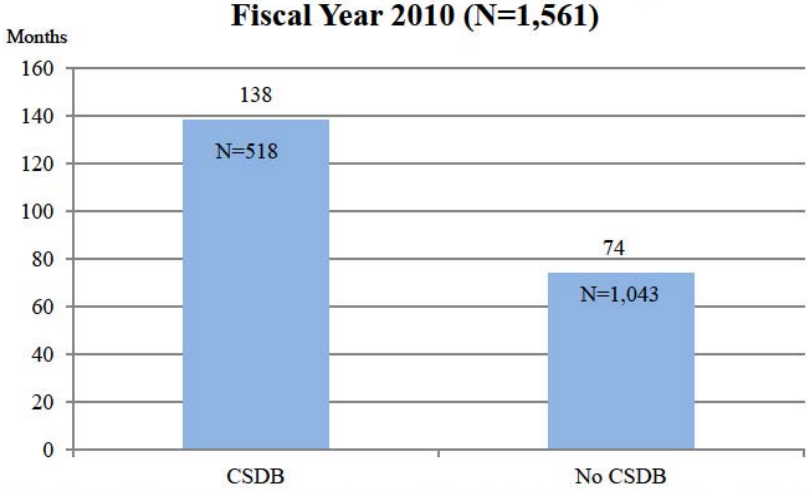
[96] Fifteen districts had more than 30 USSG §2G2.2 cases.

[97] Cases solely with unresolved allegations of CSDB were excluded from this analysis.

[98] The remaining 25 USSG §2G2.2 cases in fiscal year 2010 in which probationary sentences were imposed, *see* Chapter 6 at 130 (noting 27 non-production cases in fiscal year 2010 received probationary sentences), did not

As shown in Figure 7–13, the average sentence of imprisonment for the 518 offenders with known CSDB (138 months) was significantly longer than the average sentence of imprisonment for the 1,043 offenders without any history of CSDB (74 months).

Figure 7-13
Sentence Length for §2G2.2 Offenders by CSDB
Fiscal Year 2010 (N=1,561)



Note: This figure excludes eight cases with missing sentence information and 24 cases that did not receive a prison sentence. This figure also excludes the 61 cases in which PSRs contained unresolved allegations of CSDB.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Of those 518 offenders with CSDB histories, 291 (56.2%) received sentences of ten years or more, 227 offenders (43.8%) received sentences of less than ten years and, of the latter group, 66 (12.7% of all CSDB offenders) received sentences of less than five years. Of those 227 offenders who received sentences of less than ten years, 187 (82.4%) did not receive either the guideline pattern-of-activity enhancement in §2G2.2(b)(5) or a statutory enhancement based on a prior conviction for a predicate sex offense (18 U.S.C. § 2252(b) or 2252A(b)).

Some offenders who had engaged in a single instance of CSDB did not receive the pattern-of-activity enhancement because §2G2.2(b)(5) requires two predicate acts in order to establish a "pattern."[99] Those offenders received an average sentence of incarceration of 114 months — 24 months lower than offenders who received the pattern of activity enhancement but 40 months higher than offenders with no history of CSDB.

The Commission also analyzed prison sentence lengths for offenders whose CSDB was established solely by a finding in the PSR (as opposed to a prior conviction). This analysis was done because the existence of a predicate *conviction* for many types of CSDB triggers higher

involve either a prior conviction or finding in the PSR establishing CSDB. One of those 25 cases involved an unresolved allegation of CSDB.

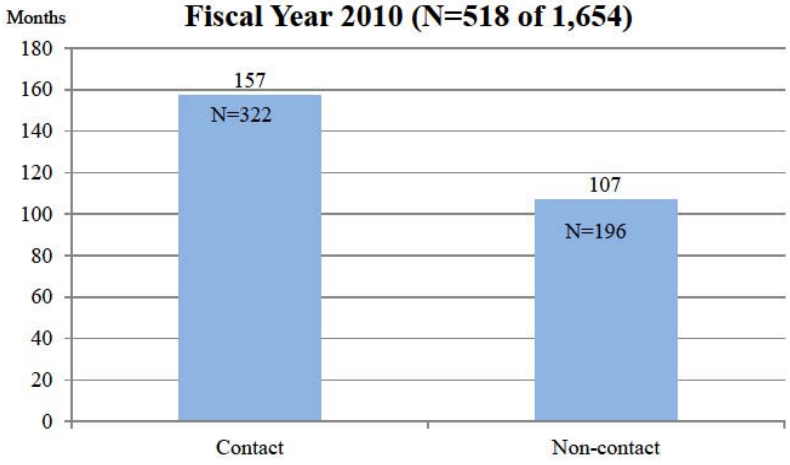
[99] *See* USSG §2G2.2(b)(5) (requiring *two* predicate acts to establish a "pattern").

statutory mandatory minimum and maximum penalties under 18 U.S.C. §§ 2252(b)(1) or 2252A(b)(1), while a factual finding at sentencing does not trigger such higher statutory penalty range absent a prior conviction. The average prison sentence for the 236 offenders whose prior convictions established CSDB was 160 months, while the average prison sentence for the 282 offenders whose CSDB was established solely by findings in PSRs was 120 months.

The Commission also analyzed the average sentence length of those 288 offenders with known histories of CSDB who received neither the pattern-of-activity enhancement nor the statutory enhancement for a predicate conviction for a sex offense. The average prison sentence for such offenders was 102 months — compared to average prison sentence of 186 months for the 230 offenders with known CSDB histories who received either the guidelines or statutory enhancement (or both).

Finally, the Commission analyzed sentence length for the 322 offenders who had a history of "contact" CSDB versus the 196 offenders who had a history of only "non-contact" CSDB or repeat non-production child pornography offenses. As shown in Figure 7–14, average sentence of imprisonment for the former offenders was 157 months, while the average prison sentence length for the latter offenders was 107 months.

Figure 7-14
Sentence Length for §2G2.2 Offenders by Contact and Non-Contact CSDB Offenses
Fiscal Year 2010 (N=518 of 1,654)



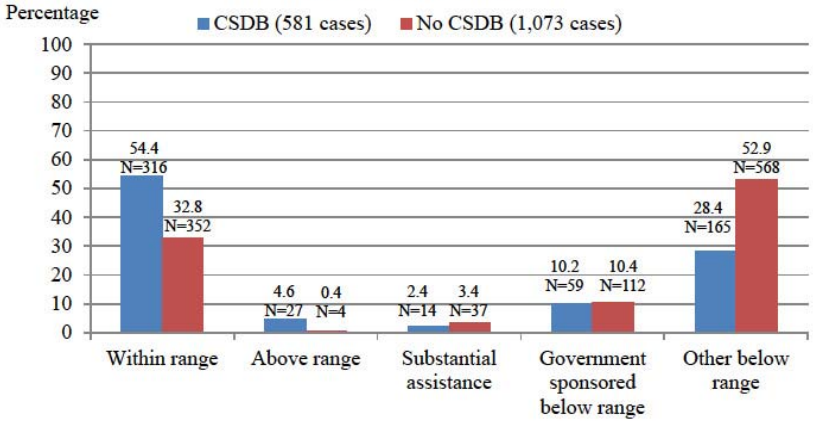
Note: This figure excludes two cases that did not receive a prison sentence.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

G. DIFFERENCES IN DEPARTURE/VARIANCE RATES BASED ON CSDB

The differences in average sentence length between CSDB and non-CSDB offenders are only partly explained by the application of the pattern of activity enhancement and statutory recidivist enhancement. As noted, one or both of those two enhancements applied to 13.9 percent of all §2G2.2 offenders, while approximately one-third of all §2G2.2 offenders had known histories of CSDB. Another explanation for the differences in sentence length appears to be noticeably different rates of variances and departures from the applicable guideline ranges.

As shown in Figure 7–15, offenders with histories of CSDB (including unresolved allegations) had a higher rate of within-range sentences, a higher rate of above-range sentences, and a lower rate of non-government sponsored below-range sentences than offenders without histories of CSDB.

Figure 7-15
Within Range and Out of Range Sentences for §2G2.2 Offenses by CSDB
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Although this data suggests that some judges find evidence and allegations of CSDB to be an important factor in determining whether to impose a within-range sentence, the Commission's analysis in Chapter 8 suggests that the relevance of CSDB for sentencing purposes varies widely depending on the judge and parties in a particular case.[100]

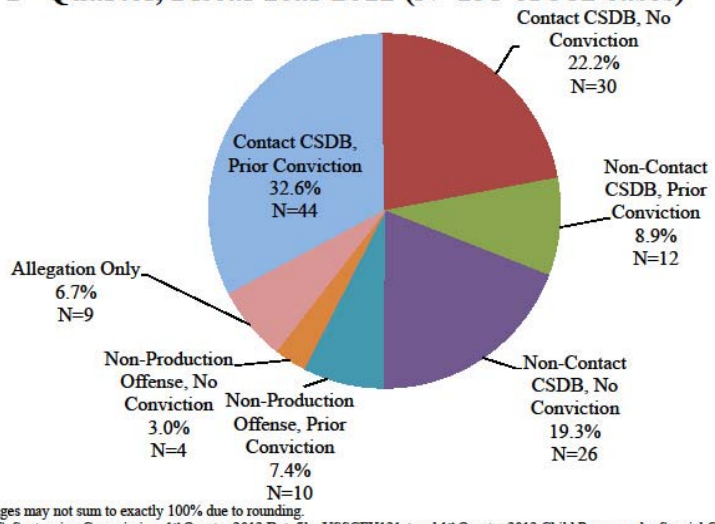
H. FINDINGS OF COMMISSION'S STUDY OF FIRST-QUARTER FISCAL YEAR 2012 CASES

As discussed in Chapter 6, the Commission coded 382 §2G2.2 cases from the first quarter of fiscal year 2012 for certain offense characteristics, including whether an offender had a history of CSDB. The Commission's findings show that, in both fiscal year 2010 and fiscal year 2012, virtually the same percentages of §2G2.2 offenders had histories of CSDB. In the fiscal year 2012 cases, 33.0 percent of offenders had histories of CSDB (35.3%, including cases involving unresolved allegations of CSDB); as discussed in section D above, 31.4 percent of offenders in fiscal year 2010 cases had CSDB histories (35.1%, including cases involving unresolved allegations of CSDB). With respect to the types of CSDB in the fiscal year 2012 cases (contact, non-contact, and prior non-production offenses) and the types of evidence of such

[100] *See* Chapter 8 at 229–31.

conduct (prior conviction, judicial finding, and allegation only), Figure 7–16 shows the percentages of each (reported in a manner similar to Figure 7–2 above).

Figure 7-16
§2G2.2 Offense Characteristics: Most Serious CSDB
1st Quarter, Fiscal Year 2012 (N=135 of 382 cases)

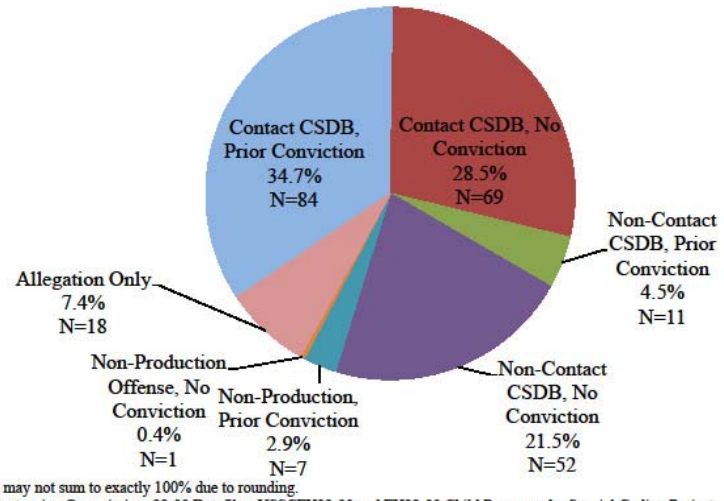


Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 1st Quarter 2012 Datafile, USSCFY121st and 1st Quarter 2012 Child Pornography Special Coding Project.

I. FINDINGS OF COMMISSION'S STUDY OF FISCAL YEARS 1999 AND 2000 CASES

In addition to coding for CSDB in §2G2.2 cases from fiscal years 2010 and 2012, the Commission also analyzed whether CSDB was present in the 660 cases from fiscal years 1999 and 2000 in which offenders were sentenced under the non-production guidelines (§2G2.2 and the former §2G2.4) in order to allow for a comparison over time. As reflected in Figure 7–17 below, the Commission identified 224 offenders with histories of CSDB (or 33.9% of the total 660 offenders) established by prior convictions or findings in PSRs. The Commission identified an additional 18 offenders against whom an allegation of CSDB had been made but was not resolved by the sentencing court. Thus, including cases with unresolved allegations, 242 of the total 660 offenders (36.7%) had CSDB histories. Consistent with Figures 7–2 and 7–16 above, Figure 7–17 reports the different types of CSDB and the different types of evidence of CSDB.

Figure 7-17
§2G2.2 Offense Characteristics: Categories of CSDB
Fiscal Years 1999-2000 (N=242 of 660 cases)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 99-00 Datafiles, USSCFY99-00 and FY99-00 Child Pornography Special Coding Project.

Despite the changes in methods of receipt and distribution of child pornography since 1999 (*e.g.*, the advent of P2P file-sharing), and the proliferation of child pornography on the Internet during that time period, the rate of CSDB in the cases in fiscal years 1999 and 2000 was nearly identical (approximately one-third of all cases) to the rates in the §2G2.2 cases in fiscal years 2010 and 2012.[101] One noticeable difference between the two time periods, however, is the somewhat larger percentage of "contact" CSDB in the older cases (63.2% of offenders in fiscal years 1999–2000 cases, excluding allegations, versus 55.4% in the fiscal year 2010 cases, excluding allegations, and 54.8% in the fiscal year 2012 cases, excluding allegations) and the smaller percentage of prior non-production offenses (3.3% in the fiscal year 1999–2000 cases versus 8.8% in the fiscal year 2010 cases). These differences may be explained in part by the manner in which offenders were detected during the two time periods. For instance, a greater number of offenders in fiscal years 1999 and 2000 were detected by law enforcement officers in Internet "sting" operations — often involving officers who posed as juveniles in Internet chat rooms — than in the more recent cases. Many of the latter period's cases involved officers who detected offenders' distribution of child pornography via P2P file-sharing programs, which were

[101] *See* Figures 7–2 & 7–16, *supra*. In a 1990 Commission staff study involving a much smaller number of cases, the study reported that "15 of 44 [child pornography trafficking cases] received by the Commission [in the prior two years] "involve an offender who currently or at some time in the past has been involved in the sexual abuse of children." *See* U.S. SENT'G COMM'N, REVISED REPORT OF THE WORKING GROUP ON CHILD PORNOGRAPHY AND OBSCENITY OFFENSES AND HATE CRIME (Jan. 16, 1990). Subsequently, the Commission's 1996 report to Congress noted that "13 percent of [child] pornography defendants had a history of sexual misconduct." It is not clear whether that finding referred only to prior convictions or also included findings of sexual misconduct in presentence reports. *See* U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN 33 (1996).

not apparent in the earlier period's cases. As discussed above in Part E.1.b.i., the CSDB rate of offenders whose distribution occurred through P2P file-sharing was lower than the overall rate of CSDB for all non-production offenders.

J. CONCLUSION

The Commission's study of non-production cases from fiscal years 1999, 2000, 2010, and 2012 concerning sexually dangerous behavior and related social science research yields the following conclusions:

- Approximately one in three federal offenders sentenced under the non-production guidelines in the past decade had a known history of one or more types of CSDB predating their federal prosecutions for child pornography charges. Offenders sentenced in fiscal years 1999 and 2000 had both a somewhat higher rate of "contact" CSDB and a significantly lower rate of prior non-production offenses than modern offenders. That difference may reflect that a larger percentage of non-production offenders in the earlier period were detected in "sting" operations whereby law enforcement pretended to be minors in Internet chat rooms (and offenders attempted to engage in "travel" offenses) and also that more non-production offenders today are detected using P2P file-sharing programs.

- The proportion of non-production offenders who engaged in CSDB was likely higher than one-third of such offenders, as social science research (based on offender self-report data) demonstrates that the actual historical prevalence rate of CSDB among child pornography offenders is higher than the known rate. Furthermore, an additional segment of non-production offenders engaged in other types of non-criminal yet sexual deviant conduct in addition to their non-production offenses that may indicate their sexual dangerousness.

- The vast majority of offenders' acts of CSDB (94.7%) involved victims who were minors. The most common type of CSDB was sexual molestation of a female prepubescent minor who knew the perpetrator (*e.g.*, a family member or family friend). The typical non-production offender who engaged in such CSDB was at least 20 years older than the victim. The mean age of the non-production offender at the time of such CSDB was 31 years old, and the mean age of the victim was ten years old.

- Of those non-production offenders in fiscal year 2010 whose CSDB included prior non-production child pornography offenses, nearly half also had committed "contact" or "non-contact" sex offenses.

- Other than the pattern of activity enhancement in the guidelines and the statutory enhancement for predicate convictions for sex offenses, the current guideline and statutory measures of offender culpability (*e.g.*, for distribution of child pornography, number of images possessed, possession of sado-masochistic images) are generally not associated with significantly higher rates of CSDB.

- Although the general act of distribution of child pornography was not associated with a higher rate of CSDB, the particular types of distribution — "personal" versus "impersonal" distribution to other adult offenders[102] — were associated with different rates of CSDB. Of the offenders who engaged in one or more personal modes of distribution to other adults in fiscal year 2010 (e.g., emailing), their CSDB rate was 38.4 percent. Of the offenders whose distribution was impersonal only (*i.e.*, an "open" P2P file-sharing program such as LimeWire), their CSDB rate was 26.2 percent. By comparison, the CSDB rate for the offenders who did not distribute to anyone was 37.2 percent. Therefore, the CSDB rate for the offenders who engaged in personal distribution to other adults — and who thereby appeared to be involved to some degree in an Internet-based child pornography "community" — was significantly higher than the offenders who distributed only using an impersonal mode of distribution but very similar to the offenders who did not distribute child pornography to anyone.

- Of the 520 offenders with known CSDB histories established through prior convictions or findings in PSRs in fiscal year 2010, 44.2 percent of such offenders (230 of 520) received the guideline enhancement and/or the statutory enhancement. The remaining 55.8 percent of offenders with CSDB histories (290 of 520) did not receive either enhancement based on their CSDB typically because it did not constitute the requisite "pattern of activity" for the guideline enhancement or result in a conviction as required for the statutory enhancement.

- The guidelines' criminal history scheme does not account for CSDB in a majority of cases where it existed; most offenders with a history of CSDB were in Criminal History Category I. This is because (1) some offenders with histories of CSDB were never convicted of the conduct constituting their CSDB; (2) some offenders' CSDB resulting in a conviction was concomitant with their federal child pornography offenses (*e.g.*, production, travel, or enticement offenses), and their convictions for such CSDB were not treated as "prior" convictions under USSG §4A1.2(a)(1); and (3) some offenders with prior convictions for CSDB did not have their convictions counted under USSG §4A1.2(e) because of the age of the convictions.

- Certain offender characteristics — an offender's reported history of childhood sexual abuse and lower socio-economic status (as reflected in unemployment status, minimal or negative assets, and lower educational levels) — appear to be associated with somewhat higher rates of CSDB.

- The rates of CSDB in §2G2.2 cases vary across the country, which apparently reflects differing charging policies among the 94 U.S. Attorneys' offices with respect to the prioritization of offenders with known histories of CSDB.

[102] All offenders who distributed child pornography to real or perceived minors necessarily engaged in CSDB.

- The average sentence length for offenders with CSDB histories was significantly higher than the average sentence length for offenders without CSDB histories. On average, offenders with CSDB histories received a 138-month sentence, while offenders without CSDB received a 74-month sentence.

- A substantial number of non-production offenders with CSDB histories (43.8%) received prison sentences of less than ten years. Over four out of five of those offenders did not receive either a guidelines pattern-of-activity enhancement or a statutory enhancement for a predicate conviction for a sex offense.

- Offenders with CSDB histories had a higher rate of sentences within the applicable guideline range than offenders without CSDB histories. Over half of CSDB offenders (54.4%) received within range sentences, while 32.8 percent of non-CSDB offenders received within range sentences.

Chapter 8

EXAMINATION OF SENTENCING DISPARITIES IN §2G2.2 CASES

This chapter examines sentencing disparities in cases in which defendants are sentenced for non-production child pornography offenses under USSG §2G2.2.[1] As discussed elsewhere in this report, the sentencing scheme for non-production offenses has not been updated for nearly a decade.[2] It thus does not account for significant changes in offense conduct, particularly in technology, that have occurred in recent years — such as the widespread use of peer-to-peer ("P2P") file sharing, which typical offenders now use to receive and distribute large quantities of graphically violent child pornography.[3] Such typical offense conduct triggers multiple guideline enhancements and exposes the vast majority of defendants today to substantial penalty ranges under the sentencing scheme resulting from the PROTECT Act of 2003.[4] Growing numbers of sentencing courts and parties believe that this sentencing scheme fails to distinguish meaningfully among offenders in terms of their culpability and dangerousness.[5] As the data analyses in this chapter show, many courts and parties have responded by engaging in a variety of charging and sentencing practices to distinguish among offenders in a manner that differs from the existing penalty scheme and often limits the offenders' sentencing exposure under that scheme. This approach has resulted in growing sentencing disparities since 2004, the last year in which the guidelines were mandatory and the last year in which most offenders convicted of non-production offenses were sentenced based on significantly lower penalty ranges in effect before the enactment of the PROTECT Act.[6] Finally, as discussed in Part F below, appellate review of sentences in non-production cases since *United States v. Booker*[7] has not reduced the growing sentencing disparities in §2G2.2 cases. Indeed, differing approaches among the circuit courts have contributed to the sentencing disparities.

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[1] One of the primary purposes of the Sentencing Reform Act of 1984 was to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B) (instructing the Commission to avoid such disparities); *see also* 18 U.S.C. § 3553(a)(6) (instructing sentencing courts to do the same). In passing the Act, Congress found that "'federal judges [had] mete[d] out an unjustifiably wide range of sentences to defendants with similar histories, convicted of similar crimes, committed under similar circumstances.'" Koon v. United States, 518 U.S. 81, 92 (1996) (quoting from S. Rep. No. 98-225, at 38 (1983)).

[2] *See* Chapter 1 at 2.

[3] *See* Chapter 6 at 154–55; *see also* Chapter 1 at 6 (discussing the increasing presence of graphic and sexually violent images in offenders' child pornography collections resulting from technological changes in offense conduct such as P2P file-sharing).

[4] *See* Chapter 6 at 135, 138–41 (discussing the post-PROTECT Act guideline ranges in USSG §2G2.2 cases today); *see also infra* at 208–10.

[5] *See* Chapter 1 at 10–14 (discussing criticisms of non-production sentencing scheme).

[6] *See id.* at 4 (discussing guideline and statutory changes as a result of the PROTECT Act).

[7] 543 U.S. 220 (2005).

A. SENTENCING FRAMEWORK IN NON-PRODUCTION CHILD PORNOGRAPHY CASES

Before analyzing the sentencing data, this chapter briefly summarizes the sentencing framework in cases in which offenders were sentenced under the non-production guideline in fiscal year 2010 — the time period primarily analyzed in this chapter — which, with a single exception, is identical to the current sentencing framework.[8]

Penalty ranges in non-production cases are a function of both the most serious offense of conviction and the sentencing court's application of §2G2.2.[9] The most serious offense of conviction not only determines the statutory minimums and maximums but also affects the applicable guideline range.[10]

In fiscal year 2010, the statutory range of punishment was zero to ten years for possession offenses and five to 20 years for receipt, transportation, and distribution (R/T/D) offenses; defendants with predicate convictions for sex offenses were subject to increased statutory imprisonment ranges (10 to 20 years for possession and 15 to 40 years for R/T/D offenses).[11] As noted, the only change in the statutory scheme since fiscal year 2010 has been an increase in the statutory maximum term imprisonment — from ten to 20 years — for possession offenses involving images of minors who were prepubescent or under 12 years of age.[12]

Section 2G2.2, which has not changed in any respect since fiscal year 2010, has base offense levels that correspond to the different statutory penalty ranges — 18 for possession convictions and 22 for R/T/D convictions. However, a specific offense characteristic for defendants convicted of receipt who had no intent to distribute child pornography effectively creates three "starting points" in the guideline: 18 for defendants convicted of possession; 20 for defendants convicted of receipt (whose real offense conduct involved only receipt); and 22 for defendants convicted of transportation or distribution or defendants convicted of receipt who intended to distribute child pornography.[13]

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[8] *See* Chapter 2, at 25–27, 31–32. In late 2012, Congress enacted the Child Protection Act of 2012, P. L. 112–206, 126 Stat. 1490 (Dec. 7, 2012), which raised the statutory maximum for possession offenses from ten to 20 years of imprisonment if an image possessed depicted a prepubescent minor or a minor under 12 years of age. *See* Chapter 1 at 4–5. Otherwise, the statutory sentencing scheme remains identical to what it was in fiscal year 2010.

[9] *See* Chapter 2 at 25–27, 31–32.

[10] *See id.* at 32.

[11] *See id.* at 25–27.

[12] *See supra* note 8.

[13] *See* Chapter 2 at 32 (discussing the three "starting points"). As discussed in Chapter 2, a defendant's base offense level in USSG §2G2.2 depends solely on the most serious offense of conviction regardless of the defendant's actual conduct. *See id.* Thus, for example, a defendant convicted of possession will have a base offense level of 18 even if the defendant distributed large volumes of child pornography to others. The guidelines' "relevant conduct" approach does not apply in setting base offense levels in §2G2.2; instead, the base offense level is established solely according to the nature of the most serious offense of conviction. Section 2G2.2(b)(1) includes a limited "relevant conduct" provision that requires a reduction in the base offense from 22 to 20 for defendants convicted of receipt if the court finds that an defendant did not intend to distribute and, instead, his "conduct was limited to the receipt or solicitation of" child pornography. *See* USSG §2G2.2(b)(1).

Several additional offense levels may be — and typically are — added based on several aggravating factors ("specific offense characteristics") in §2G2.2(b)(2)–(b)(7). They include: a 2-level enhancement for possession of child pornography depicting prepubescent minors or children under 12 ("P/P/M"); incremental enhancements of 2 to 7 levels for different types of distribution of child pornography; a 4-level enhancement for possession of child pornography depicting sado-masochistic or violent conduct ("S/M"); a 5-level enhancement for engaging in a "pattern of activity" involving the sexual exploitation or abuse of a minor; a 2-level enhancement for use of a computer in connection with the offense; and incremental enhancements of 2 to 5 levels for possession of a certain quantity of images (with ten or more images receiving the minimum enhancement and 600 or more images receiving the maximum enhancement).[14] As reflected in Table 8–1, which is based on the Commission's regular annual datafile for fiscal year 2010 non-production cases, several of these enhancements applied in the vast majority of §2G2.2 cases.

Table 8–1
FY10 Application Rates of Enhancements in §2G2.2

	All §2G2.2 Cases N = 1654	Possession N = 874	Receipt N = 428	Transportation/ Distribution N = 352
P/P/M	96.3%	95.4%	97.4%	96.9%
S/M	74.2%	68.1%	80.1%	82.1%
Distribution	41.6%	26.8%	33.9%	87.8%
Use of Computer	96.3%	95.8%	96.0%	97.7%
Number of Images	96.9%	94.6%	98.4%	94.6%
Pattern of Activity	10.2%	7.3%	13.3%	13.6%

Before the PROTECT Act, the statutory and guideline framework was less complex, and penalty ranges were less severe. For non-production defendants with no predicate convictions for sex offenses, there were no statutory mandatory minimum penalties for possession offenses or R/T/D offenses, while statutory maximum penalties were five years of imprisonment for possession and 15 years of imprisonment for R/T/D offenses.[15] In addition, the base offense levels for both possession offenses and R/T/D offenses were lower,[16] and the impact of specific offense characteristics was substantially less for typical defendants.[17] In addition to lower penalty levels, under the pre-PROTECT Act guidelines, defendants convicted of possession whose real offense conduct involved receiving, transporting, or distributing child pornography were sentenced under §2G2.2, which had a higher base offense level, as a result of a cross-reference provision in USSG §2G2.4.[18] Thus, under the pre-PROTECT Act version of the non-

[14] *See* Chapter 2 at 32–35. Nearly 70 percent of offenders who received an enhancement based on the number of images that they possessed received the maximum 5-level enhancement. *See* Chapter 6 at 141.

[15] *See* 18 U.S.C. §§ 2252(a)(1), (a)(2) & 2252A(a)(1), (a)(2) (2002).

[16] The base offense level for receipt, transportation, or distribution was 17 under USSG §2G2.2, while the base offense level for possession was 15 under USSG §2G2.4.

[17] *See* Chapter 6 at 124–25.

[18] *See* USSG §2G2.4(c)(2) ("If the offense involved trafficking in [child pornography] (including receiving, transporting, shipping, advertising, or possessing [child pornography] with the intent to traffic), apply §2G2.2.").

production guidelines, a defendant's real offense conduct determined his base offense level notwithstanding his offense of conviction.

B. COMMON GUIDELINE RANGES FOR OFFENDERS SENTENCED UNDER THE NON-PRODUCTION GUIDELINES: FISCAL YEAR 2010 VERSUS FISCAL YEAR 2004

This section compares common guideline ranges for defendants sentenced under the 2010 and 2004 non-production guidelines. As discussed below, these ranges were calculated using the most commonly applied specific offense characteristics for possession, receipt, and transportation/distribution defendants. Because the vast majority of defendants sentenced under the non-production guidelines have no prior criminal record and plead guilty, the common ranges discussed below are for defendants in Criminal History Category I who received full credit for acceptance of responsibility.[19]

1. *Common 2010 Guideline Ranges*

As reflected in Table 8–1 above and Figure 8–1 below, the typical defendant in fiscal year 2010 sentenced under the current version of §2G2.2 received a minimum cumulative enhancement of 13 offense levels[20] in addition to a "starting point" of 18, 20, or 22.[21] On average, each 2-level increase in the offense level results in a 20 to 30 percent increase in the minimum of the applicable guideline sentencing range.[22] After accounting for a 3-level decrease for acceptance of responsibility, corresponding guideline ranges in 2010 were 78–97 months for defendants convicted of possession (based on a final offense level of 28 and Criminal History Category I) and 97–121 months for defendants convicted of receipt (based on a final offense level of 30 and Criminal History Category I). Guideline ranges for typical defendants convicted of transportation or distribution offenses were either 151–188 months (based on final offense level of 34 and Criminal History Category I) or 210–262 months (based on a final offense level of 37 and Criminal History Category I).[23] Their guideline ranges were greater not only because such defendants had a higher starting point of 22 but also because they typically received 2 or 5 additional levels for distributing child pornography under §2G2.2(b)(3)(B) (5 levels) or §2G2.2(b)(3)(F) (2 levels).[24]

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[19] For instance, in fiscal year 2010, 82% of all USSG §2G2.2 defendants were in Criminal History Category I and 94.3% received full credit for acceptance of responsibility (*i.e.*, a reduction of 3 offense levels) pursuant to USSG §3E1.1 (Acceptance of Responsibility).

[20] *See* Chapter 6 at 138–41 (noting that the typical offender received the following enhancements: 2 levels for possessing images of a prepubescent minor, 4 levels for possessing sado-masochistic images; 2 levels for use of a computer; and 5 levels for possessing 600 or more images).

[21] *See* Chapter 2 at 32 (discussing the three "starting points" under USSG §2G2.2).

[22] *See* Chapter 6 at 124.

[23] *See* USSG, Ch. 5, Pt. A (Sentencing Table). The Sentencing Table is reproduced in Appendix B.

[24] Section 2G2.2(b)(3)(A)–(F) has six different subsections providing for incremental enhancements of 2 to 7 levels based on the type of distribution conduct. The typical defendant who receives an enhancement for distribution receives a 2- or 5-level enhancement under USSG §2G2.2(b)(3)(B) or (F). Subsection (B) provides for a 5-level enhancement for a defendant who distributed in expectation of the receipt of a thing of value (but not for pecuniary

2. *Common 2004 Guideline Ranges*

By comparison, common guidelines ranges for offenders sentenced under the non-production guidelines in fiscal year 2004 were significantly lower. Using the Commission's annual datafile for fiscal year 2004 (cases in which sentences were imposed between October 1, 2003, and June 24, 2004),[25] and considering only defendants sentenced under pre-PROTECT Act statutory and guidelines provisions,[26] the Commission identified the most common guideline ranges applicable to possession, receipt, and transportation/distribution offenders in Criminal History Category I during that year.[27]

In fiscal year 2004, the most common guideline range for defendants convicted of possession resulted from a base offense level of 15 and 6 additional offense levels for the three most commonly applied specific offense characteristics in §2G2.4 — P/P/M, use of a computer, and possession of ten or more images.[28] After credit for acceptance of responsibility, the final offense level was 18 for defendants convicted of possession, and the corresponding guideline range was 27–33 months. The most common guideline range for defendants convicted of receipt resulted from a base offense level of 17 and 8 additional offense levels for the three most commonly applied specific offense characteristics in §2G2.2 — P/P/M, S/M, and use of a computer.[29] After credit for acceptance of responsibility, the final offense level was 22 for defendants convicted of receipt, and the corresponding guideline range was 41–51 months. The most common guideline range for transportation or distribution defendants resulted from a base offense level of 17 and 13 additional offense levels for the four most commonly applied specific offense characteristics in §2G2.2 — the same three applied to receipt defendants (P/P/M, S/M, and use of a computer) and also the 5-level enhancement for distributing child pornography for a

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gain) (*e.g.*, a defendant who traded child pornography images for other images), while subsection (F) provides for a 2-level enhancement for distribution without any expectation of the receipt of anything of value. The remaining subsections of §2G2.2(b) apply to defendants who distributed to minors or who distributed for pecuniary gain. In fiscal year 2010, of the 683 offenders who received an enhancement under §2G2.2(b)(3), 620 (90.8%) receive a 2- or 5-level enhancement under §2G2.2(b)(3)(B) & (F).

[25] Fiscal year data in 2004 was divided between cases in which sentences were imposed before June 24, 2004 — when the Supreme Court decided Blakely v. Washington, 542 U.S. 296 (2004) — and cases in which sentences were imposed after that date. *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS iii (2004). There were a total of 463 non-production cases in pre-*Blakely* fiscal year 2004.

[26] Of the 463 cases in the pre-*Blakely* fiscal year 2004 period, 408 (88.1%) were sentenced pursuant to the pre-PROTECT Act statutory and guidelines provisions. Fiscal year 2004 was the last year in which a majority of non-production defendants were sentenced under pre-PROTECT Act provisions, as the PROTECT Act applied to offenses committed on or after April 30, 2003.

[27] Of the 463 defendants in the pre-*Blakely* fiscal year 2004 period, 84.7% were in Criminal History Category I.

[28] In fiscal year 2004 (from October 1, 2003, until June 24, 2004), of defendants sentenced under USSG §2G2.4, 91.2% received the enhancement for P/P/M, 75.8% received the enhancement for possession of 10 or more images, and 93.5% received the enhancement for use of a computer.

[29] In fiscal year 2004 (from October 1, 2003, until June 24, 2004), of defendants sentenced under USSG §2G2.2, 96.3% received the enhancement for P/P/M, 54.7% received the enhancement for S/M, and 94.6% received the enhancement for use of a computer.

thing of value (other than pecuniary gain).[30] After credit for acceptance of responsibility, the final offense level was 27 for defendants convicted of transportation or distribution, and their corresponding guideline range was 70–87 months.[31]

Figure 8–1 compares common sentencing ranges for possession, receipt, and transportation/distribution defendants in 2004 and 2010.

Figure 8-1
Comparison of Non-Production Offenses:
Common Guideline Calculations and Ranges (CHC I)
Fiscal Years 2004 and 2010

	Possession		Receipt		Distribution/Transportation	
	FY2004	FY2010	FY2004	FY2010	FY2004	FY2010
Base Offense Level	15	18	17	22	17	22
Receipt Only	N/A	N/A	N/A	-2	N/A	N/A
Distribution for Gain	N/A	N/A	N/A	N/A	+5	+5
Pre-Pubescent Minor	+2	+2	+2	+2	+2	+2
Sadism & Masochism	N/A	+4	+4	+4	+4	+4
Use of a Computer	+2	+2	+2	+2	+2	+2
Number of Images	+2 (>10 images)	+5 (>600 images)	N/A	+5 (>600 images)	N/A	+5 (>600 images)
Acceptance	-3	-3	-3	-3	-3	-3
Final Offense Level	18	28	22	30	27	37
Range for CHC I	27-33 months	78-97 months	41-51 months	97-121 months	70-87 months	210-262 months

SOURCE: U.S. Sentencing Commission, 2004 & 2010 Datafile, USSCFY04 & USSCFY10.

[30] In fiscal year 2004 (from October 1, 2003, until June 24, 2004), of defendants sentenced under USSG §2G2.2, 33.7% received the enhancement for distributing child pornography for a thing of value.

[31] Six of those defendants sentenced under the distribution guideline were convicted of a single count of possession, and, therefore, faced a statutory maximum sentence of 60 months under the pre-PROTECT Act versions of 18 U.S.C. §§ 2252(a)(4) and 2252A(a)(5). Thus, under the operation of USSG §5G1.1(a) (Sentencing on a Single Count of Conviction), their guideline sentence was 60 months. *See* USSG §5G1.1(a) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.").

C. GROWING SENTENCING DISPARITIES SINCE 2004

As discussed in Chapter 1, only 40.0 percent of non-production defendants sentenced in fiscal year 2010 received sentences within the applicable guideline ranges, compared to 83.2 percent in fiscal year 2004.[32] The increasing number of sentences outside of the applicable guideline ranges reflects the belief of many stakeholders that the current guideline and statutory penalty levels are excessive or are not based on relevant factors in non-production cases.[33] In view of the steeply declining rate of within-range sentences, the Commission examined cases with the most frequently applied specific offense characteristics for possession, receipt, and transportation/distribution offenders sentenced in fiscal year 2010 to determine the extent of disparities among offenders who were similarly situated under the guidelines.

What follows are analyses of sentencing data based on the previously-mentioned common non-production sentencing case types — involving actual, not hypothetical cases — derived from data in the Commission's regular fiscal year 2010 datafile.[34] The Commission examined 498 (or 30.1%) of all 1,654 non-production cases for these analyses. Each case involved a typical child pornography defendant with no criminal history points (and no predicate convictions for sex offenses) who, as reflected in findings in his presentence report ("PSR"), engaged in conduct that caused him to receive at least the 13 offense levels mentioned above. (Such defendants are hereafter referred to as "plus-13 defendants.") Two of the three case types concern such defendants who also distributed child pornography and received an additional 2 or 5 offense levels under §2G2.2(b)(3)(B) or (F). All 498 defendants in the cases analyzed received full credit for acceptance of responsibility under USSG §3E1.1 (Acceptance of Responsibility).

The only difference in sentencing exposure under the guidelines and penal statutes for the members of the different case types analyzed relates to their offenses of conviction. Some defendants were convicted of R/T/D offenses (which, as noted, had guideline starting points of 20 or 22 and statutory ranges of five to 20 years of imprisonment), while others were convicted only of possession (and, thus, had a starting point of 18 under the guideline and a statutory range of punishment of zero to ten years based on the law then in effect).

1. *Case Type One: No Distribution Enhancement*

Figure 8–2 below compares the guideline determinations for the 245 plus-13 defendants who did not receive any additional enhancement for distribution pursuant to §2G2.2(b)(3). One group (157 offenders) was convicted of possession, while the second group (88 offenders) was convicted of receipt. Both sets of defendants engaged in comparable conduct, as described in the

[32] *See* Chapter 1 at 7, 9–10. Just one year later, the within range rate in USSG §2G2.2 cases had fallen to 32.7%. *See id.* at 7.

[33] *See id.* at 10–14 (discussing criticism of the current statutory and guideline penalty frameworks by various stakeholders in the federal criminal justice system).

[34] All defendants in the three case types were sentenced under versions of the penal statutes and guidelines in effect since November 1, 2004 (reflecting the PROTECT Act amendments).

PSRs, but were convicted of different statutory offenses.[35] The 157 defendants convicted of possession had a guideline range of 78 to 97 months, while the 88 defendants convicted of receipt had a guideline range of 97 to 121 months. Thus, the guidelines provided substantially different ranges for the two groups of defendants who engaged in substantially similar conduct.

Figure 8-2
Case Type One:
No Distribution Enhancement

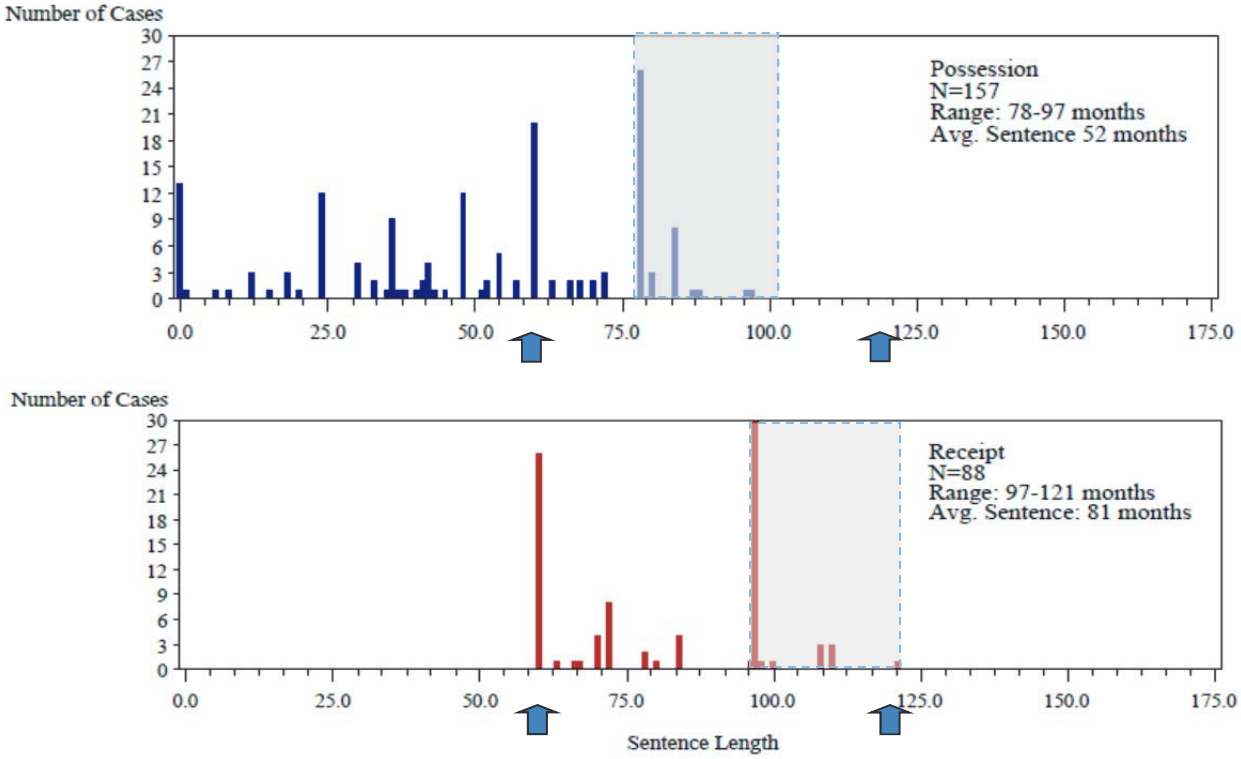
	Possession Offenders (N=157)	Receipt Offenders (N=88)
Base Offense Level	18	22
Receipt Only	N/A	-2
Pre-Pubescent Minor	+2	+2
Sadism & Masochism	+4	+4
Use of Computer	+2	+2
>600 Images	+5	+5
Acceptance	-3	-3
Final Offense Level	28	30
Range for CHC I	78-97	97-121

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 8–3 below shows the manner in which these 245 defendants were actually sentenced. The top portion of the graph depicts the sentence lengths for the 157 defendants convicted of possession; the bottom portion of the graph depicts the sentence lengths for the 88 defendants convicted of receipt. The horizontal axes of both portions depict sentence lengths (in increasing increments, stated in months). The vertical axes of the two portions of the graph show the number of cases in each increment, as represented by blue or red bars; blue bars on the top portion together comprise the 157 defendants convicted of possession, and red bars on the bottom portion together comprise the 88 defendants convicted of receipt. The shaded area in the top portion of the graph represents the applicable guideline range for the possession defendants (78–97 months), and the shaded area in the bottom portion represents the applicable guideline range for the receipt defendants (97–121 months). Blue arrows on the horizontal axes mark 60 and 120 months, the statutory mandatory minimum term of imprisonment for receipt defendants (five years) and the statutory maximum term of imprisonment for possession defendants in 2010 (ten years).

[35] As determined by the Commission's special coding project, which examined the offense conduct section of the PSRs, the 157 possession defendants all engaged in knowing receipt of child pornography. *See* Chapter 6 at 145–46 (discussing the Commission's special coding project of fiscal year 2010 non-production cases).

Figure 8-3
Variation of Sentence Length for Case Type One Offenders
Convicted of Possession and Receipt Offenses



As Figure 8–3 above reflects, the clear majority of defendants convicted of possession (116 of 157, 73.9%) were sentenced below their applicable guideline range, and just over half of the defendants convicted of receipt (49 of 88, 55.7%) were sentenced below their applicable guideline range. The average sentence for defendants convicted of possession was 52 months, while the average sentence for defendants convicted of receipt was 81 months. The below range sentences for possession and receipt defendants varied widely. Figure 8–3 demonstrates not only significant sentencing differences *between* similarly situated defendants convicted of possession and similarly situated defendants convicted of receipt but also significant sentencing differences *among* similarly situated defendants convicted of receipt and *among* similarly situated defendants convicted of possession.

2. *Case Type Two: Distribution Resulting in a 2-Level Enhancement*

Figure 8–4 below compares the guideline determinations for the 132 plus-13 defendants who also received a 2-level enhancement for distribution pursuant to §2G2.2(b)(3)(F). One group (62 offenders) was convicted of possession, while the second group (70 offenders) was convicted of distribution. Both sets of defendants engaged in comparable distribution conduct, as found by sentencing courts in applying §2G2.2(b)(3)(F). However, because the two groups were convicted of different statutory offenses, their guideline ranges differed considerably as a result of different "starting points" under the guidelines and different statutory ranges of imprisonment. The 62 defendants convicted of possession had a guideline range of 97 to 120 months, while the 70 defendants convicted of distribution had a guideline range of 151 to 188

months.[36] Thus, both the relevant penal statutes and the guidelines provide substantially different ranges for two groups of defendants who engaged in substantially similar conduct as found by sentencing courts.

Figure 8-4
Case Type Two:
Two-Level Distribution Enhancement

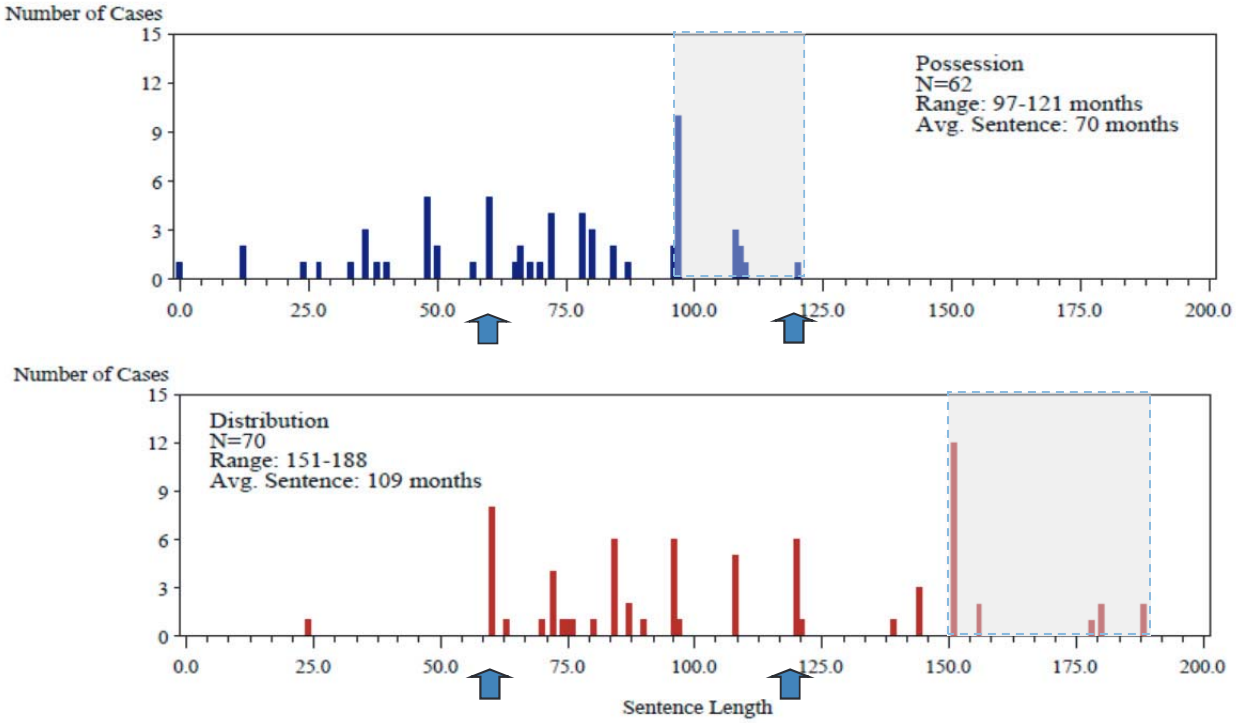
	Possession Offenders (N=62)	Distribution/Transportation Offenders (N=70)
Base Offense Level	18	22
Pre-Pubescent Minor	+2	+2
Other Distribution	+2	+2
Sadism & Masochism	+4	+4
Use of Computer	+2	+2
>600 Images	+5	+5
Acceptance	-3	-3
Final Offense Level	30	34
Range for CHC I	~~97-121~~ 97-120	151-188

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 8–5 below shows the manner in which these 132 defendants were actually sentenced. The average sentence for defendants convicted of possession was 70 months, while the average sentence for defendants convicted of distribution was 109 months. Just as with the similarly situated defendants in case type one above, significant differences in sentence length are apparent in case type two — both *between* defendants convicted of possession and similarly situated defendants convicted of distribution and *among* similarly situated defendants in each sub-group. The vast majority of defendants in both sub-groups (72.6% of possession defendants and 72.9% of distribution defendants) received below-range sentences.

[36] Because offenders convicted of a single count of possession were subject to a 120-month statutory maximum term of imprisonment under 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5), their guideline range was 97–120 months pursuant to USSG §5G1.1(c)(1) rather than 97–121 months. Section 5G1.1(c)(1) provides that the guideline range cannot be "greater than the statutorily authorized maximum sentence." *Id.* The shaded area in the top portion of the graph in Figure 8–4 depicts the guideline range that would have been applicable but for the fact that the possession defendants faced a 120-month statutory maximum sentence.

Figure 8-5
Variation of Sentence Length for Case Type Two Offenders
Convicted of Possession and Distribution Offenses



3. *Case Type Three: Distribution Resulting in a 5-Level Enhancement*

Figure 8–6 below compares the guideline determinations for the 121 plus-13 defendants who also received a 5-level enhancement pursuant to §2G2.2(b)(3)(B) for distribution; one group (40 offenders) was convicted of possession, while the second group (81 offenders) was convicted of distribution. As noted, both sets of defendants engaged in comparable conduct, as found by sentencing courts in applying §2G2.2(b)(3)(B), but were convicted of different statutory offenses. Their guideline ranges differed both because of different "starting points" under the guidelines and also because of different statutory ranges of imprisonment. The 40 defendants convicted of possession had a guideline sentence of 120 months (135 to 168 months without the statutory maximum of 120 months), while the 81 defendants convicted of distribution had a guideline range of 210 to 240 months.[37] Thus, both the relevant penal statutes and the guidelines provide substantially different ranges for two groups of defendants who engaged in substantially similar conduct as found by sentencing courts.

[37] Because offenders convicted of a single count of possession faced a 120-month statutory maximum term of imprisonment under 18 U.S.C. §§ 2252(a)(4) or 2252A(a)(5), their guideline sentence was 120 months pursuant to USSG §5G1.1(a) rather than 135–168 months. Section 5G1.1(a) provides that "[w]here the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence." *Id* The shaded area in the top portion of the graph in Figure 8–7 depicts the guideline range that would have been applicable but for the fact that the possession defendants faced a 120-month statutory maximum sentence. Similarly, because the statutory maximum punishment for transportation or distribution was 20 years (240 months), *see* 18 U.S.C. §§ 2252(a)(1), (a)(2) & 2252A(a)(1), (a)(2), the guideline range for the defendants convicted of those offenses was 210–240 months rather than 210–262 months.

Figure 8-6
Case Type Three:
Five-Level Distribution Enhancement

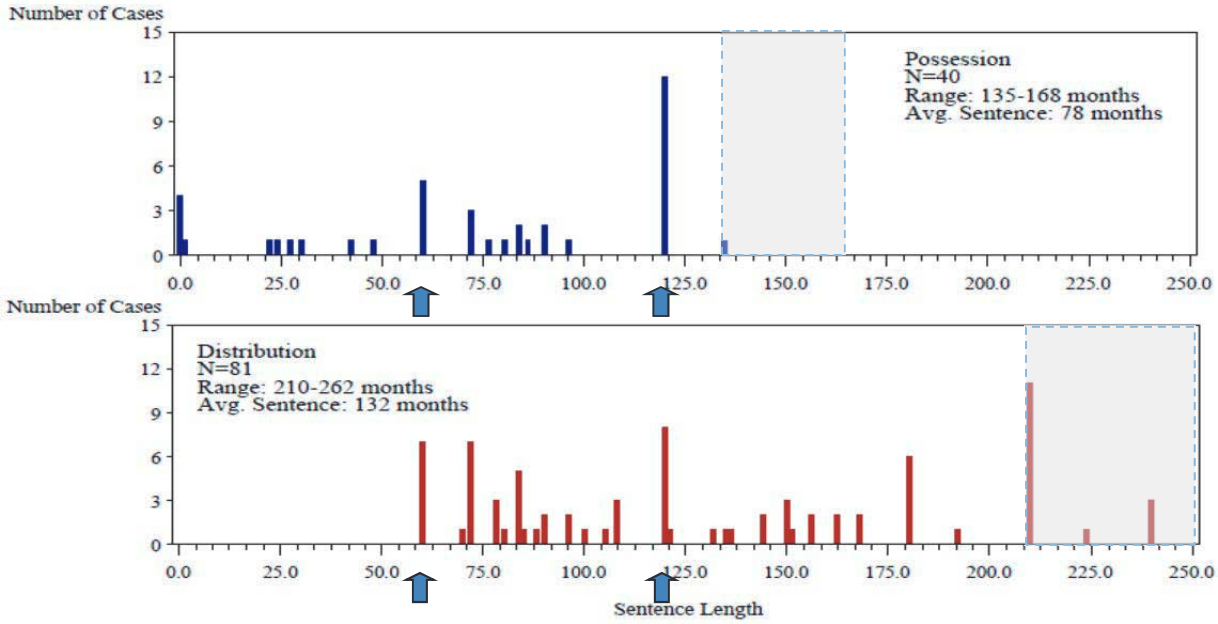
	Possession Offenders (N=40)	Distribution/Transportation Offenders (N=81)
Base Offense Level	18	22
Pre-Pubescent Minor	+2	+2
Distribution to Minor/for Gain	+5	+5
Sadism & Masochism	+4	+4
Use of Computer	+2	+2
>600 Images	+5	+5
Acceptance	-3	-3
Final Offense Level	33	37
Range for CHC I	~~135-168~~ 120-120	~~210-262~~ 210-240

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 8–7 below shows the manner in which these 121 defendants were actually sentenced. The average sentence for defendants convicted of possession was 78 months, while the average sentence for defendants convicted of distribution was 132 months. Just as with the first two case types, significant differences in sentence length are apparent — both *between* the defendants convicted of possession and similarly situated defendants convicted of distribution and *among* similarly situated defendants in each sub-group. All but one of the defendants convicted of possession received sentences below the guideline range that would have been applicable but for the fact that they were charged with a single count of possession that carried a statutory maximum sentence of 120 months.[38] The vast majority of defendants convicted of distribution (81.5%) received a below-range sentence.

[38] The single defendant who received a within-range sentence was convicted of two counts of possession and, thus, was able to receive a sentence above 120 months pursuant to USSG §5G1.2(d).

Figure 8-7
Variation of Sentence Length for Case Type Three Offenders
Convicted of Possession and Distribution Offenses



D. COMMON PRACTICES OF COURTS AND PARTIES IN LIMITING OFFENDERS' SENTENCING EXPOSURE UNDER THE STATUTORY AND GUIDELINE PENALTY SCHEMES

The remainder of this chapter addresses the specific manners in which many courts and parties in non-production cases have limited defendants' sentencing exposure under the statutory and guideline frameworks created by the PROTECT Act. As discussed below, there are four primary methods whereby courts and/or parties have not applied the statutory and guidelines sentencing schemes:

- Charging practices that do not reflect the most serious offense conduct;
- Guideline stipulations in plea agreements (adopted by sentencing courts) that are inconsistent with the facts in the "offense conduct" sections of presentence reports and/or the "factual basis" sections of plea agreements;
- Government sponsored variances and departures (other than departures for a defendant's substantial assistance to the authorities pursuant to USSC §5K1.1 (Substantial Assistance to Authorities (Policy Statement)); and
- Non-government sponsored variances and departures.

1. *Charging Practices*

As explained below, a common method for limiting defendants' sentencing exposure in fiscal year 2010 non-production cases was charging practices that permitted defendants who

committed R/T/D offenses to plead guilty to possession. The data analysis of charging practices that follows is based on the Commission's special coding project of all 1,654 non-production cases, including 1,310 cases that had plea agreements, in fiscal year 2010. The Commission examined cases with and without plea agreements to determine whether defendants avoided mandatory minimum penalties despite their actual offense conduct.

First, to determine whether a defendant received a "charge bargain,"[39] the Commission initially examined the language of plea agreements that memorialized the parties' agreements. Typically, in charge-bargain cases, the parties expressly agreed that the prosecution would dismiss (or not bring) an R/T/D offense carrying a mandatory minimum penalty in exchange for a defendant's guilty plea to possession. The Commission next examined both the "factual basis" sections of plea agreements and the "offense conduct" sections of PSRs to determine whether there was sufficient evidence that the defendant had committed an R/T/D offense. In cases without plea agreements in which a defendant was only charged with possession, the Commission examined the "offense conduct" section of PSRs to determine whether an R/T/D charge appeared available but was not brought.[40]

As shown in Chapter 6, 878 (53.1%) of the 1,654 non-production defendants were convicted of possession rather than an R/T/D offense.[41] The Commission's review of PSRs and plea agreements revealed that, of the 878 defendants convicted solely of possession, 837 (95.3%) engaged in knowing receipt and/or distribution of child pornography[42] and thereby either totally avoided a mandatory minimum penalty as a result of charging practices or, in the case of defendants with predicate sex convictions, were subject to a lower mandatory minimum

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[39] A "charge bargain" is an agreement between the parties whereby the prosecutor agrees to dismiss a charge already brought or agrees not to bring a charge where evidence of such an offense exists — often one carrying a mandatory minimum penalty — in exchange for the defendant's agreement to plead guilty to a remaining charge. *See* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 108 (2011) (defining and discussing "charge bargains" in federal cases).

[40] As explained in Chapter 6, in typical non-production cases, the Commission's review of PSRs and plea agreements revealed that receipt and/or distribution conduct appeared readily provable based on the manner in which law enforcement detected the offense. In nearly 90% of fiscal year 2010 cases, law enforcement detected the offense in one of three ways: (1) by accessing the offender's child pornography files through a P2P file-sharing program used by the offender; (2) by directly receiving child pornography from an offender via email or an instant-messaging service during an Internet "chat" session with an undercover officer; or (3) by discovering that an offender had obtained child pornography from a website (typically using his own name as well as an email address and credit card associated with his true identity). In such cases, the evidence of the defendant's act of receipt or distribution was directly related to the manner in which the defendant was detected by law enforcement and, thus, appeared readily provable. *See* Chapter 6 at 145. Nevertheless, the Commission recognizes that in some of those cases in which only possession charges were brought, there may have been limited forensic resources available to the prosecution (thus making it much easier to prove possession rather than receipt or distribution) or other forensic difficulties related to proving receipt or distribution in addition to possession. *See* Testimony of James Fottrell, Child Exploitation and Obscenity Section, Criminal Division, Department of Justice, to the Commission, at 58 (Feb. 15, 2012) (on behalf of the Department of Justice) (noting limited forensic resources available to law enforcement in some child pornography cases).

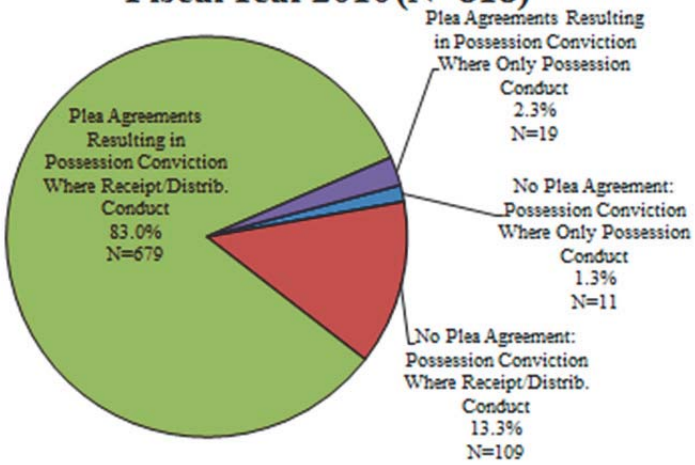
[41] Chapter 6 at 145-46. Included in this group of "possession" defendants were five defendants convicted of obscenity offenses not carrying a mandatory minimum penalty who, at sentencing, were treated as the equivalent of defendants convicted of possession under USSG §2G2.2(a)(1).

[42] Chapter 6 at 146-47.

penalty.[43] In the other 41 cases (4.7%), the offense conduct sections of PSRs and factual basis sections of plea agreements did not recount evidence of an R/T/D offense.

Figure 8–8 below summarizes the charging practices in the 818 cases in which defendants without predicate convictions for sex offenses were convicted of possession rather than an R/T/D offense.

Figure 8-8
Charging Practices in Possession Offenses without Mandatory Minimums
Fiscal Year 2010 (N=818)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

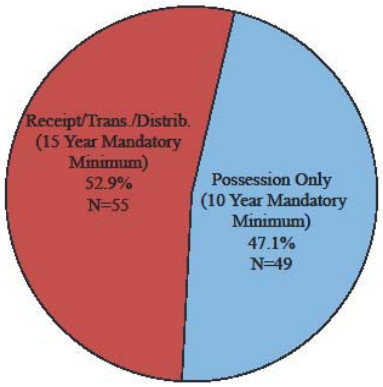
Of the 818 cases, only 30 cases (3.7%) involved defendants charged solely with possession where PSRs did not contain evidence of knowing receipt and/or distribution. In contrast, 679 (83.0%) involved plea agreements whereby defendants pleaded guilty to possession but the offense conduct sections of their PSRs and/or factual basis sections of their plea agreements stated that such defendant engaged in knowing receipt and/or distribution. An additional 109 cases (13.3%) involved defendants who only were charged with (and convicted of) possession without a plea agreement, despite findings in PSRs that the defendants had engaged in knowing receipt and/or distribution.

Figure 8–9 below shows the charging practices in the 104 non-production cases in which defendants had predicate convictions for sex offenses and engaged in knowing receipt and/or distribution conduct according to their PSRs or plea agreements. Of the 104 cases, 49 cases (47.1%) involved defendants who only were charged with possession. Such defendants, unlike

[43] *See id.* at 148 (Figure 6–16). Of the 878 defendants convicted of possession, 818 defendants (93.2%) were convicted of a possession offense that did not carry a mandatory minimum term of imprisonment, while 60 (6.8%) of those possession defendants had predicate convictions for sex offenses and, thus, faced a statutory mandatory minimum sentence of ten years of imprisonment.

the remaining 55 defendants who were convicted of R/T/D offenses, were subject to a ten-year rather than a 15-year statutory mandatory minimum sentence.[44]

Figure 8-9
Charging Practices in Non-Production Offenses with Predicate Sex Convictions and Receipt/Distribution Conduct
Fiscal Year 2010 (N=104)



Note: Percentages may not sum to exactly 100% due to rounding. Only cases involving 18 U.S.C. §§ 2252 and 2252A were used in this analysis. Other mandatory minimum cases (N=21) were excluded for this analysis.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

2. *Guideline Stipulations in Plea Agreements*

Parties also used stipulations in plea agreements concerning the application of the guidelines (which were adopted by sentencing courts) to limit defendants' sentencing exposure in some non-production cases.[45] Of the 1,310 non-production cases with plea agreements, 1,117 (85.3%) contained guideline stipulations in some form.[46] The Commission divided the guideline stipulations into two groups: (1) stipulations that were consistent (or at least not inconsistent) with the relevant underlying facts as recounted in PSRs or plea agreements concerning specific offense characteristics in §2G2.2(b); and (2) stipulations that were inconsistent with the relevant facts as recounted in PSRs or plea agreements concerning specific offense characteristics in §2G2.2(b) and that resulted in a guideline range lower than one consistent with the defendant's actual offense conduct.[47] An example of the latter type of stipulation is a plea agreement in

[44] *See* Chapter 2 at 26.

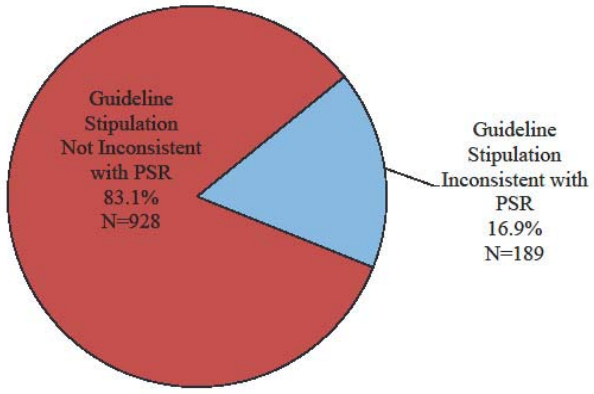
[45] Typically, guideline stipulations in plea agreements in non-production cases concerned not only the relevant facts but also the manner in which the parties envisioned that the sentencing guidelines would apply. *Cf.* USSG §6B1.4(a) (Stipulations (Policy Statement)) ("A plea agreement may be accompanied by a written stipulation of facts relevant to sentencing.").

[46] Some plea agreements contained full guidelines stipulations that addressed all of the applicable issues in Chapters Two, Three, and Four of the *Guidelines Manual*, while others addressed only limited guideline application issues (*e.g.*, a stipulation that a defendant should receive credit for acceptance of responsibility under USSG §3E1.1).

[47] The Commission only considered facts contained in PSRs if they were adopted by district courts (as reflected in the statement of reasons forms).

which the parties agreed not to apply the use-of-a-computer enhancement in §2G2.2(b)(6), despite the PSR's finding that the defendant used a computer during the offense. Figure 8–10 shows that, of the 1,117 non-production cases with guideline stipulations in plea agreements, 189 (16.9%) contained stipulations that were inconsistent with the relevant facts set forth in PSRs or plea agreements and that resulted in lower guideline ranges.

Figure 8-10
Guideline Stipulations in Non-Production Plea Agreements
Fiscal Year 2010
(N=1,117 Cases with Guideline Stipulations out of 1,310 Cases with Plea Agreements)



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

3. *Government Sponsored Downward Variances and Departures*

A third practice that reduced defendants' sentencing exposure in non-production cases was a government motion for downward variance or departure[48] from the otherwise applicable guideline range based on reasons other than a defendant's substantial assistance to the authorities.[49] Of the 1,654 non-production cases in fiscal year 2010, 171 (10.3%) involved such government motions for downward variances or departures.[50] In the typical such case, no reason was given in a plea agreement for such downward variances or departures.[51]

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[48] For an explanation of the difference between "variances" and "departures," *see* USSG §1B1.1(b) & (c) (Application Instructions); *see also id.,* comment. (back'd).

[49] In 51 cases (3.1%) prosecutors moved for downward departures pursuant to USSG §5K1.1 based on defendants' substantial assistance to the authorities. In no child pornography case in fiscal year 2010 did the government move for an early disposition program (or "fast track") downward departure pursuant to USSG §5K3.1 (Early Disposition Programs (Policy Statement)).

[50] By fiscal year 2011, 14.6% of USSG §2G2.2 cases had government-sponsored departures or variances (other than for a defendant's substantial assistance). *See* U.S. SENT'G COMM'N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS 80 (2011) (Table 28).

[51] In the relatively small number of cases in which a plea agreement did specify a reason for a government sponsored variance or departure, the most common reason cited was a defendant's agreement to submit to a psycho-

4. *Non-Government Sponsored Downward Variances and Departures*

A final means of reducing a defendant's sentencing exposure was a non-government downward variance or departure. Of the total 1,654 non-production cases, 733 cases (44.3%) involved courts' imposition of sentences below the applicable guidelines ranges based on non-government sponsored variances or departures.[52] Such downward variances or departures usually were initiated by the filing of a motion by the defendant, but it appears from the statement of reasons forms that sentencing courts occasionally downwardly varied or departed *sua sponte*.[53] Of the 733 cases involving downward variances or departures, the prosecution objected in 632 such cases (86.2%), but did not object in 101 cases (13.8%). The three leading reasons given by courts for downwardly varying or departing from the applicable guideline ranges were: (1) a variance based on the "nature and circumstances of the offense [and/or] the history and characteristics of the defendant" under 18 U.S.C. § 3553(a)(1) (551 cases, or 75.1% of cases with variances or departures); (2) a departure[54] or variance based on the overrepresentation of a defendant's criminal history score (26 cases, or 3.5% of such cases); and (3) a departure based on a mitigating factor of a kind or to a degree not adequately taken into consideration by §2G2.2 (20 cases, or 2.7% of such cases).[55] The remaining 18.7 percent of downward variances and departures were based on a wide variety of grounds, including defendants' ages (youthful or elderly), physical conditions, and previous employment records. Some cases involved multiple grounds for downward variance or departure.

As a result of the different types of variances and departures, only 668 (40.4%) of the 1,654 non-production defendants received within-range sentences in fiscal year 2010. Figure 8–11 below shows the different types of variances and departures in non-production cases (including upward variances or departures, which occurred in only 1.9% of cases).

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sexual examination by a mental health expert (that would be shared with the prosecution and court). This practice was limited to only a few districts (*e.g.*, W.D. Wash.).

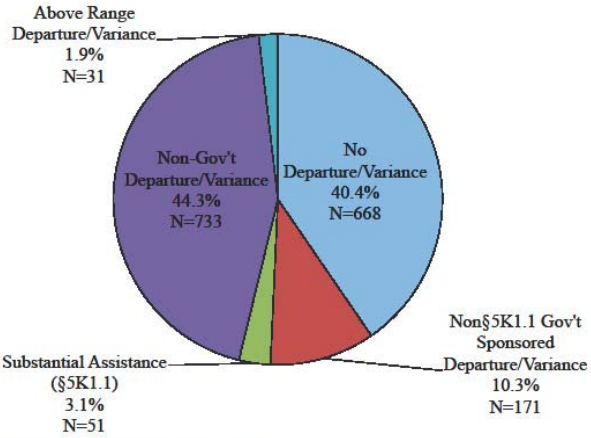
[52] The vast majority of such sentences imposed outside of the applicable guidelines ranges in non-production child pornography cases were the result of variances rather than departures. *See, e.g.*, U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80 (2010) (Table 28). In fiscal year 2011, the percentage of USSG §2G2.2 offenders receiving non-government sponsored variances or departures grew to 48.1%. *See* U.S. SENT'G COMM'N, SOURCEBOOK FOR FEDERAL SENTENCING STATISTICS 80 (2011) (Table 28).

[53] Such *sua sponte* downward variances or departures most commonly occurred in cases in which a defendant had agreed in the plea agreement not to move for a variance or departure.

[54] *See* USSG §4A1.3(b) (Departures Based on Inadequacy of Criminal History Category (Policy Statement)).

[55] *See* USSG §5K2.0 (Grounds for Departure (Policy Statement)).

Figure 8-11
Departures and Variances in Non-Production Offenses
Fiscal Year 2010 (N=1,654)



Note: Percentages may not sum to exactly 100.0% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

E. ANALYSIS OF THE CUMULATIVE EFFECT OF THE FOUR PRACTICES TO REDUCE DEFENDANTS' SENTENCING EXPOSURE IN NON-PRODUCTION CASES

As reflected in Figure 8–12 below, 78.8 percent (1,304 of the 1,654) of non-production defendants in fiscal year 2010 had their sentencing exposure reduced by one or more of the four practices employed by the parties and/or courts — charging practices, guideline stipulations inconsistent with the facts recounted in PSRs and/or plea agreements, government sponsored variances and departures (other than for substantial assistance), and non-government sponsored variances and departures. Because many cases involved two or more practices, the total number of cases listed in Figure 8–12 exceeds the total number of non-production cases (1,654).

Figure 8-12
Charging and Sentencing Practices to Limit Defendants' Sentencing Exposure
Fiscal Year 2010
(N=1,654)

Practice	Number and Percentage
Government Charging Practices	770 (46.6%)
Guideline Stipulations in Plea Agreements that are Contrary to PSRs	189 (11.4%)
Government Sponsored Variances/Departures (Other than §5K1.1)	171 (10.3%)
Non-Government Sponsored Variances/Departures	733 (44.3%)

- 78.8% (N=1,304) of all non-production cases involved one or more of these four practices.

Note: A single offender may appear in more than one category.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

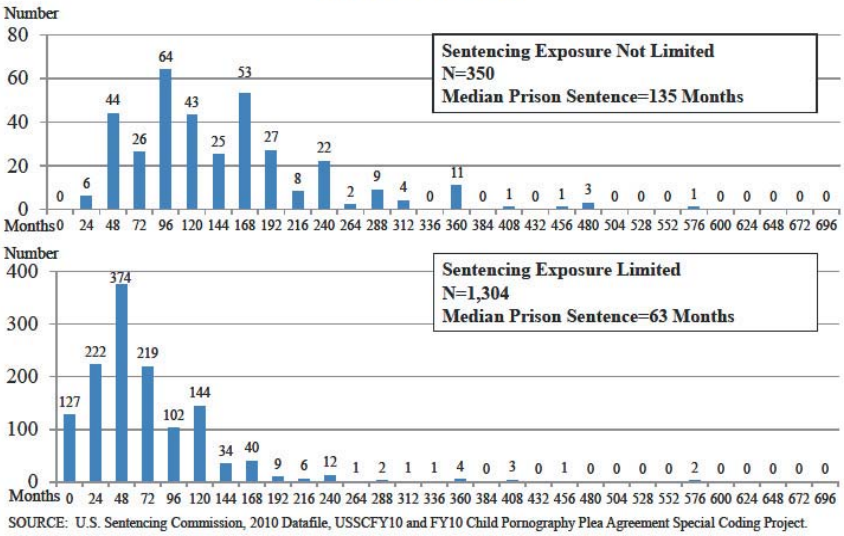
The 1,304 cases summarized in Figure 8–12 do not include those in which defendants received downward departures solely pursuant to §5K1.1 (based on a defendant's substantial assistance) or cases in which a court *upwardly* varied or departed. For purposes of the analysis in this chapter, "limited sentencing exposure" cases only include those in which the parties or the court engaged in one or more of the above-mentioned four practices to *limit* a

defendant's sentencing exposure under the statutory or guidelines sentencing schemes (other than based on a defendant's substantial assistance).

1. *Variation in Sentence Lengths*

The four practices, individually or collectively, had significant effects on defendants' sentence lengths and thereby resulted in disparate sentences for similarly situated defendants. Figure 8–13 below shows the distribution of sentence lengths for all 1,654 non-production cases in fiscal year 2010 cases — comparing the 1,304 offenders whose sentencing exposure was limited in one or more of the four ways discussed above with the 350 offenders whose sentencing exposure was not so limited. The horizontal axes of Figure 8-13 depict sentence lengths in 24-month increments (*e.g.*, sentences from 0-23 months, sentences from 24-47 months).

Figure 8-13
Distribution of Sentence Lengths for Non-Production Offenses
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–13 demonstrates that the median sentence for defendants whose sentencing exposure was limited was less than one half of the median sentence for defendants whose sentencing exposure was not limited. Furthermore, because a mandatory minimum penalty did not apply to many of the defendants whose sentencing exposure was limited, a significant percentage of such defendants received sentences of less than 60 months. In contrast, relatively few defendants whose sentencing exposure was not limited received prison sentences below 60 months.[56]

[56] The relatively small number of sentences under 60 months that did not result from one or more of the four above-mentioned practices were those in which a defendant received a downward departure based on substantial assistance or was convicted of possession and there was no readily-provable receipt or distribution conduct.

2. *Analysis of Possible Influences on Sentencing Practices*

Because of the significant differences in average sentence lengths for offenders based on whether their sentencing exposure was limited, the Commission analyzed a variety of offender and offense characteristics, as well as the geographical location of prosecutions, to help explain why most offenders benefited from limited sentencing exposure but some did not. That analysis follows.

a. Primary Aggravating Factors

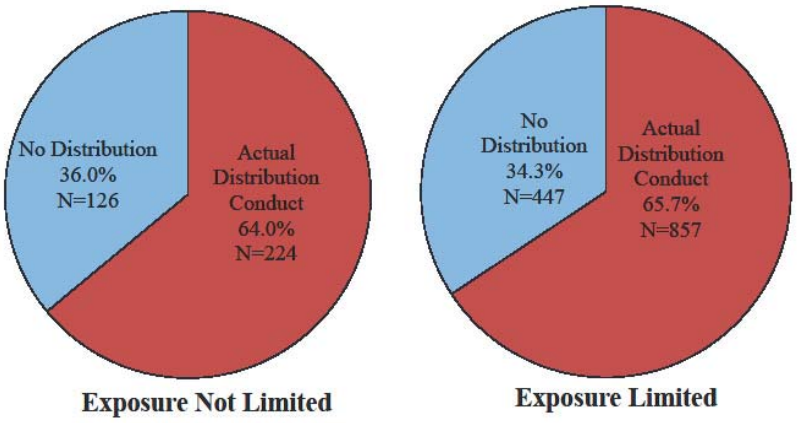
The Commission examined three factors that would appear most likely to explain differences in sentence length — distribution conduct, criminal history, and criminal sexually dangerous behavior — to determine whether one or more of those factors explain why the vast majority of defendants (78.8%) received sentences based on limited sentencing exposure.

i. Distribution

Distributing child pornography is commonly cited as a primary basis for punishing non-production defendants who distributed more severely than non-production defendants who did not.[57] The Commission compared the incidence of distribution conduct in all cases to determine whether defendants whose sentencing exposure was limited had a lesser incidence of distribution conduct than defendants whose sentencing exposure was not limited. Figure 8–14 below shows that the incidence of distribution conduct is virtually identical in the two groups.

[57] *See* U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010, Question 1 (noting that 71% of judges who responded stated that the mandatory minimum penalty for receipt was too high, while only 37% of judges believed that the mandatory minimum penalty for distribution was too high); *id.*, Question 8 (noting that 69% of the judges stated that the guidelines penalty ranges for receipt cases generally were too high; 70% of the respondents believed that the guideline ranges for possession cases generally were too high; but only 30% of judges believed that the guideline ranges for distribution cases generally were too high); *see also* 18 U.S.C. § 2252(a)(2) & 2252A(a)(2) (providing for a five-year mandatory minimum penalty for distribution); USSG §2G2.2(b)(3) (providing for enhancements of 2 to 7 levels depending on the type of distribution conduct of a defendant).

Figure 8-14
Non-Production Offense Characteristics:
Distribution Conduct by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

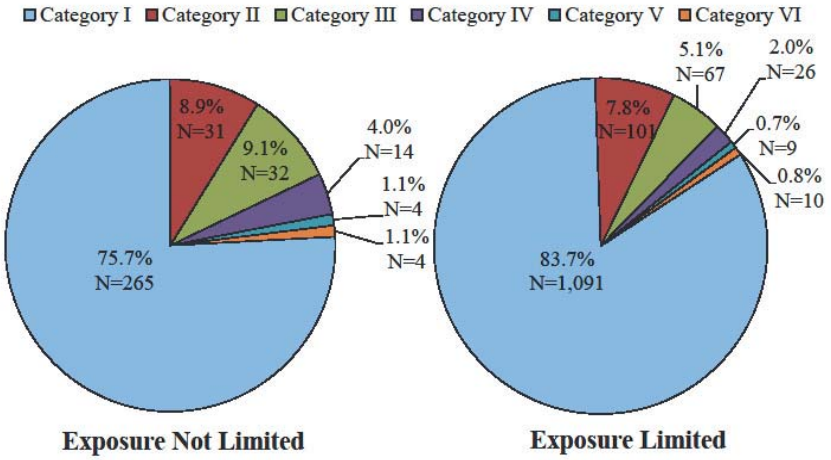
The Commission further specifically examined the incidence of "personal" and "impersonal" modes of distribution to determine whether the two modes were associated with different rates of limited sentencing exposure.[58] Sentencing exposure was limited in a slightly larger percentage of cases involving impersonal distribution (487 of 577 cases, or 84.4%) than in cases involving personal distribution (324 of 445 cases, or 72.8%). However, this data suggest that the type of distribution offers only a partial explanation for whether sentencing exposure was limited, as the vast majority of offenders with both types of distribution had their sentencing exposure limited.

ii. Criminal History

The Commission next examined whether the extent of a defendant's criminal history was associated with different rates of limited sentencing exposure. Figure 8–15 below shows that a defendant's criminal history (or lack of it) is not a significant explanatory factor concerning whether a defendant had limited sentencing exposure. In particular, although a larger percentage of defendants without limited sentencing exposure were in Criminal History Categories II through VI than defendants who had limited sentencing exposure (24.3% compared to 16.3%), the vast majority of defendants in both groups were in Criminal History Category I.

[58] *See* Chapter 3 at 52–53 (discussing "personal" and "impersonal" modes of distribution); *see also* Testimony of Deirdre D. von Dornum, Assistant Federal Defender, Federal Defenders of New York (on behalf of the Federal and Community Defenders), to the Commission, at 398–99 (Feb. 15, 2012) ("von Dornum Testimony") (contending that offenders who distribute using "passive," impersonal modes of P2P file-sharing are less culpable than offenders who engage in "active dissemination of images" to others).

Figure 8-15
Non-Production Offense Characteristics:
Offender Criminal History Category by Sentencing Exposure
Fiscal Year 2010



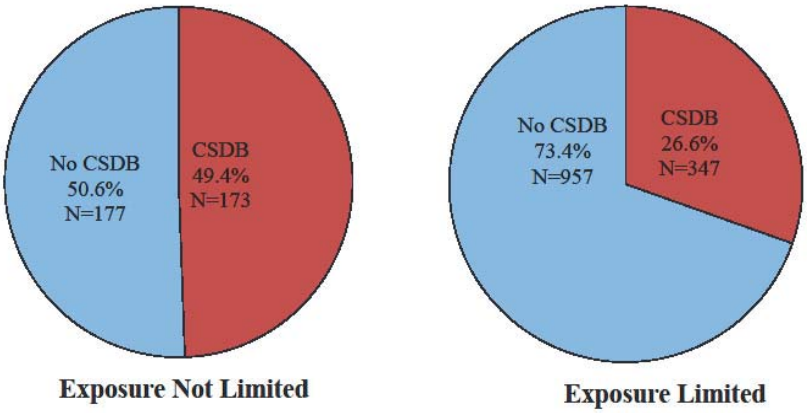
Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

iii. Criminal Sexually Dangerous Behavior

The Commission also specifically examined whether offenders whose sentencing exposure was limited had lower rates of criminal sexually dangerous behavior ("CSDB") in their pasts than offenders who did not have their sentencing exposure limited.[59] Figure 8–16 below shows that 26.6 percent of offenders whose sentencing exposure was limited had histories of CSDB compared to 49.4 percent of offenders whose sentencing exposure was not limited.

[59] CSDB in non-production cases is discussed in Chapter 7. As explained in that chapter, a significant percentage of offenders with CSDB histories were never convicted of such illegal conduct. *See* Chapter 7 at 182–83. Thus, an analysis of CSDB histories should occur separately from analysis of offenders' Criminal History Categories (which are based on prior *convictions*).

Figure 8-16
Non-Production Offense Characteristics:
CSDB by Sentencing Exposure
Fiscal Year 2010

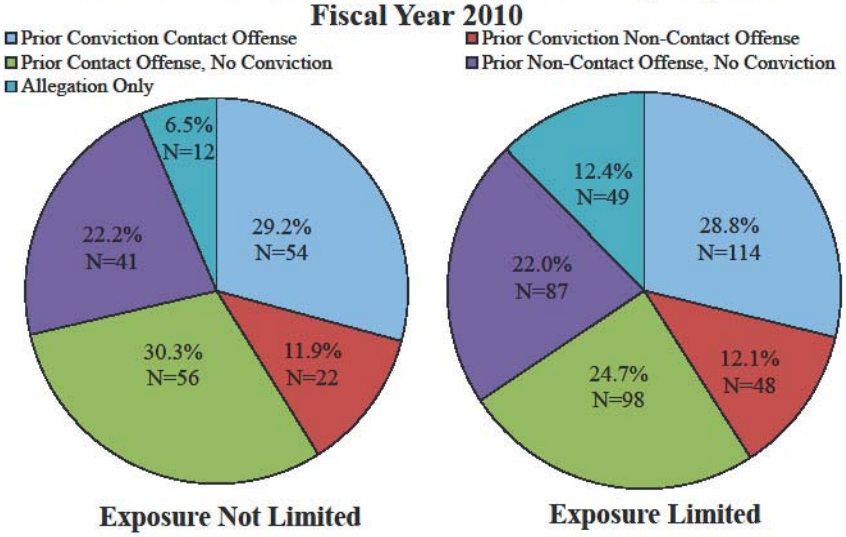


Note: Percentages may not sum to exactly 100% due to rounding. Allegations were not included among the CSDB.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

However, as Figure 8-16 shows, more than two-thirds of all offenders with a history of CSDB (347 of 520) received sentences based on limited sentencing exposure. As such, the presence of CSDB offers only a partial explanation for why a minority of defendants received sentences not based on limited sentencing exposure.

The Commission also examined whether the type of CSDB (contact vs. non-contact offenses) or the type of proof of CSDB (prior conviction, judicial finding, or allegation-only) differed with respect to the rate of limited sentencing exposure. Figure 8–17 below shows that both the type of CSDB and type of proof of CSDB appear at similar rates in cases with limited sentencing exposure and cases without it.

Figure 8-17
Non-Production Offense Characteristics:
Nature of CSDB and Allegations by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

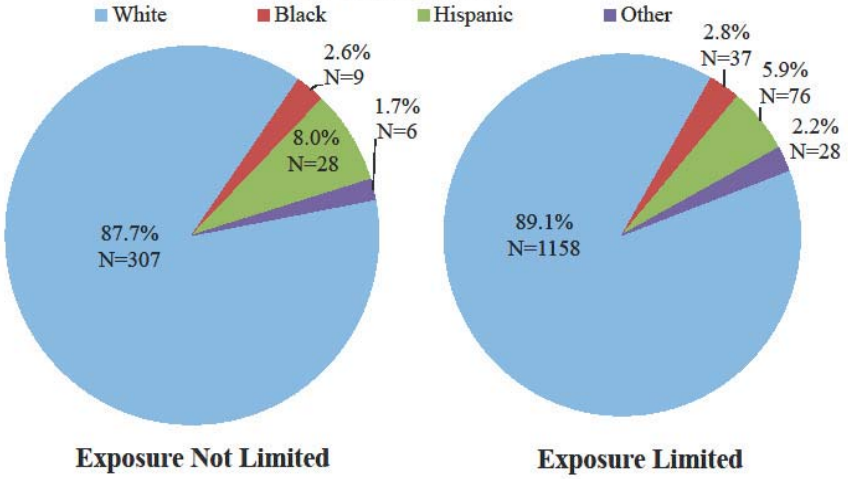
b. Demographic Factors

The Commission next compared cases with and without limited sentencing exposure to determine whether there were any significant differences regarding demographic characteristics of offenders. The demographic factors examined by the Commission included race of the offender, education level, employment at the time of arrest, net worth at the time of the presentence investigation, age at time of sentencing, reported history of substance abuse, reported history of childhood sexual abuse, and military record.[60]

Figure 8–18 below compares the racial identities of defendants whose sentencing exposure was limited with the racial identities of offenders whose sentencing exposure was not limited. It shows no notable differences.

[60] Although some offender characteristics are prohibited or discouraged factors under the sentencing guidelines, *see* USSG §5K2.0(b)–(d), most such factors are generally relevant under 18 U.S.C. § 3553(a)(1), which permits a sentencing court to consider the "history and characteristics of the defendant." *Id.* As discussed *supra* at 224, three-fourths of sentencing courts that have "varied" from the advisory guideline sentencing range have done so under § 3553(a)(1) .

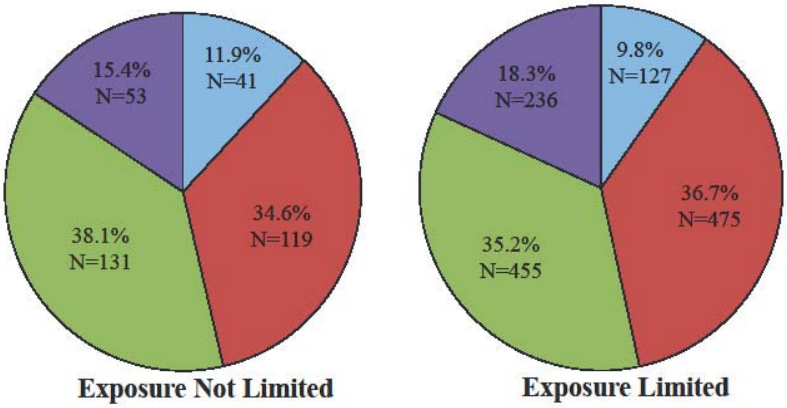
Figure 8-18
Non-Production Offense Characteristics:
Offender Race by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–19 below compares the educational levels of defendants whose sentencing exposure was limited with the educational levels of defendants whose sentencing exposure was not limited. It shows no notable differences.

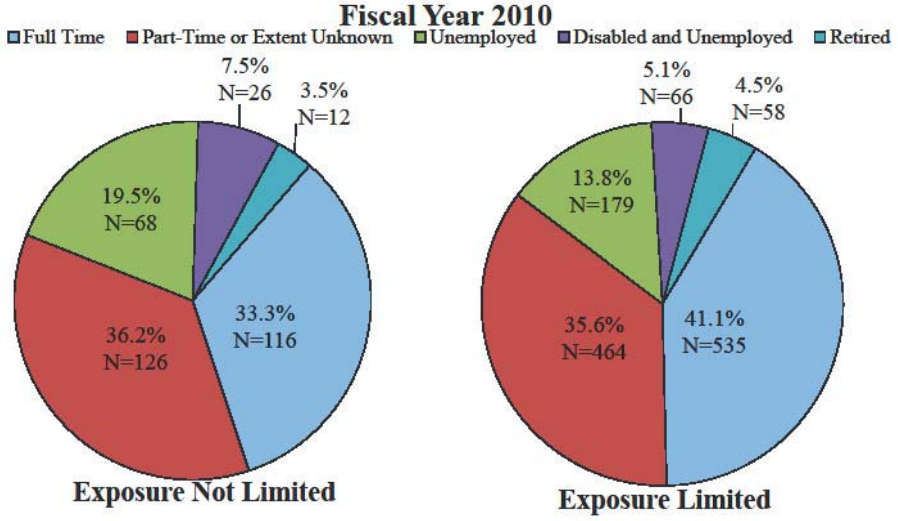
Figure 8-19
Non-Production Offense Characteristics:
Offender Education by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding. Seventeen cases were excluded from the analysis due to missing information on offender education.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–20 below compares the employment status of defendants. It shows only minor differences (in particular, offenders whose sentencing exposure was not limited had a slightly higher rate of unemployment and somewhat lower rate of full-employment).

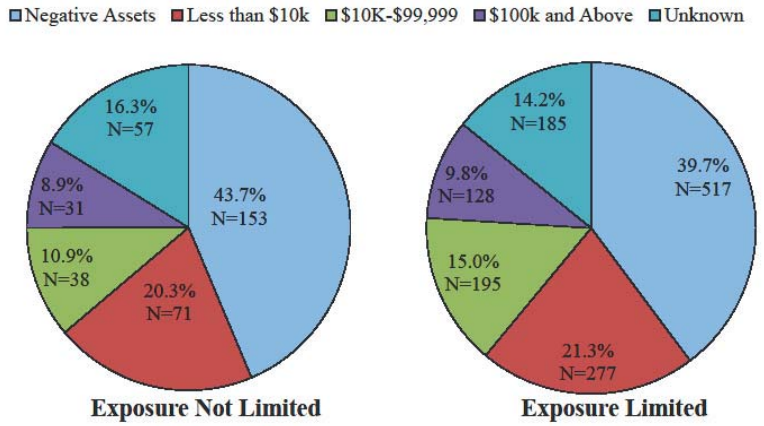
Figure 8-20
Non-Production Offense Characteristics:
Offender Employment by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding. Four cases were excluded from the analysis due to missing information on offender employment.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–21 below compares defendants' net worth. It shows only minor differences.

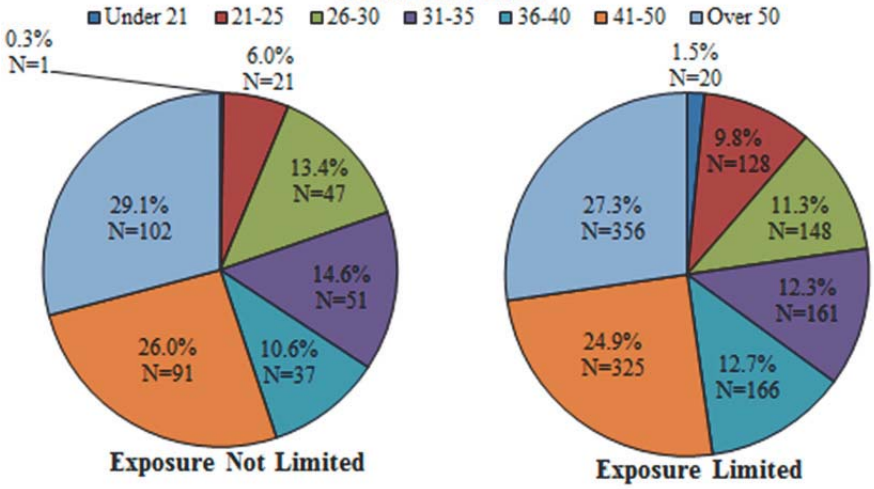
Figure 8-21
Non-Production Offense Characteristics:
Offender Assets by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding. Two cases were excluded from the analysis due to missing information on offender assets.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–22 below compares the ages of defendants. It shows that, although both groups contain generally comparable percentages for most of the age ranges, youthful defendants (in particular, offenders under 21 years of age) were more likely to have their sentencing exposure limited.

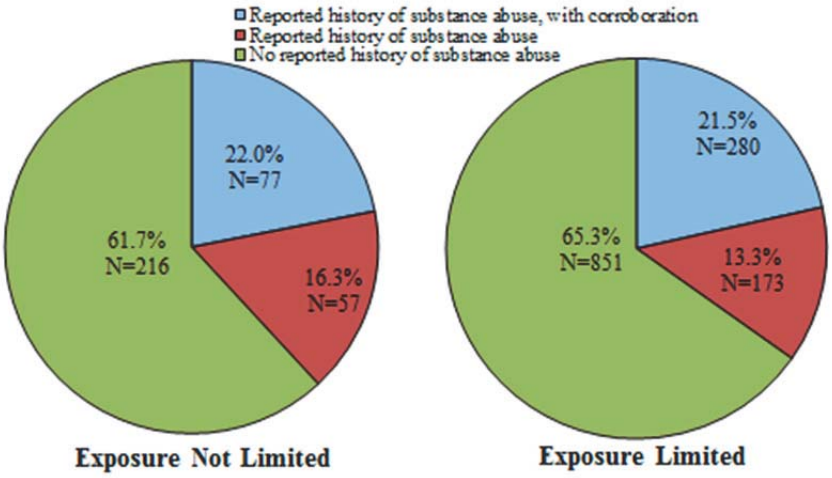
Figure 8-22
Non-Production Offense Characteristics:
Offender Age Range by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–23 below compares defendants' reported substance abuse histories. It shows no notable differences.

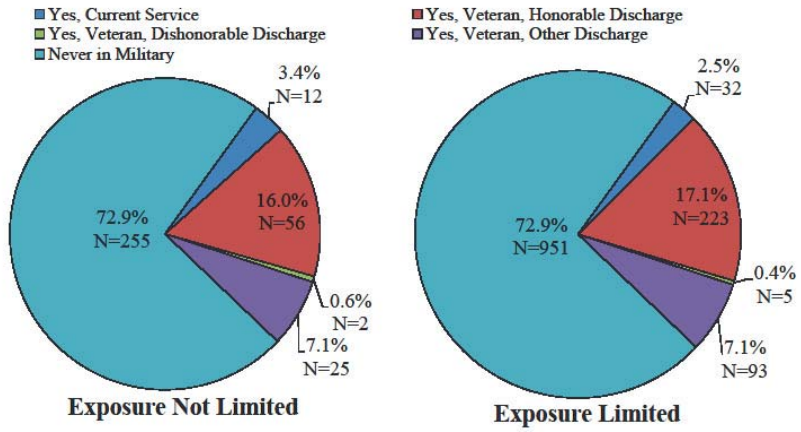
Figure 8-23
Non-Production Offense Characteristics:
Offender Substance Abuse History by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–24 below compares the military records of defendants. It shows no notable differences.

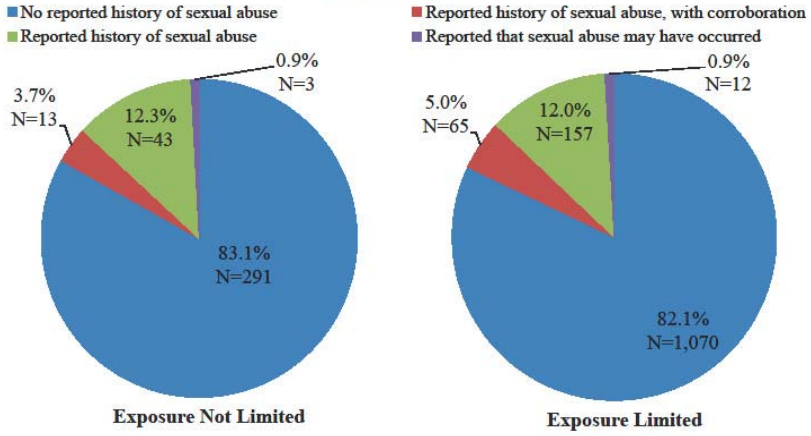
Figure 8-24
Non-Production Offense Characteristics:
Offender Military Background by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

Figure 8–25 below compares defendants' reported histories of childhood sexual abuse. It shows no notable differences.

Figure 8-25
Non-Production Offense Characteristics:
Offender History of Sexual Abuse by Sentencing Exposure
Fiscal Year 2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

As Figures 8–18 through 8–25 show, with certain limited exceptions, these demographic factors do not appear to be associated with different rates of limited sentencing exposure.

c. Geographic Variations

Finally, the Commission analyzed whether geography — *i.e.*, the circuit or district in which non-production defendants were sentenced — was associated with differing rates of limited sentencing exposure. Table 8–2 below shows the geographic variation by circuit with respect to the percentage of offenders whose sentencing exposure was limited.

Table 8-2
Non-Production Cases by Circuit
Fiscal Year 2010

Circuit	Cases by Circuit	Percent of Cases Where Sentencing Exposure Was Limited	Median Sentence (in months)
D.C.	12	66.7	63
First	22	86.4	60
Second	119	89.1	63
Third	101	89.1	60
Fourth	147	78.9	72
Fifth	172	72.7	96
Sixth	183	72.1	87
Seventh	111	63.1	108
Eighth	205	82.9	60
Ninth	315	86.7	63
Tenth	79	88.6	72
Eleventh	188	66.5	86

Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

As shown in Table 8–2, the sentencing exposure of 63.1 percent of offenders in the Seventh Circuit was limited, which was the lowest rate among the circuits. Conversely, in both the Second and Third Circuits, the sentencing exposure of 89.1 percent of offenders was limited.[61] Excluding cases from the D.C. Circuit (which had too few cases to permit meaningful analysis), the data demonstrate that, in those circuits with higher rates of limited sentencing exposure, the median sentences were less than those in circuits with lower rates of limited sentencing exposure.

[61] As discussed below, in 2010 both the Second and Third Circuits issued decisions that permitted or even encouraged downward variances from USSG §2G2.2 in many cases. *See* United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010); United States v. Grober, 624 F.3d 592 (3d Cir. 2010). The opinion in *Dorvee* was issued on May 11, 2010, and the opinion in *Grober* was issued on October 26, 2010. *Dorvee* was thus decided approximately halfway through the fiscal year in 2010 — and may partially explain the Second Circuit's high rate of limited sentencing exposure — while *Grober* was issued after the end of that fiscal year.

Different rates of sentencing exposure — and corresponding differences in sentence lengths — were more pronounced at the district level. Table 8–3 below shows the top five districts in terms of the number of non-production cases per district in fiscal year 2010 (which ranged from 49 to 72 cases). Those five districts varied greatly in terms of the extent of limited sentencing exposure — from 93.1 percent of cases in the Eastern District of Missouri to 65.3 percent of cases in the Western District of Texas. Just as with the circuit comparisons, higher rates of limited sentencing exposure were associated with lower median sentences in the districts.

Table 8-3
Districts with the Most Non-Production Cases
Fiscal Year 2010

	Western Texas	Middle Florida	Eastern Virginia	Central California	Eastern Missouri
N	49	59	53	63	72
Percent of Cases Where Sentencing Exposure Was Limited	65.3	72.9	73.6	92.1	93.1
Median Sentence (in Months)	100	78	72	42	54

Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Plea Agreement Special Coding Project.

As Tables 8–2 and 8–3 above reflect, geography — in particular, the district in which a non-production defendant was charged and sentenced — appears to be a more significant explanatory factor with respect to whether the defendant's sentencing exposure was limited than any of the above noted offender or offense characteristics. Geographic differences primarily appear to be a function of local charging and sentencing practices and policies. Such local practices to some degree may reflect different offender and offense characteristics in the cases brought in particular districts. For instance, the Commission examined the non-production cases brought in both the Eastern District of Missouri (which has one of the highest rates of limited sentencing exposure at 93.1%) and the Western District of Texas (which has one of the lowest rate, *i.e.*, 65.3% of cases) with respect to the three primary aggravating factors mentioned above ("personal" distribution conduct, criminal record, and CSDB). Although the rate of "personal" distribution and percentage of cases with defendants in Criminal History Categories II through VI were comparable in the two districts, the Commission found the rate of CSDB in the cases in the Eastern District of Missouri was 20.8 percent compared to 42.9 percent for cases in the Western District of Texas. Comparing those two districts alone would suggest that increased rates of CSDB could explain a lower rate of limited sentencing exposure. However, that association is not apparent in other districts. For instance, in the Middle District of Florida — which has a rate of limited sentencing exposure (72.9%) that resembles the Western District of

Texas (65.3%) more than the Eastern District of Missouri (93.1%) — the CSDB rate (23.7%) more resembles the CSDB rate in the Eastern District of Missouri (20.8%) than the rate in the Western District of Texas (42.9%).

In sum, varying local charging and sentencing practices appear to account for much of the differences in sentence length for similarly situated non-production offenders in the post-PROTECT Act era.

F. DIFFERENCES IN APPELLATE REVIEW AMONG THE COURTS OF APPEALS

Both before and after the Supreme Court's decision in *Booker*, meaningful appellate review of sentences has been considered an important part of the sentencing system created by the Sentencing Reform Act of 1984 (SRA).[62] A primary purpose of appellate review of sentences is to help avoid unwarranted disparities in sentencing.[63] As discussed below, particularly since the Supreme Court's decisions in *Gall* and *Kimbrough*, the Courts of Appeals have taken inconsistent approaches in their "substantive reasonableness" review[64] of sentences in non-production child pornography cases, which has not reduced — and, indeed, appears to have increased — disparities among similarly situated offenders.

1. *Review of Variances Based on "Policy Disagreements" with USSG §2G2.2*

The Court's decision in *Kimbrough*, which approved downward variances from the crack cocaine guideline based on a district court's "policy disagreement" with the guideline,[65] has engendered significant disagreement in the circuit courts about whether a district court may categorically reject §2G2.2 in non-production cases on "policy" grounds. Several circuits have considered the argument that the guideline deserves little or no weight in the sentencing process[66] because Congress, through repeated directives to the Commission, significantly altered

[62] Gall v. United States, 552 U.S. 38, 50 (2007) ("After settling on the appropriate sentence, [the district court] must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."); Booker v. United States, 543 U.S. 220, 264–65 (2005) ("The courts of appeals review sentencing decisions for unreasonableness [after *Booker*]. These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."); Koon v. United States, 518 U.S. 81, 98 (1996) ("That the district court retains much of its traditional discretion [at sentencing under the guidelines] does not mean appellate review is an empty exercise. . . ."); Burns v. United States, 501 U.S. 129, 154 (1991) ("[A] procedure available to minimize the risk of serving an unreasonable sentence is appellate review of the sentence itself.").

[63] Kimbrough v. United States, 552 U.S. 85, 107–08 (2007) (citing *Booker*, 543 U.S. at 263–64).

[64] *See Gall*, 552 U.S. at 51 ("Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court will, of course, take into account the totality of the circumstances . . . . [An appellate court] may consider the extent of the deviation, but must give due deference to the district court's decision that the [18 U.S.C.] § 3553(a) factors, on a whole, justify the extent of the variance.").

[65] *See* Spears v. United States, 555 U.S. 261, 265–66 (2009) (per curiam) (discussing *Kimbrough*).

[66] Even after *Booker* rendered the guidelines advisory, district courts generally still must apply the guidelines as the "initial benchmark" in the sentencing process. *See Gall*, 552 U.S. at 49–50 ("A district court should begin all

§2G2.2 and, in so doing, created a guideline that fails to reflect the Commission's traditional institutional expertise and is not based on empirical evidence.[67]

The United States Courts of Appeals for the Second, Third, and Ninth Circuits have held that, under *Kimbrough*'s reasoning, a sentencing judge may reject §2G2.2 categorically as a "policy" matter and have either affirmed a district court's decision to do so or reversed a district court's decision that refused to do so.[68] The most pointed criticism of the guideline was voiced by the Second Circuit in *United States v. Dorvee*, which vacated the defendant's 240-month guideline sentence for "procedural" reasons (*i.e.*, the district court's erroneous guideline application) but also held that the guideline, even if correctly applied in the defendant's case, would yield a "substantively unreasonable" sentence.[69] The court in *Dorvee* not only permitted district courts to reject the guideline under *Kimbrough* and impose below range sentences but also suggested that the guideline will yield an "unreasonabl[y]" severe sentence in some cases.[70] The court concluded that §2G2.2 warrants virtually no deference because it is "fundamentally different" from most other guidelines in that it was not promulgated by "an empirical approach based on data about past practices" but, instead, was created "at the direction of Congress" through a series of directives to the Commission.[71] Additional circuits, while affording district courts discretion to reject the guideline on policy grounds in particular cases, nonetheless have affirmed a district court's ability to impose a within range sentence and thereby have held that §2G2.2 is not *per se* substantively unreasonable.[72]

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sentencing proceedings by correctly calculating the applicable Guidelines range. . . . As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark."). Although a court is permitted to vary from the applicable guideline range, the court must give "respectful consideration" to that range after properly calculating the guidelines. *Kimbrough*, 552 U.S. at 101.

[67] *See, e.g.*, United States v. Bistline, 665 F.3d 758 (6th Cir. 2012); United States v. Miller, 665 F.3d 114 (5th Cir. 2011); United States v. Henderson, 649 F.3d 955 (9th Cir. 2011); United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010); United States v. Grober, 624 F.3d 592 (3d Cir. 2010); United States v. Huffstatler, 571 F.3d 620 (7th Cir. 2009); United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008).

[68] *Henderson*, 649 F.3d at 960 ("[T]he history of the child pornography Guidelines reveals that, like the crack-cocaine Guidelines at issue in *Kimbrough*, the child pornography Guidelines were not developed in a manner 'exemplify[ing] the [Sentencing] Commission's exercise of its characteristic institutional role,' so . . . district judges must enjoy the same liberty to [vary] from them based on reasonable policy disagreement as they do from the crack-cocaine Guidelines discussed in *Kimbrough*.") (*quoting Kimbrough* 552 U.S. at 109); *Dorvee*, 616 F.3d at 184–88 (holding that USSG §2G2.2 "is fundamentally different from most [guidelines because it was not created based on empirical data and rather based on congressional directives] and that, unless applied with great care, can lead to unreasonable sentences that are inconsistent with what [18 U.S.C.] § 3553 requires"; vacating defendant's 240-month sentence as "substantively unreasonable"); *Grober*, 624 F.3d at 599 ("The government does not challenge the District Court's authority to vary, as the Court did, from the advisory Guidelines range based on its policy disagreement with §2G2.2, nor does the dissent.").

[69] *Dorvee*, 616 F.3d at 188.

[70] *Id.* at 184 (encouraging district courts "to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.").

[71] *Id.* at 184–85.

[72] *See, e.g.*, United States v. Stone, 575 F.3d 83, 90–91 (1st Cir. 2009) (sentencing court may reject USSG §2G2.2 on "policy" grounds based on *Kimbrough* but need not do so). The Seventh Circuit permits — albeit with apparent hesitation — sentencing judges to reject §2G2.2 as a policy matter. *Compare* United States v. Pape, 601 F.3d 743,

The United States Court of Appeals for the Fifth, Sixth, and Eleventh Circuits have taken a position contrary to cases such as *Dorvee* by refusing to allow district courts to categorically reject §2G2.2 based on congressional involvement in amending the guideline and, instead, have required courts to afford the guideline respectful consideration in sentencing defendants (even if ultimately courts decide to vary for other reasons).[73] Most recently, the Sixth Circuit has called other courts' categorical rejection of §2G2.2 based on the many congressional directives reflected in it as "misguided" by noting that, in our system of government, defining crimes and fixing penalties are legislative functions. While Congress has delegated some authority to the Commission, "it is normally a constitutional virtue, rather than vice, that Congress exercises its power directly, rather than hand it off to an unelected commission."[74] The Sixth Circuit emphasized that it was not constraining district court discretion to disagree with the child pornography guidelines on policy grounds, but rather holding that "the fact of Congress' role in amending a guideline is not itself a valid reason to disagree with the guideline."[75] Moreover, the court concluded that the argument that the Commission had departed from its usual role in amending §2G2.2 simply "misses the point":

> It is true that the Commission did not act in its usual institutional role with respect to the relevant amendments to §2G2.2. But that is because Congress was the relevant actor with respect to those amendments; and that puts §2G2.2 on stronger ground than the crack-cocaine guidelines were on in *Kimbrough*. . . . It simply misses the point, therefore, to say

749 (7th Cir. 2010) (holding that a *Kimbrough*-type "policy" variance is proper regarding "any guideline," including §2G2.2), *with* United States v. Garthus, 652 F.3d 715, 721 (7th Cir. 2011) ("The defendant's final argument is that the provisions of the sentencing guidelines relating to [child pornography offenses] are empirically unsupported, vindictive, and excessively harsh. . . . The argument is more properly addressed to the Sentencing Commission, or to Congress, which has greatly influenced the child-pornography guidelines . . . than to an individual district judge in a sentencing hearing."). A more recent decision noted that, "[w]hile we have rejected the argument that district courts are required to sentence below the Guideline range in cases involving U.S.S.G. §2G2.2, we have noted that such criticism has been 'gaining traction.'" United States v. Halliday, 672 F.3d 462, 474 (7th Cir. 2012) (citation omitted).

[73] *Bistline*, 665 F.3d at 762 (refusing to permit a "policy disagreement" variance in USSG §2G2.2 case); United States v. Mohr, 418 F. App'x 902, 908–09 (11th Cir. 2011) ("Mohr essentially makes a *Kimbrough*-style argument that U.S.S.G. §2G2.2 should be disregarded because it is based on flawed policy considerations. . . . This Court has already concluded that the provisions of U.S.S.G. §2G2.2 'do not exhibit the deficiencies the Supreme Court identified in *Kimbrough*.'") (*quoting* United States v. Pugh, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008)); United States v. Miller, 665 F.3d 114, 120–21 ("[W]e do not agree with [*Dorvee*'s] reasoning. Our circuit has not followed the course that the Second Circuit has charted with respect to sentencing Guidelines that are not based on empirical data. Empirically based or not, the Guidelines remain the Guidelines. . . . [W]e will not reject a Guidelines provision as 'unreasonable' or 'irrational' simply because it is not based on empirical data and even if it leads to some disparities in sentencing. The advisory Guidelines sentencing range remains a factor for district courts to consider in arriving upon a sentence."). Although not yet directly addressing the *Kimbrough* issue, the Fourth and Eighth Circuits have signaled their agreement with the Fifth and Eleventh Circuits by affording an appellate "presumption of reasonableness" to sentences imposed in accordance with USSG §2G2.2 notwithstanding the guideline's congressional influences. *See* United States v. Black, 670 F.3d 877, 882 (8th Cir. 2012) ("A presumption of reasonableness will be applied to sentences within the guideline range, even if the sentence is derived from a guideline that was 'the product of congressional direction rather than [an] empirical approach.'"); United States v. Strieper, 666 F.3d 288, 295–96 (4th Cir. 2012) (same).

[74] *Bistline*, 665 F.3d at 762.

[75] *Id.*

> that the Commission departed from its usual role in the case of §2G2.2. Congress is the body that dictated numerous enhancements to that provision over the past two decades; and thus, with respect to those enhancements at least, it is Congress's reasons that a district court must refute before declining to apply §2G2.2 out of hand. . . . [It] is . . . Congress's prerogative to dictate sentencing enhancements based on a retributive judgment that certain crimes are reprehensible and warrant serious punishment as a result. When a congressional directive reflects such a judgment, a district court that disagrees with the guideline that follows must contend with those grounds too. Thus, when a guideline comes bristling with Congress's own empirical and value judgments — or even just value judgments — the district court that seeks to disagree with the guideline on policy grounds faces a considerably more formidable task than the district court did in *Kimbrough*.[76]

2. *Appellate Review of Extensive Downward Variances*

In *Gall*, the Supreme Court held that district courts possess broad discretion to downwardly vary from the applicable guideline ranges after considering both the guidelines and the statutory factors in 18 U.S.C. § 3553(a).[77] Appellate courts must apply an abuse of discretion standard and, although they "may consider the extent of the deviation," they "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."[78] In *Gall*, the Court affirmed a probationary sentence imposed on a defendant convicted of drug trafficking whose guideline range was 30–37 months.[79]

After *Gall*, some district courts in child pornography cases in which defendants have been convicted only of possession[80] have downwardly varied from significant guideline ranges to relatively lenient sentences — including sentences of probation or very short custodial sentences (such as one day) followed by terms of supervised release.[81] In addition to taking inconsistent approaches to variances under *Kimbrough* based on "policy" disagreements with §2G2.2, the circuit courts after *Gall* have taken seemingly inconsistent positions in reviewing lenient

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[76] *Id.* at 763–64.

[77] *Gall*, 552 U.S. at 50–51.

[78] *Id.* at 50.

[79] *Id.* at 59–60.

[80] Defendants convicted of receipt, transportation , or distribution face mandatory minimum prison sentences of five years. *See* Chapter 2, at 26. As noted in Chapter Six, approximately half of all non-production offenders today are convicted of possession and do not face any mandatory minimum prison sentence. *See* Chapter 6 at 146.

[81] *See generally* Holly H. Krohel, *Dangerous Discretion: Protecting Children by Amending the Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Noncustodial Sentences*, 48 SAN DIEGO L. REV. 623, 637–60 (2011) (discussing such cases).

sentences of probation or very short prison sentences in §2G2.2 possession cases resulting from extensive variances.[82]

For instance, in *United States v. Camiscione*, the 33-year old defendant, who had no criminal record, purchased subscriptions to a commercial child pornography website during a six-month period. Many of the graphic child pornography images that he possessed were of prepubescent minors and one was a four-year old child. After being arrested, the defendant underwent psychological treatment. He was diagnosed with various mental and emotional disorders, including diminished intellectual functioning, some of which was attributable to epileptic seizures he had experienced since childhood. He experienced social isolation as a result, had no friends, and had never had a romantic relationship. There was no evidence that he ever engaged in actual or attempted child sexual abuse or other sexually dangerous behavior in addition to downloading child pornography; he also was found to pose a "low risk" of engaging in such sexually dangerous behavior.[83] The Sixth Circuit vacated the district court's probationary sentence (a downward variance from a guideline range of 27–33 months) as unreasonable, primarily on the ground that such a lenient sentence did not promote "general deterrence,"[84] one of the statutory factors set forth in 18 U.S.C. § 3553(a)(2).[85] The court also noted that, had the defendant been convicted of receipt of child pornography (conduct which he clearly committed) and punished under the PROTECT Act's mandatory minimum provision, he would have received a minimum 60-month sentence.[86]

Conversely, in *United States v. Duhon*,[87] the Fifth Circuit affirmed a probationary sentence for a 47-year old defendant with no prior criminal record who engaged in very similar, if not more culpable, conduct than the defendant in *Camiscione* and who had comparable

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[82] *Compare, e.g.*, United States v. Stall, 581 F.3d 276 (6th Cir. 2009) (affirming as reasonable a one-day prison sentence; district court downwardly varied from 57–71 month guideline range); United States v. Autery, 555 F.3d 864 (9th Cir. 2009) (affirming as reasonable sentence of probation; district court downwardly varied from 41–51 month guideline range); United States v. Rowan, 530 F.3d 379 (5th Cir. 2008) (affirming as reasonable sentence of probation; district court downwardly varied from 46–57 month guideline range), *with* United States v. Morace, 594 F.3d 340 (4th Cir. 2010) (vacating as unreasonable a sentence of probation; district court downwardly varied from a 41–51 month guideline range); United States v. Camiscione, 591 F.3d 823 (6th Cir. 2010) (vacating as unreasonable a one-day prison sentence; district court downwardly varied from a 27–33 month guideline range); United States v. Lychock, 578 F.3d 214 (3d Cir. 2009) (vacating as unreasonable sentence of probation; district court downwardly varied from 30–37 month guideline range). It should be noted that the annual number of government appeals of downward variances imposed in USSG §2G2.2 cases since *Kimbrough* and *Gall* has been low. According to the Commission's appellate database, only 23 government appeals in §2G2.2 cases were decided by the federal circuit courts during the five-year period from fiscal year 2007 through fiscal year 2011.

[83] 591 F.3d at 825–32.

[84] *Id.* at 833–34.

[85] 18 U.S.C. § 3553(a)(2)(B).

[86] *Camiscione*, 591 F.3d at 836; *cf. Morace*, 594 F.3d at 347 (Fourth Circuit vacated probation sentence based in part on its "respectful attention to Congress' view that [child pornography crimes] are serious offenses deserving serious sanctions"). The defendant's guideline range in *Camiscione* was based on the pre-PROTECT Act version of the non-production guidelines. *See* Chapter 1 at 4, 8–9 (discussing the lower penalty ranges associated with the pre-PROTECT Act non-production guidelines).

[87] 440 F.3d 711 (5th Cir. 2006), *vacated*, 552 U.S. 1088 (2008), *on remand*, 541 F.3d 391 (5th Cir. 2008). The defendant's guideline range in *Duhon* also was based on the pre-PROTECT Act version of the guidelines.

mitigating circumstances. The defendant in *Duhon* not only downloaded graphic images of child pornography but also distributed such images to another person. The defendant received social security disability payments for his injured back and, after being arrested, sought psychiatric treatment for his sexual disorder. There was no evidence that the defendant had ever engaged in sexually dangerous behavior in addition to his receipt and distribution of child pornography. The Fifth Circuit deemed the district court's downward variance from a guideline range of 27–33 months to probation to be reasonable under the deferential standard of review in *Gall*.[88] Unlike the Sixth Circuit in *Camiscione*, the Fifth Circuit in *Duhon* did not focus on deterrence as a § 3553(a)(2) factor militating against probation.[89]

Similar to the Fifth Circuit in *Duhon*, the Ninth Circuit in *United States v. Autery*[90] affirmed as reasonable a sentence of five years' probation — a downward variance from a guideline range of 41–51 months of imprisonment — for a 39-year old defendant. The district court had expressed its view that "Autery [was] 'totally different than what . . . [the] court has normally experienced with people who are ordering this sort of child pornography'" because he "did not 'fit the profile of a pedophile.'"[91] Additionally, the district court credited the defendant's "redeeming personal characteristics," including that he had "no history of substance abuse, no 'interpersonal instability,' no 'sociopathic or criminalistic attitudes,' and that he was motivated and intelligent," in addition to having the support of his family.[92] The district court also opined that imprisonment would interfere with what it believed would be a successful outpatient treatment regime.[93] On appeal, the Ninth Circuit emphasized the district court's assessment that the defendant was not a pedophile and that his "redeeming personal characteristics" were sufficient to support the district court's conclusion that the defendant's case was not a mine-run child pornography possession case.[94] As to the government's argument that the sentence did not "reflect the seriousness of the offense, promote respect for the law, or provide just punishment for the offense," the Ninth Circuit conceded that "[r]easonable minds can differ as to whether a five-year probation provides 'just' punishment" but noted that "the district court was desirous of doing what was 'just' in this case."[95] The Ninth Circuit also concluded that the sentence did not fail to provide adequate deterrence because, in addition to the length of the probationary term and its attendant conditions, "the district court's stern warning" that a violation of probation would result in a significant punishment would constitute effective deterrence.[96]

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[88] 541 F.3d 391.

[89] *See id.* at 398–99.

[90] 555 F.3d 864.

[91] *Id.* at 867–68.

[92] *Id.* at 868.

[93] *Id.*

[94] *Id.* at 877.

[95] *Id.* at 875.

[96] *Id.* at 876.

3. *Conclusions About Appellate Review*

After *Kimbrough* and *Gall*, appellate review of district courts' sentences in §2G2.2 cases has been inconsistent — both in terms of review of district court's "policy" disagreements with the guideline and of courts' extensive variances to lenient sentences of probation or very short custodial sentences. That inconsistency at the appellate level does not appear to have reduced sentencing disparities at the district court level, as the Court anticipated that it would in *Booker*.[97]

G. CONCLUSION

Many judges and parties in §2G2.2 cases believe that the current statutory and guideline structure is outmoded, does not make meaningful sentencing distinctions among offenders, and is overly severe in some cases. As a consequence, they have, to some degree, fashioned their own sentencing schemes. The result has been growing sentencing disparities among similarly situated offenders. Furthermore, given the declining rate of within guideline sentences, judges increasingly are unable to impose sentences in accordance with §2G2.2 for the purpose of avoiding "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[98]

In particular, the Commission concludes that:

- Following both significant increases in the statutory and guideline penalty levels resulting from the PROTECT Act in 2003 and the Supreme Court's decision in *Booker* in 2005 (which rendered the guidelines advisory), many courts and parties in §2G2.2 cases have engaged in one or more of four practices that have the effect of limiting the sentencing exposure of defendants.

- Those four methods are: (1) charging practices (usually pursuant to plea agreements) in which an offender is charged only with possession despite readily provable conduct involving receipt and/or distribution; (2) guideline stipulations in plea agreements that limit enhancements in a manner inconsistent with the actual offense conduct as recounted in presentence reports and/or plea agreements; (3) government sponsored variances and departures (other than for a defendant's substantial assistance to the authorities); and (4) non-government sponsored variances and departures.

- The sentencing exposure of nearly four out of five non-production defendants in fiscal year 2010 was limited by one or more of these four practices.

- The Commission's analysis of all fiscal year 2010 §2G2.2 cases revealed that, with limited exceptions, parties' or courts' decisions whether to employ of one of more of the four practices to limit defendants' sentencing exposure were not associated with particular offense or offender characteristics.

[97] *See Booker*, 543 U.S. at 264.

[98] 18 U.S.C. § 3353(a)(6) .

- The most significant explanatory factor with respect to how often one or more of the four practices were employed appears to have been geographical differences (at both the circuit and district levels). Higher rates of limited sentencing exposure were associated with lower average sentences in both the districts and circuits.

- The Commission's study of a large sample of §2G2.2 offenders in Criminal History Category I sentenced in fiscal year 2010 revealed substantial sentencing disparities among similarly situated offenders resulting from how they were charged and sentenced. Offenders charged and convicted of possession but who in fact knowingly received child pornography had an average sentence of 52 months, while similarly situated offenders charged and convicted of receipt had an average sentence of 81 months. Offenders charged and convicted of possession but who in fact distributed child pornography in exchange for other child pornography received a sentence of 78 months, while similarly situated offenders charged and convicted of distribution received an average sentence of 132 months.

- Appellate review of sentences in non-production cases since *Booker* has not reduced the growing sentencing disparities in §2G2.2 cases. Indeed, differing approaches among the circuit courts concerning both district courts' categorical rejection of §2G2.2 on "policy" grounds and the "substantive reasonableness" of significant downward variances from the applicable guidelines range have contributed to the sentencing disparities.

Chapter 9

CHILD PORNOGRAPHY PRODUCTION CASES

A. BACKGROUND

This chapter presents an analysis of data concerning sentencing trends, offense conduct, offender characteristics, and victim characteristics in federal cases in which offenders were sentenced under USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) for producing child pornography ("production" cases or offenses).[1] Sentencing in federal production cases has been less controversial than in non-production cases.[2]

The number of production cases has grown substantially since 1992, as reflected in Figure 9–1 below. In 1992, there were only ten production cases. During the past two decades, the number of cases has risen steadily, with the largest increase appearing after 2006 (from 92 cases in 2006 to 207 cases in 2010). Even with this increase, production offenders constituted only 0.25 percent of the federal offender population in fiscal year 2010. Figure 9–1 below also compares the annual increase in the number of production cases to the number of non-production cases — the latter divided into (1) receipt, transportation, and distribution ("R/T/D") cases and

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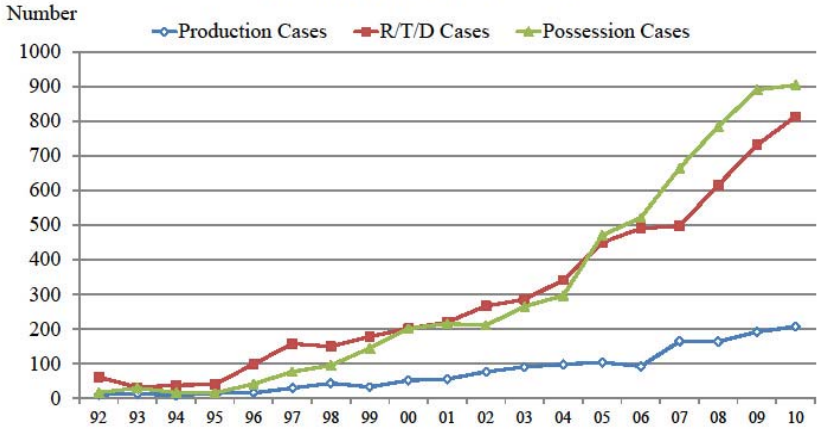
[1] The data are derived from two sources: (1) routinely-collected federal sentencing data from the Commission's regular annual datafiles of fiscal years 1992 through 2010; in limited instances, relevant data from fiscal year 2011 also are noted; and (2) the Commission's special coding project of production cases from fiscal year 2010. Fiscal year 1992 was selected as the starting point for data analysis in order to correspond to the Commission's data analysis of non-production cases. *See* Chapter 6 at 121 n.2. Relevant data in the Commission's regular datafiles include basic demographics, criminal history, guideline applications, sentences imposed, application of specific offense characteristics, and sentences relative to the guideline range. Data in the special coding project supplement the annual datasets with more detailed information about offense conduct and offender characteristics. Of the 207 production cases in fiscal year 2010, as many as ten were excluded from some of the data analyses that appear in this chapter because of insufficient sentencing documentation. In some analyses, where relevant information from all 207 cases was available (*e.g.*, annual number of cases), all 207 cases were included. The specific numbers of cases that were considered in each analysis are noted below in the figures.

[2] *Cf.* Chapter 1 at 10–14 (discussing the criticisms of the non-production sentencing scheme). A small number of courts have been expressly critical of the production guideline, USSG §2G2.1. *See, e.g.*, United States v. Price, 2012 U.S. Dist. LEXIS 38397, at *33 (C.D. Ill. Mar. 21, 2012) (engaging in a variance from the guideline range recommended by application of §2G2.1, but observing that courts have been more critical of USSG §2G2.2 than of §2G2.1); United States v. Jacob, 631 F. Supp. 2d 1099, 1115 (N. D. Iowa 2009) ("USSG §2G2.1 has some of the same flaws that I found warranted categorical rejection of USSG §2G2.2 [*i.e.*, . . . it does] not distinguish between least and worst offenders . . . and [gives] excessive weight to some otherwise proper factors. . . . Thus, I find that USSG §2G2.1 can be rejected on categorical, policy grounds."). These courts appear to represent a minority of federal judges. The Commission's 2010 survey of federal district judges revealed that the vast majority of judges surveyed stated that the guideline and statutory penalty ranges in production cases were appropriate as a general matter. *See* U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010, Questions 1 and 8 (June 2012) (67% of judges responded that the mandatory minimum statutory penalties for production offenses were generally appropriate and 72% responded that the guideline ranges for production offenses were generally appropriate). Nevertheless, as discussed below, in the past two years, the percentage of below range sentences has noticeably increased in production cases (albeit well below the equivalent rate in non-production cases). *See infra* at 254.

(2) possession cases. In fiscal year 2010, production cases constituted 10.8 percent of all types of federal child pornography cases (207 of 1,924 cases).[3]

Figure 9-1
Child Pornography Production Cases
Fiscal Years 1992-2010



SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10

B. PENAL STATUTES AND GUIDELINE PROVISIONS CONCERNING PRODUCTION

It was not until the 1970s that significant efforts were made to combat the production of child pornography in the United States.[4] Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977, which was the first federal law outlawing the production of child pornography.[5] That penal statute had no mandatory minimum penalty and a maximum penalty of ten years of imprisonment.[6] Federal prosecutions for production offenses were rare

[3] Production cases occurred in all 12 federal circuits in fiscal year 2010. Because the annual volume of production cases is small and the number of cases brought in any particular district or circuit may differ significantly year by year based on the manner in which offenders are apprehended, an analysis of geographical distribution of production cases is not included in this chapter. *Compare* Chapter 6 at 127–29 (analysis of geographic distribution of the 1,654 non-production cases in fiscal year 2010). For instance, in fiscal year 2010, the District of Maryland, which had five production cases, was not among the top five districts in terms of the number of production cases. In fiscal year 2011, however, the District of Maryland had 15 production cases, which was the highest number among all 94 districts.

[4] *See* U.S. Dep't of Justice, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 599 (1986) ("MEESE REPORT").

[5] Pub. L. No. 95–225, 92 Stat. 7 (Feb. 8, 1978) (codified as amended at 18 U.S.C. § 2251).

[6] *Id.*

during the next decade.[7] Over the next two decades, Congress repeatedly increased the penalty range for production offenses, culminating with the PROTECT Act of 2003,[8] which created the 15-year mandatory minimum and 30-year statutory maximum penalties currently in effect.[9] Defendants with predicate convictions for sex offenses are subject to increased minimum and maximum penalties.[10]

The sentencing guideline for production offenses is §2G2.1, which was part of the original 1987 guidelines. Section 2G2.1 initially provided for a base offense level of 25 and had a single specific offense characteristic (a 2-level increase if a minor under the age of 12 years was used in the production).[11] Over the years, the Commission increased the base offense level and added additional enhancements, usually as a result of congressional directives. Section 2G2.1 has been amended 13 times since it became effective on November 1, 1987, with several amendments resulting in an increase in the minimum of the applicable guideline range. For example, in 1996 the Commission implemented directives in the Sex Crimes Against Children Prevention Act of 1995[12] by increasing the base offense level in §2G2.1 from 25 to 27 and adding a 2-level increase if the offense involved the use of a computer.[13] As another example, in 2004 the Commission implemented directives in the PROTECT Act by increasing the base offense level from 27 to 32, and by adding separate enhancements for offenses that involved the commission of a sexual act or contact, aggravated sexual abuse, or material portraying sadistic or masochistic conduct or other depictions of violence.[14]

The current production guideline, which went into effect on November 1, 2004, has a base offense level of 32 and six specific offense characteristics with various enhancements.[15] Those enhancements are for: (1) producing child pornography with minors under 16 or under 12 years of age (2- or 4-level enhancements); (2) engaging in certain types of "sexual conduct" or "sexual acts" with a minor, including sexual acts under aggravating circumstances such as an unconscious victim (2- or 4-level enhancements);[16] (3) distribution of child pornography (2-level

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[7] MEESE REPORT, *supra* note 4, at 604 ("The production of child pornography is so clandestine in character that from 1978 to 1984 only one person had been convicted under that portion of the 1977 Act."); *id.* at 606 (noting that there were "few indictments" under the federal production statute from 1984–86).

[8] Pub. L. No. 108–21, § 103, 117 Stat. 650, 653 (2003).

[9] *See* 18 U.S.C. § 2251(e).

[10] *Id.* (defendants with one predicate conviction are subject to a 25- to 50-year range, and defendants with two predicate convictions face a range of 35 years to life imprisonment). Production offenders with a predicate conviction for a sex offense involving a victim 16 years old or younger are subject to a mandatory sentence of life imprisonment without parole under 18 U.S.C. § 3559(e). Predicate sex offenses are discussed in Chapter 2. *See* Chapter 2 at 24.

[11] USSC §2G2.1 (1987).

[12] Pub. L. No. 104–71, §§ 2–3, 109 Stat. 774 (1995).

[13] USSG App. C., amend. 537 (Nov. 1, 1996).

[14] USSG App. C., amend. 664 (Nov. 1, 2004).

[15] The current version of the production guideline is set forth in Appendix B.

[16] The guideline defines "sexual act" as vaginal or anal intercourse with a minor victim of any age; penetration of the vagina or anus of a victim of any age with a finger or object; or sexual touching, other than through the clothing,

enhancement); (4) producing child pornography that depicts sadistic or masochistic conduct or violence (4-level enhancement); (5) using a minor who was a relative or otherwise in the care of the defendant (2-level enhancement); and (6) either misrepresenting the defendant's identity or using a computer for the purpose of enticing a minor or otherwise facilitating the offense (2-level enhancement).[17] In addition, the guideline provides that "[i]f the offense involved the exploitation of more than one minor," a court should apply the guidelines' multi-count rules in USSG §§3D1.1 through 3D1.5 "as if the exploitation of each minor had been contained in a separate count of conviction," even if the indictment only contained a single production count.[18] Thus, in a production case involving multiple victims, a defendant's base offense level could be increased even if he were convicted of only a single count of production.[19]

Under a cross reference provision in §2G2.2, the non-production guideline, a defendant who produced child pornography but who was only convicted of a non-production offense (such as possession or distribution) should be sentenced under §2G2.1 rather than under §2G2.2, if the former yields a higher sentencing range than the latter guideline.[20] In such a case, the statutory maximum punishment may be lower than the otherwise applicable guideline range.[21]

Only offenders sentenced under §2G2.1 as their "primary guideline" (*i.e.*, the guideline yielding the highest guideline range) are considered as "production" offenders in this chapter. Some offenders convicted of production of child pornography under section 2251 in fiscal year 2010 also were convicted of non-production offenses (*e.g.*, distribution of child pornography) and had higher guideline ranges under a non-production guideline, which became their primary guideline. In fiscal year 2010, 11 offenders convicted of production offenses had guidelines other than §2G2.1 as their primary guideline. Of those 11 offenders, ten were sentenced under

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of the genitalia of a person under 16 years of age. It defines "sexual contact" as the sexual touching, whether or not through the clothing, of the victim's genitalia, anus, breasts, groin, inner thigh, or buttocks of a minor under 18 years old. *See* USSG §2G2.1, comment. (n.2) (incorporating the definitions set forth in 18 U.S.C. § 2256(2) & (3)).

[17] *See* USSG §2G2.1(b)(1)–(b)(6) (2011). Henceforth, in this chapter, all citations to §2G2.1 will be to the 2011 version unless otherwise noted.

[18] USSG §2G2.1(d)(1). The multi-count guidelines are USSG §§3D1.1 (Procedures for Determining Offense Level on Multiple Counts), 3D1.2 (Groups of Closely Related Counts), 3D1.3 (Offense Level Applicable to Each Group of Closely Related Counts), 3D1.4 (Determining the Combined Offense Level), and 3D1.5 (Determining the Total Punishment).

[19] *See, e.g.*, United States v. Peck, 496 F.3d 885, 890 (8th Cir. 2007) (noting that the defendant, who was convicted of a single count of production, received a 3-level increase in his offense level under USSG §2G2.1(d)(1) because of multiple victims in his case).

[20] USSG §2G2.2(c)(1).

[21] *See* subsection (a) of USSG §5G1.1 (Sentencing on a Single Count of Conviction) ("Where the statutorily authorized maximum sentence is less than the maximum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."). In 2010, in the case of a production offender convicted of a single count of possession, his guideline sentence under USSG §2G2.1 could be no more than 120 months, the statutory maximum penalty for possession then applicable (where the offender did not have a predicate conviction for a sex offense). *See* Chapter 2 at 26 & n.39. In the case of a production offender convicted of a single count of an R/T/D offense, his guideline sentence under §2G2.1 could be no more than 240 months, the statutory maximum penalty for an R/T/D offense (where the offender did not have a predicate conviction for a sex offense). *See id.*

the non-production guideline (§2G2.2) as their primary guideline.[22] Because the non-production guideline was the primary guideline in their cases, those offenders are treated as "non-production" offenders and are analyzed in Chapters 7 and 8 along with other §2G2.2 offenders.[23]

The vast majority of offenders whose primary guideline was §2G2.1 (171 of 204, or 83.8%)[24] were convicted under 18 U.S.C. § 2251 for production offenses. Of those 171 offenders, 162 were subject to mandatory minimum penalties of 15 years of imprisonment or more under the version of that statute in effect since the PROTECT Act, while eight were subject to a ten-year mandatory minimum under the version of the statute in effect immediately before the PROTECT Act went into effect. One of the 171 offenders was convicted of an earlier version of section 2251 that did not carry a mandatory minimum penalty. Eight of the 171 had one or more predicate sex convictions and received mandatory minimum penalties higher than 15 years; three of those eight offenders had predicate sex convictions involving minor victims under 17 years old and received sentences of life without parole under 18 U.S.C. § 3559(e).

Of the 33 offenders sentenced under §2G2.1 in fiscal year 2010 who were not convicted of production under section 2251, all were cross-referenced to the production guideline from another guideline based on the court's finding that the offender produced child pornography in relation to his offense of conviction. Those 33 included:

- four convicted of promoting (or conspiracy to promote) child prostitution;[25]
- six convicted of travel or enticement offenses;[26]
- 23 convicted of non-production child pornography offenses (ten of whom were convicted of possession and 13 of whom were convicted of R/T/D offenses).

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[22] The eleventh offender was convicted of obstruction of justice in connection with his successful destruction of sexual images that he had solicited from a minor and sentenced pursuant to USSG §§2J1.2 (Obstruction of Justice) (with a cross reference to 2X3.1 (Accessory After the Fact)) as the primary guideline.

[23] As discussed in Chapter 7, 127 of the 1,654 offenders sentenced under the non-production guideline (USSG §2G2.2) in fiscal year 2010 committed production offenses in addition to their non-production offenses. *See* Chapter 7 at 181 (Table 7-1). Six of those offenders had prior state or federal convictions for production that did not qualify as relevant conduct in their non-production prosecutions, and ten were contemporaneously convicted of a federal production offense along with their non-production offense. The remaining 111 offenders were never convicted of their production offenses and were sentenced under §2G2.2 based on their convictions of non-production offenses.

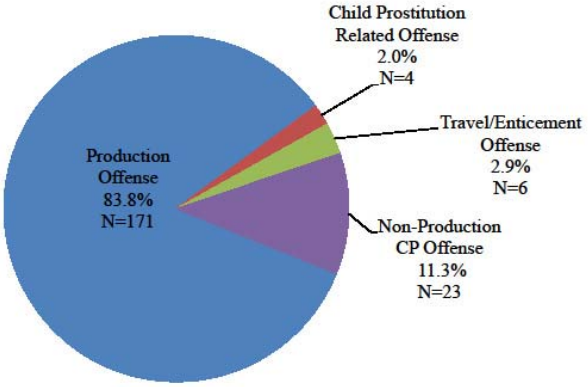
[24] Three of the 207 USSG §2G2.1 cases in fiscal year 2010 analyzed by the Commission did not have sufficient documentation to allow for analysis of the most serious offense of conviction.

[25] *See* 18 U.S.C. § 1591. One of those offenders was convicted of conspiracy to promote child prostitution under 18 U.S.C. § 371.

[26] Travel and enticement offenses are discussed in Chapter 2. *See* Chapter 2 at 30. One of those six offenses was a violation of 18 U.S.C. § 2425 (use of interstate facilities to transmit information about a minor). An element of that offense is transmitting such information for purpose of enticing a minor under 16 years of age to engage in illegal sexual activity. *See* 18 U.S.C. § 2425.

Figure 9–2 shows the most serious offense of conviction for production cases sentenced under §2G2.1 in fiscal year 2010.[27]

Figure 9-2
Production Cases: Most Serious Conviction
Fiscal Year 2010 (N=204)



Note: Percentages may not sum to exactly 100% due to rounding. Of the 207 production cases in fiscal year 2010, three were excluded for insufficient documentation.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

C. ANALYSIS OF SENTENCING DATA

The following analysis of sentencing data in production cases generally does not extend beyond fiscal year 2010.[28] However, in two analyses — concerning (1) the rate of below range sentences and (2) the difference between the average bottom of the guideline range and average sentence — this chapter also notes data from fiscal year 2011 because significant changes

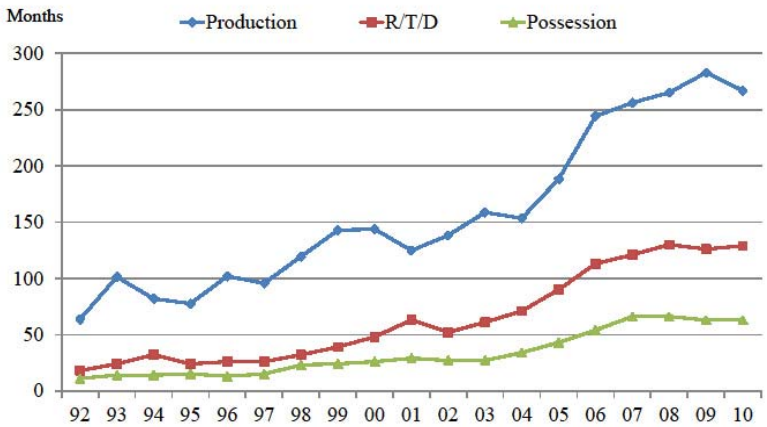
[27] Some production offenders were convicted of more than one type of sex offense (*e.g.*, a production offense and an enticement offense) or were convicted of a non-production sex offense (*e.g.*, distribution of child pornography) and were cross-referenced to USSG §2G2.1. Only the most serious offense of conviction per case is depicted in Figure 9–2. The order of seriousness, in descending order, is as follows: (1) production; (2) child prostitution related offenses; (3) travel/enticement offenses; and (4) non-production offenses. The order of the ranking is based on the severity of the statutory mandatory minimum and maximum sentences for offenders who have no predicate convictions for sex offenses. *See* 18 U.S.C. § 1591 (child prostitution/sex trafficking offenses, depending on the manner in which they are committed, have a range of punishment from a minimum of ten or 15 years to a maximum of life imprisonment); 18 U.S.C. § 2251 (child pornography production offenses have a range of punishment from 15 years to 30 years of imprisonment); 18 U.S.C. § 2422 (enticement offenses, depending the manner in which they are committed, have a range of punishment of zero to ten years or ten years to life imprisonment); 18 U.S.C. § 2423 (travel offenses have a general range of punishment of zero to 30 years of imprisonment, unless the victim is under 12, when a defendant is subject to a 30-year mandatory minimum penalty under 18 U.S.C. § 2241(c)). As discussed in Chapter 2, in 2010, the penalty ranges for non-production offenses were either zero to ten years of imprisonment (for possession offenses) or five to 20 years (for R/T/D offenses). *See* Chapter 2 at 25–26.

[28] Such analysis is consistent with the Commission's analyses of non-production cases in Chapter 6, which generally do not extend beyond fiscal year 2010 data. *See* Chapter 6 at 121, 152.

occurred during that one-year period. All other data analyses do not extend beyond fiscal year 2010 data because there were no notable changes in fiscal year 2011 data.

During the past two decades, average sentences for production offenses consistently have been longer than average sentences for non-production offenses (both possession offenses and R/T/D offenses). Average sentences consistently have increased over time for all types of child pornography offenses, as shown in Figure 9–3.

Figure 9-3
Child Pornography Sentences Over Time
Fiscal Years 1992-2010



Note: Average sentence length is shown as average total prison sentence excluding probation and months of alternative confinement.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

Average prison sentences for production offenses increased from 63.5 months in 1992 to 153.4 months in 2004, the year after the PROTECT Act was enacted. As more offenders thereafter were subject to the increased penalty provisions in the PROTECT Act, sentences continued to increase, and by 2009 average sentences hit their high point (282.9 months). Average sentences decreased slightly in fiscal year 2010 (267.1 months).[29]

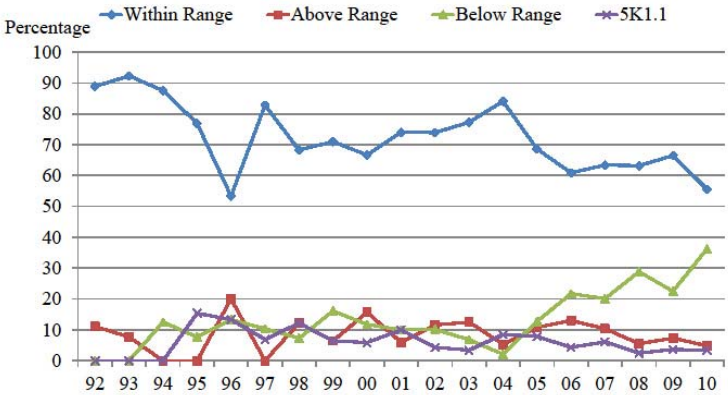
All production offenders sentenced in fiscal year 2010 received a term of imprisonment as part of their sentences. This has been a relatively consistent trend since 1992, when 90 percent (9 of 10) received prison only sentences, and one offender received a sentence of probation. By 2010, all production offenders received custodial sentences of prison only.[30]

[29] The above reported average sentences for fiscal years 2009 and 2010 include a small number of cases in which offenders were sentenced under pre-PROTECT Act versions of the applicable sentencing guidelines and penal statutes (which increased in severity after the PROTECT Act went into effect).

[30] By comparison, for all federal offenders in fiscal year 2010, the prison only rate was 87.4%, followed by much smaller rates for probation only (7.3%), probation with some form of community confinement (2.8%), and imprisonment and some other type of confinement (2.5%).

Figure 9–4 below shows sentences in production cases in relation to the applicable guideline ranges during the period of fiscal year 1992 through fiscal year 2010.[31] For production offenses, in 1992, 88.9 percent (8 of 9 cases) were sentenced within the range and 11.1 percent were sentenced above the range; none received below range sentences.[32] The within range rate fluctuated for several years, and by fiscal year 2004, 84.0 percent (79 of 94) of offenders were sentenced within their applicable guideline ranges, with small percentages of offenders receiving sentences above or below their ranges (including below the range based on substantial assistance to the authorities). Following *United States v. Booker*[33]and its progeny,[34] the within range rate steadily dropped, and, by fiscal year 2010, the within range rate for production cases was 56.8 percent (109 of 192 cases), while the below range rate (excluding substantial assistance departures) increased to 35.9 percent (69 of 192 cases). The within range rate continued to decrease in fiscal year 2011, when 50.4 percent (114 of 226) of offenders were sentenced within the applicable guideline range and 38.1 percent of offenders (86 of 226) received below range sentences for reasons other than substantial assistance. By comparison, in *non-production* cases in fiscal year 2011, the within range rate was 32.7 percent, while the below range rate (excluding substantial assistance departures) was 62.7 percent.[35]

Figure 9-4
Within Range and Out of Range Sentences:
Production Offenses
Fiscal Years 1992-2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

[31] Figure 9–3 uses a format that allows comparison of pre- and post-*Booker* cases; it shows within range sentences, cases in which offenders received downward departures under USSG §5K1.1 for substantial assistance, all other government and non-government sponsored below range sentences, and above range sentences.

[32] Relevant documentation concerning one of the ten production cases was missing. Thus, this data analysis is limited to the nine remaining cases. The incomplete documentation for that offender's case shows that he received probation.

[33] 543 U.S. 220 (2005).

[34] *See, e.g.*, Gall v. United States, 552 U.S. 38 (2007); Kimbrough v. United States, 552 U.S. 85 (2007).

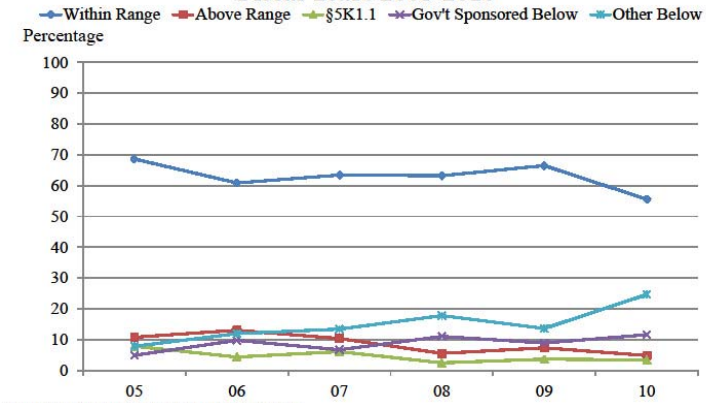
[35] *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 80 (2011) (Table 28).

While the within range rate in production cases has been steadily decreasing since *Booker*, average sentences in production cases continued to increase until fiscal year 2010, when they slightly decreased (as reflected in Figure 9–3 above). The increase in average sentences, despite a decreasing rate of within range sentences since *Booker*, is explained by two trends: (1) increasing average guideline minimums in the past few years (as reflected in Figure 9–6 below); and (2) the significant number of sentences in production cases (40.5% in fiscal year 2010) at or above the middle of the applicable guideline ranges (including upward departures or variances above the applicable ranges).[36]

Figure 9–5 below shows sentences within and outside the guideline range between fiscal years 2005 and 2010. Beginning in fiscal year 2005, the Commission changed the manner in which it reported sentencing data in response to *Booker*.[37] Since then, below range sentences are reported as (1) government sponsored below range sentences based on an offender's substantial assistance (pursuant to USSG §5K1.1 (Substantial Assistance to Authorities (Policy Statement)), (2) other government sponsored below range sentences, or (3) non-government sponsored below range sentences. Both non-§5K1.1 government sponsored below range sentences and non-government sponsored below range sentences increased in production cases after *Booker*. In fiscal year 2005, 3.7 percent of production offenders received a non-§5K1.1 government sponsored below range sentence, and 18.4 percent received a non-government sponsored below range sentence. By fiscal year 2010, 12.0 percent of offenders received non-§5K1.1 government sponsored below range sentences, and 24.0 percent received non-government sponsored below range sentences.

Of the 200 fiscal year 2010 production cases for which sufficient documentation existed, courts downwardly varied or departed in 70 cases (35.0%) for reasons other than substantial assistance. As reflected on the statement of reasons forms, the three primary reasons given by courts for varying or departing downwardly were: (1) a variance based on the "nature and circumstances of the offense [and/or] the history

Figure 9-5
Within Range and Out of Range Sentences:
Production Offenses
Fiscal Years 2005-2010



Note: Percentages may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 2005-2010 Datafile, USSCFY05-10.

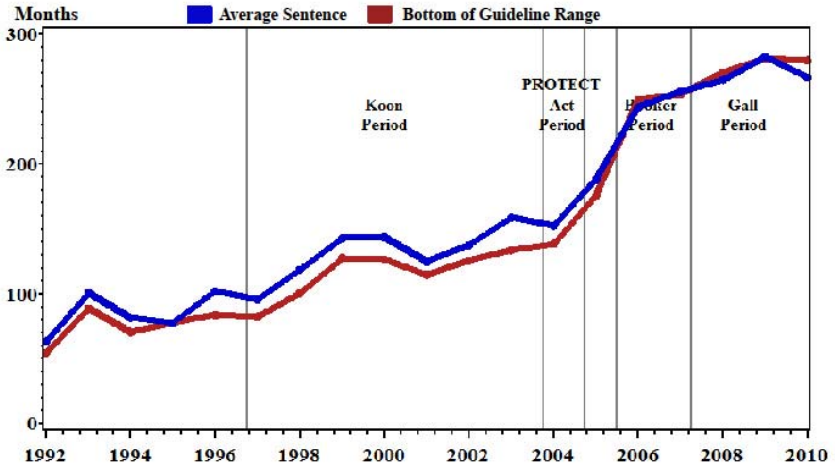
[36] Of the 200 production cases in fiscal year 2010 that included complete documentation, 81 (40.5%) involved sentences at the mid-point or higher of the applicable guideline ranges (including ten cases involving upward departures or variances above the applicable ranges). Conversely, of all federal cases in fiscal year 2010 with complete documentation, 18.1% of cases involved sentences at the mid-point or higher of the ranges (including upward departures or variances).

[37] This change took effect for cases sentenced since January 12, 2005, the date of the *Booker* decision. As a result, fiscal year 2005 is reported as the partial year from January 12, 2005 through September 30, 2005.

and characteristics of the defendant" under 18 U.S.C. § 3553(a)(1) (53.5%); (2) a departure[38] or variance based on the overrepresentation of a defendant's criminal history score (18.0%); and (3) a variance based on the defendant's mental or emotional conditions (18.0%).

Figure 9–6 below shows the average length of the term of imprisonment imposed compared to the average bottom of the applicable guideline range in production cases from fiscal years 1992 through 2010. Also indicated are key periods: the *Koon* era, the PROTECT Act period, the *Booker* era, and the *Gall* period.[39] As Figure 9–6 demonstrates, average prison sentences in production cases largely tracked the average guideline minimums, with average sentences slightly above the average guideline minimums from 1996 through 2005, and very close to the average guideline minimums until fiscal year 2010, when the average sentence (267.1 months) fell slightly below the average guideline minimum (281.0 months).

Figure 9-6
Average Guideline Minimum and Sentence Imposed:
Production Offenses
Fiscal Years 1992-2010



Note: Average sentence length is shown as average total prison sentence excluding probation and months of alternative confinement.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

In fiscal year 2011, the trend continued, with the gap between the average sentence and the average guideline minimum increasingly slightly. In fiscal year 2011, the average guideline minimum was 291.0 months, while the average sentence imposed was 274.0 months.

Figure 9–6 should be contrasted with Figures 6–7 and 6–8 in Chapter 6, which show a more pronounced and growing gap between the average guideline minimum and average sentence imposed in non-production cases during the same time period.[40]

[38] *See* USSG §4A1.3(b).

[39] These periods (and the above-mentioned U.S. Supreme Court decisions and PROTECT Act upon which they are based) are discussed in Chapter 6. *See* Chapter 6 at 123–24.

[40] *See id.* at 135.

In fiscal year 2010, in production cases in which a below-range sentence was imposed, the average extent of non-government sponsored downward departures and variances — as expressed in the difference in percentage between the average guideline minimum and average sentence imposed in cases receiving below-range sentences — was 24.5 percent (or an average reduction of 64 months); the average extent of government sponsored downward departures and variances (other than for an offender's substantial assistance) was 29.1 percent (or an average reduction of 93 months). In fiscal year 2011, in production cases in which a below-range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 20.9 percent (or an average reduction of 62 months); the average extent of government sponsored downward departures and variances (other than for an offender's substantial assistance) was 27.6 percent (or an average reduction of 75 months).

Thus, the growing gap in the difference between the average guideline minimums and average sentences imposed in fiscal years 2010 and 2011 is explained by the increased *rate* of below range sentences rather than by an increased *extent* of departures and variances. Furthermore, as noted above, the widening of the gap is somewhat tempered by the substantial number of sentences in production cases at or above the middle of the applicable guideline ranges (including upward departures and variances above the applicable ranges).

D. OFFENDER AND OFFENSE CHARACTERISTICS

This section discusses offender and offense characteristics based on data derived from both the Commission's regular datafile from fiscal year 2010 and the special coding project of fiscal year 2010 production cases.

1. *Offender Characteristics*

Production offenders, like non-production child pornography offenders, are a relatively homogenous group demographically compared to federal offenders generally.[41] Among production offenders in fiscal year 2010, the overwhelming majority were male (97.0%), white (85.9%), and United States citizens (97.0%). The average age of production offenders was 41 years — one year younger than non-production offenders but six years older on average than federal offenders generally.[42]

Also, like non-production offenders, production offenders on average occupy a higher socio-economic status than federal offenders generally.[43] In fiscal year 2010, 87.7 percent of production offenders were high school graduates, and 46.7 percent had at least some college. In fiscal 2010, among all federal offenders, the typical offender was *not* a high school graduate (51.4%), and only 19.9 percent of offenders had at least some college education. There was a high degree of employment among child pornography production offenders at the time of their arrests. Of the 197 production offenders sentenced in 2010 for which there was employment data, 76.1 percent were employed. Only 15.2 percent were unemployed, and 8.7 percent were

[41] *See id.* at 142 (noting that the vast majority of non-production offenders are white male U.S. citizens).

[42] *See id.* at 143 (average age of non-production offenders in fiscal year 2010 was 42 years old).

[43] *See id.* at 162–63 (comparing education, employment status, and net worth of non-production offenders to federal offenders generally).

not part of the work force because they were retired or either physically or mentally disabled. Production offenders slightly differed in one respect from non-production offenders economically: a majority of production offenders had negative net worth (56.1%) at the time of the presentence investigations in their cases, compared to slightly less than half (47.5%) of non-production offenders.[44] Tables 9–1(a) and 9–1(b) summarize the characteristics of production offenders.

Table 9-1(a)
Production Offender Characteristics
Fiscal Year 2010

	Percent (Total of 200 cases)	Mean (in years)
Citizenship		
United States	97.0	
Other	3.0	
Gender		
Male	97.0	
Female	3.0	
Race		
White	85.9	
Black	6.0	
Hispanic	7.0	
Other	1.0	
Age		41

Note: Of the 207 production cases in fiscal year 2010, seven were excluded for insufficient documentation.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Table 9-1(b)
Production Offender Characteristics
Fiscal Year 2010

Category	Percent (Total of 200 cases)
Education	
Less than High School Grad	12.3
High School Grad	41.0
Some College	31.3
College Grad	15.4
Employment	
Employed in some capacity	76.1
Unemployed	15.2
Retired/Physically or Mentally Disabled	8.7
Assets	
Negative Assets	56.1
$0 to $9,999	26.9
$10,000 to $99,999	10.5
More than $100,000	6.4

Note: Of the 207 production cases in fiscal year 2010, seven were excluded for insufficient documentation.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

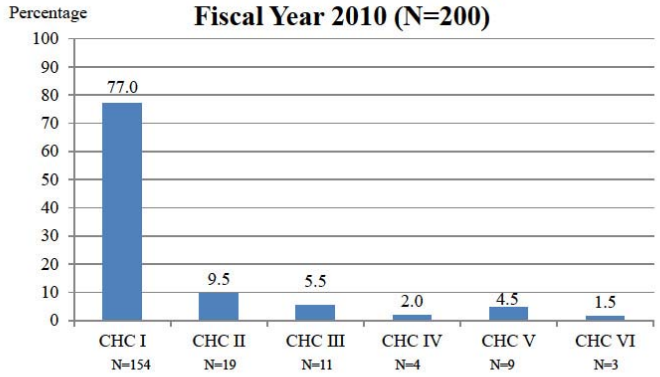
[44] That difference could be explained in part by the fact that a much larger percentage of production offenders were detained without bail before their sentencing hearings (93%) than non-production offenders (57%) — and, thus, lacked employment opportunities and may have lost assets such as houses or cars.

With respect to reported histories of sexual abuse during production offenders' own childhoods, 29.4 percent (58 of 197) reported actual or possible sexual abuse.[45] By comparison, 17.7 percent of non-production offenders (293 of 1,654) reported that they had been or may have been sexually abused as a child.[46]

Among fiscal year 2010 production offenders, 43.4 percent reported a history of substance abuse.[47] That figure is higher than the prevalence rate of substance abuse among non-production offenders (35.5%) but appears comparable to, or perhaps even lower than, the rate for federal offenders generally (which appears to be over 50%).[48]

With respect to criminal history, production offenders also differ from the average federal offender and more closely resemble non-production offenders. As reflected in Figure 9-7 below, in fiscal year 2010, 77.0 percent of production offenders (154 of 200) were in Criminal History Category I. The criminal histories of production offenders are similar to the criminal histories of non-production offenders — 81.1 percent of R/T/D offenders and 82.2 percent of possession offenders were in Criminal History Category I.[49] Figure 9–7 below shows the distribution of the various criminal history categories for production offenders in fiscal year 2010. By contrast, 43.9 percent of all federal offenders were in Criminal History Category I.

Figure 9-7
Production Offender Characteristics:
Criminal History Category
Fiscal Year 2010 (N=200)



Note: Of the 207 production cases in fiscal year 2010, seven were excluded for insufficient documentation.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

[45] Of those 58 offenders, 12 (20.7%) had their reports of abuse verified by other sources (*e.g.*, offenders' family members).

[46] *See* Chapter 6 at 156. As discussed in Chapter 6, the prevalence rate of childhood sexual abuse in the general population is approximately one in six males. *See id.* Although the fiscal year 2010 production offenders reported histories of childhood sexual abuse at a rate twice of that of the general population, caution should be exercised in making any inferences from the Commission's data. The numbers of production offenders studied was small (207), and the number of PSRs that contained any type of verification of the offenders' self-reports was small (20.7%).

[47] Of those 85 offenders, 50 (58.8%) had verified histories of substance abuse.

[48] *See* Chapter 6 at 185 n.85.

[49] *See id.* at 143.

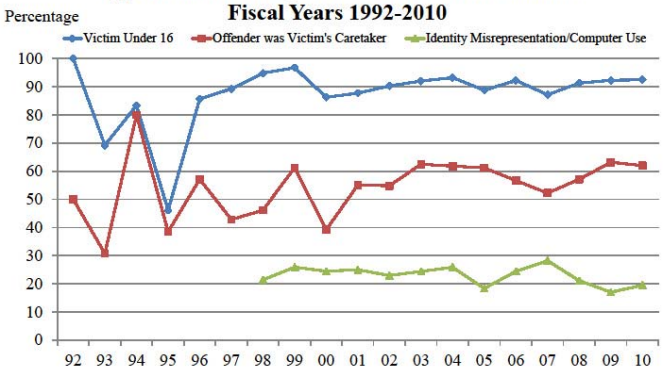
Of those production offenders with criminal histories, the vast majority had convictions for sexual contact offenses against adults or children. Of the 197 production offenders for whom relevant sentencing documentation existed, 17.3 percent (34 of 197) had a prior conviction for a sex offense. Of those 34 offenders, 23 (67.7%) had a prior contact sex offense against a child and another 4 (11.8%) percent had a prior contact sex offense against an adult.

As discussed in Chapter 2, USSG §4B1.5 (Repeat and Dangerous Sex Offenses Against Minors) contains two alternative enhancements for certain production offenders' prior criminal conduct.[50] Section 4B1.5(a), which applies if an offender has one or more predicate convictions for a sex offense, provides for enhanced minimum offense levels for production offenders (either level 34 or level 37, depending on the number of an offender's predicate convictions for sex offenses) and a minimum of Criminal History Category V. If an offender's final offense level or criminal history category resulting from a guidelines determination before application of §4B1.5(a) exceeds those in §4B1.5(a), then no additional enhancement would apply. Section 4B1.5(b), which applies if §4B1.5(a) does not apply and if an offender engaged in a "pattern of activity involving prohibited sexual conduct" (whether or not such a pattern resulted in a prior conviction), results in a 5-level enhancement in addition to any enhancements in the specific offense characteristics of §2G2.1. Of the 192 fiscal year 2010 §2G2.1 cases governed by the 2004 or later versions of the guideline and for which the Commission had sufficient documentation, eight offenders (4.2%) received enhanced sentences under §4B1.5(a), and 44 offenders (22.9%) received enhanced sentences under §4B1.5(b). The average sentence for the §4B1.5(a) offenders was 357 months, while the average sentence for the §4B1.5(b) offenders was 351 months.

2. *Offense Characteristics*

Section 2G2.1 contains a number of enhancements in specific offense characteristics that can substantially raise an offender's guideline range. Figure 9–8 shows the application rates of

Figure 9-8
Production Cases:
Application of the Specific Offense Characteristics
Fiscal Years 1992-2010



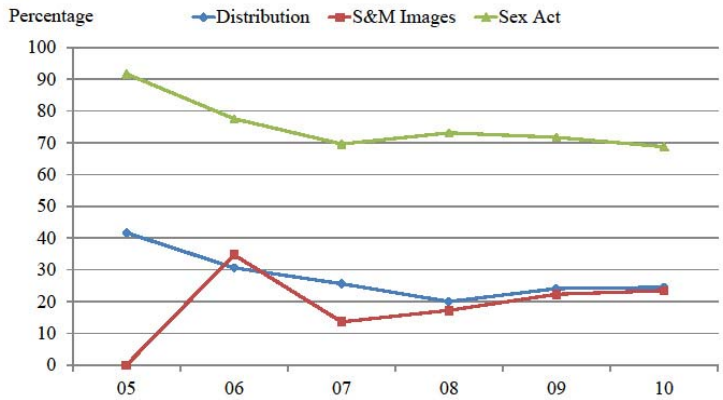
Note: The "Victim under 16" category includes both the four level enhancement for a victim under 12 years old and the two level enhancement for a victim between 12 and 16 years of age.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

[50] *See* Chapter 2 at 37–38.

three enhancements that have been in the guideline for over a decade.[51] The first enhancement, for production involving a minor under the age of 12 years old or a minor between the ages of 12 and 16 years old, involves a 4- or 2-level increase depending on the age of the victim (presently §2G2.1(b)(1)). This enhancement has existed in some form since the inception of the production guideline in 1987, when it applied only to minors under 12 years of age. The enhancement was expanded three years later also to cover minors between 12 and 16 years of age. Since 1996, this enhancement has consistently applied in approximately 90 percent of cases, as reflected in Figure 9–8. The second enhancement, which has been in §2G2.1 since November 1, 1990, is the enhancement for a defendant's status as the parent, relative, guardian, or person in custody, care, or supervision of a minor (presently §2G2.1(b)(5)). Although in its early years, its rate of application varied widely, in recent years it has been applied more consistently, in slightly more than half of all cases. The third enhancement — for misrepresenting an offender's identity to the victim or using a computer to solicit or entice the victim (presently, §2G2.1(b)(6)) — was added in part on November 1, 1997, and in part on November 1, 2000. By fiscal year 2004, that enhancement applied in 25.9 percent of production cases, and its rate of application has remained relatively consistent thereafter.

Figure 9–9 shows the rates of application for the other three enhancements in the production guideline, which became effective November 1, 2004. These enhancements — for commission of certain types of "sexual acts" or "sexual conduct" (presently, §2G2.1(b)(2)); distribution of the images produced by the offender (presently, §2G2.1(b)(3)); and production of a sado-masochistic or violent image (presently, §2G2.1(b)(4)) — did not apply in significant numbers until fiscal year 2006. Although the enhancement for a sexual act

Figure 9-9
Production Cases:
Application of the Specific Offense Characteristics
Fiscal Years 2005-2010



SOURCE: U.S. Sentencing Commission, 2005-2010 Datafile, USSCFY05-10.

[51] The application rate data included in Figures 9–8 and 9–9 refer to the number of cases in which particular specific offense characteristics have been applied in a guideline application for one or more counts of conviction in a particular case. Because multiple production counts of conviction are not "grouped" under USSG §3D1.2(d) — unlike non-production counts, which are grouped — there may be multiple guideline applications in a single production case involving different specific offense characteristics (depending on the counts at issue). If a guideline application regarding at least one count in a case involved a particular specific offense characteristic, that case is reflected in the data in Figures 9–8 and 9–9. However, if a particular specific offense characteristic was applied in connection with multiple counts in a single case, that case is only reflected once in the analysis.

There were not more than 50 production cases annually until fiscal year 2000. Thus, the small number of cases in the earlier years depicted on Figure 9–8 makes comparisons between the earlier years and more recent years difficult.

or sexual conduct has applied in a majority of production cases, the other two enhancements (for distribution and production of sado-masochistic images) have applied in less than half of the cases.

E. CLASSIFICATION OF PRODUCTION OFFENSE BEHAVIOR

As part of its special coding project of production cases, the Commission examined certain other types of offenders' behaviors related to both their production offenses and any related non-production child pornography offenses. The Commission examined the "offense conduct" sections of presentence reports ("PSRs") in the fiscal year 2010 §2G2.1 cases to enable meaningful classifications of production offenders according to such behavior.[52] The Commission's findings allow for classification of production offenders according to their offense conduct in two ways — first, by the extent of offenders' involvement with the victims of their production activities; and, second, by the extent of offenders' involvement with child pornography generally.[53] Such classifications are not intended to be an exhaustive taxonomy of production offenders; they are used to provide some insight into the types of production offenders being sentenced in federal court beyond that offered by the data concerning the specific offense characteristics discussed above in Part D.

1. *Extent of Involvement with Victims of Production Offenses*

The Commission examined fiscal year 2010 production cases to determine how often offenders were physically present with their victims when the production occurred or, instead, how often offenders caused the production from a remote location (via the Internet through use of email or a webcam or via cell phones through texting) without being physically present with the victims. In addition, the Commission examined the cases to determine whether offenders engaged in, or aided and abetted other offenders in the commission of, sexual contact offenses against the victims.

With respect to those offenders who were physically present with their victims, the Commission examined the cases to determine whether: (1) offenders either themselves engaged in sexual contact offenses against their victims or aided and abetted other offenders in the commission of such contact offenses (regardless of whether such contact was memorialized in child pornography); or (2) offenders filmed their victims engaging in sexually explicit activities but did not engage in, or aid and abet others in the commission of, any type of sexual contact offense. With respect to those offenders who were not physically present with their victims, the Commission examined cases to determine whether: (1) offenders remotely solicited self-produced sexual images from minors; or (2) offenders remotely aided and abetted other adult

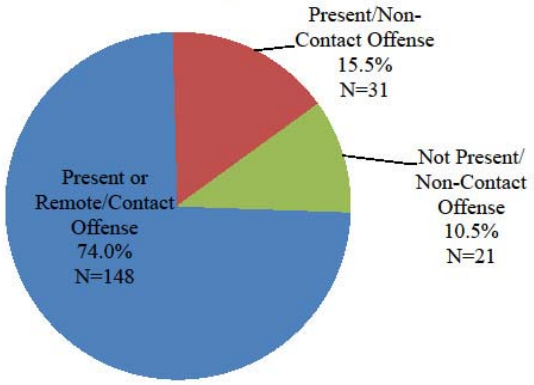
[52] Seven of the 207 USSG §2G2.1 cases from fiscal year 2010 were excluded from the analysis because of insufficient documentation. As is true with respect to the Commission's other coding projects based on PSRs, this coding project is subject to the important limitation that the Commission's data is based only on what was included in the PSRs. Because some PSRs do not include all relevant information concerning offenders' behavior, the Commission's findings may be under-inclusive in some respects. *See* Chapter 6 at 144 n.50.

[53] Data concerning victim characteristics are discussed below in section F.

offenders with custody of the children in the commission of sexual contact offenses against the children.[54]

Figure 9–10 below shows the results of the Commission's analysis of the fiscal year 2010 production cases regarding three types of offense behavior: (1) production offenders who were physically present with their victims and engaged in contact offense behavior or, if not physically present, remotely aided and abetted other adult offenders in the commission of contact offenses against minor victims; (2) production offenders who were physically present with their victims but did not engage in any contact offense behavior and did not aid or abet others in the commission of a contact offense;[55] and (3) production offenders who were not physically present with their victims during the production offense and did not remotely aid and abet others in sexual contact offenses against minor victims.[56]

Figure 9-10
Production Offender Characteristics:
Physical Presence/Contact Victimization
Fiscal Year 2010 (N=200)



Note: Percentages may not sum to exactly 100% due to rounding. Of the 207 production cases in fiscal year 2010, seven were excluded for insufficient documentation.
SOURCE: FY10 Child Pornography Special Coding Project.

As Figure 9–10 demonstrates, almost three-quarters of production offenders were physically present with their victims or remotely aided and abetted another adult offender in the commission of a sexual contact offense against a minor victim.

[54] Such remote aiding and abetting typically occurred when an offender engaged in a "chat room" or email exchange with another adult offender and requested that the latter offender produce child pornography with a child in the latter offender's custody.

[55] This category includes offenders who surreptitiously recorded their victims (*e.g.*, using a hidden camera) but did not touch them in a sexual manner.

[56] This category includes offenders who solicited still images of self-produced child pornography from minors via email or text or who recorded sexually explicit conduct of minors who appeared remotely via webcam.

2. *Extent of Involvement with Child Pornography Generally*

The Commission also examined the fiscal year 2010 §2G2.1 cases to determine the extent to which offenders were involved with child pornography generally. Examination of the cases revealed three general types of offenders:

(1) offenders who memorialized their sexual abuse of children in videos or still images for their own sexual gratification but did not otherwise commit child pornography offenses or engage in related conduct (*i.e.*, they did not collect any *other* child pornography, did not share their self-produced child pornography with others, and otherwise did not engage in child pornography "communities" such as Internet chat rooms devoted to child pornography);[57]

(2) offenders who self-produced child pornography and added it to their collection of *other* child pornography but did not share their self-produced images with others or otherwise participate in child pornography communities; and

(3) offenders who self-produced child pornography and either shared their self-produced images with others or otherwise participated in child pornography communities (even if they did not share their self-produced images).

The first type of offender did not possess any other child pornography, did not share his self-produced images, and did not have any communication with other offenders about child pornography or child exploitation. The other two types of offenders actively engaged in other child pornography collecting behaviors in addition to their production offenses; their sexual interest in children transcended the victims of their own self-produced child pornography. The distinction between those latter two types of offenders relates to their degree of involvement with child pornography generally. The second type of offender collected other child pornography but did not share his self-produced images or communicate with other offenders, while the third type of offender took additional steps to involve himself in a child pornography community (by distributing his self-produced images to others or by communicating with other offenders about child sexual exploitation). The second and third types of offenders engaged in behaviors similar to non-production child pornography offenders even though they were sentenced under §2G2.1 rather than §2G2.2.[58] The first type of production offender engaged in behavior that is relatively dissimilar from most §2G2.2 offenders.[59]

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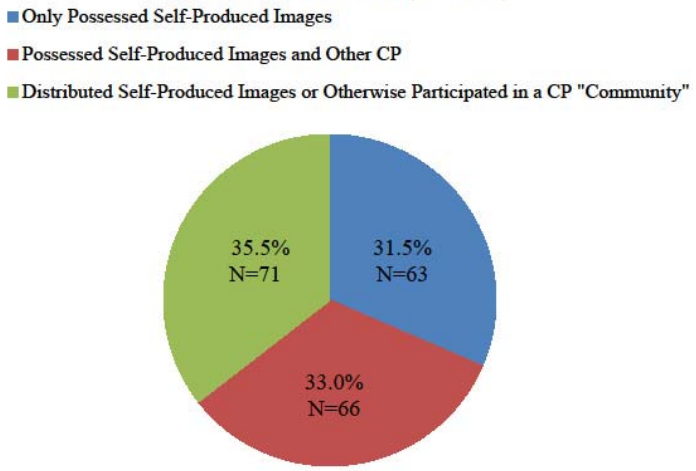
[57] Child pornography "communities" are discussed in Chapter 4. *See* Chapter 4 at 92–99.

[58] Many USSG §2G2.2 offenders studied by the Commission in its special coding project also may be classified as type 2 or type 3 offenders because their criminal dangerous sexual behavior involved production of child pornography. *See* Chapter 7 at 181 (Table 7–1; noting that 127 of the 1,654 §2G2.2 offenders had also engaged in production offenses). However, those offenders were sentenced under §2G2.2 rather than USSG §2G2.1. *See supra* note 23.

[59] The Commission's tripartite classification of production offenders reflects a "snapshot" view of offenders based on the description of their behavior in PSRs. The Commission does not intend to imply that a production offender who fits within one of the three categories at a given point in time (*i.e.*, at the time of their arrest on the instant federal offense) would have always remained in that category absent intervention by law enforcement.

Figure 9-11
Production Offender Characteristics:
Involvement with Child Pornography
Fiscal Year 2010 (N=200)



Note: Percentages may not sum to exactly 100% due to rounding. Of the 207 production cases in fiscal year 2010, seven were excluded for insufficient documentation.
SOURCE: FY10 Child Pornography Special Coding Project.

Figure 9–11 above shows the results of the Commission's special coding project of fiscal year 2010 §2G2.1 cases with respect to these three categories of production offenders. As Figure 9–11 demonstrates, among the fiscal year 2010 §2G2.1 offenders, there were roughly equal numbers of the three types of offenders discussed above.

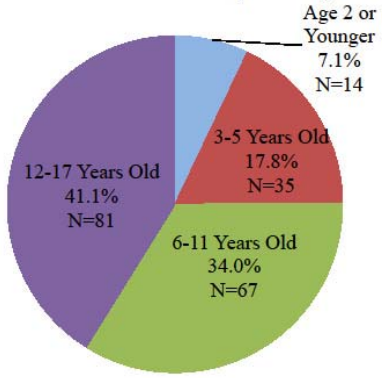
F. VICTIM CHARACTERISTICS

As noted above, a victim's age is a factor that is incorporated into the guideline calculation in §2G2.1(b)(1). Although this enhancement is divided into two age brackets (less than 16 years old and less than 12 years old), a substantial number of victims were much younger than 12 years old.[60] In 49 of 197 cases (24.9%) where sufficient documentation of the victims' ages existed, the victim was five years of age or younger.[61] In 14 of the 197 cases (7.1%), the victim was two years of age or younger. Figure 9–12 below includes a complete analysis of the victims' ages.

[60] Although USSG §2G2.1(b)(1) does not include an incremental enhancement for very young victims, the "vulnerable victim" enhancement in subsection (b)(1) of USSG §3A1.1 (Hate Crime Motivation or Vulnerable Victim) may apply to such victims. *See* Chapter 2 at 35 (discussing Ninth Circuit cases applying the enhancement to child pornography cases involving very young victims). However, most courts in production cases involving very young victims have not applied this enhancement. Of the 49 fiscal year 2010 §2G2.1 cases involving victims under six years of age, offenders in only three cases (6.1%) received an enhancement under §3A1.1(b)(1) based on a finding that the victim was a "vulnerable victim."

[61] This analysis is based on the age of victims when the photographed or filmed abuse first began, as determined from court documents. In cases where there was more than one victim in a single case, the age of the youngest victim is reported.

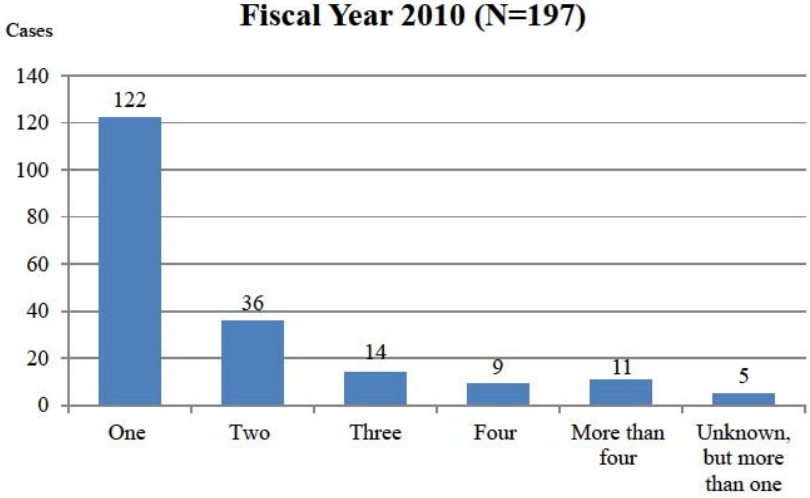
Figure 9-12
Production Offense Characteristics:
Age of Youngest Victim at Time of Offense
Fiscal Year 2010 (N=197)



Note: Percentages may not sum to exactly 100% due to rounding. Of the 207 production cases in fiscal year 2010, ten were excluded for insufficient documentation.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

In addition to victims' ages, the number of victims per case is a factor incorporated into the guideline calculation in §2G2.1(d).[62] As Figure 9–13 shows, the majority of cases had a single victim (122 of 197, or 61.9%).

Figure 9-13
Production Offense Characteristics: Number of Victims
Fiscal Year 2010 (N=197)

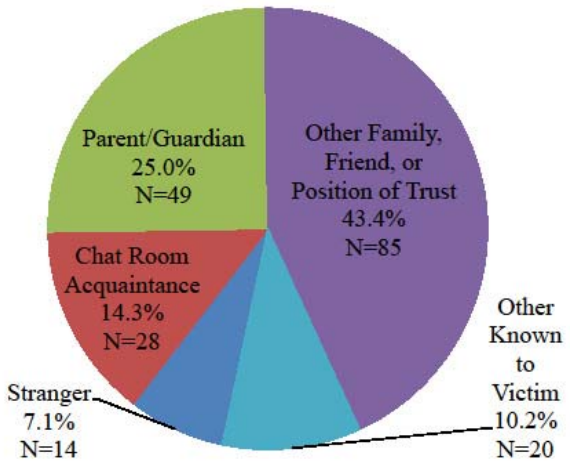


Note: Percentages may not sum to exactly 100% due to rounding. Of the 207 production cases in fiscal year 2010, ten were excluded for insufficient documentation.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

[62] *See supra* notes 18 & 19 and accompanying text.

The victim-offender relationship also is relevant under §2G2.1(b)(5), as discussed above. As shown in Figure 9–14 below, a large majority of offenders in fiscal year 2010 production cases were known to their victims; over two-thirds (68.4%) were related to their victims, were a family friend, or were a person in a position of trust relative to the victim. Chat room acquaintances represented 14.3 percent of offenders, but appeared in two distinct forms. Either the offenders solicited explicit pictures from juveniles in Internet "chat rooms" or through social media, or they groomed their victims through social media or chat rooms and then attempted to meet the victim. Offenders were strangers to their victims in only a small percentage (7.1%) of cases.

Figure 9-14
Production Offense Characteristics:
Offender-Victim Relationship
Fiscal Year 2010 (N=196)



Note: Percentages may not sum to exactly 100% due to rounding. Of the 207 production cases in fiscal year 2010, eleven were excluded for insufficient documentation.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FY10 Child Pornography Special Coding Project.

Over two-thirds (70.3%) of production cases involved only female victims in fiscal year 2010; 22.1 percent of cases involved only male victims; and 7.7 percent involved victims of both genders. Cases with only male victims were more likely to have multiple victims than cases with only female victims. In fiscal year 2010 production cases, 41.9 percent of cases with only male victims had multiple victims, while 29.2 percent of cases with only female victims had multiple victims.

G. CONCLUSION

The Commission's study of production cases from fiscal year 2010 yields the following conclusions:

- In the same manner as federal non-production cases, the number of federal production cases has steadily grown during the past two decades, although such cases constituted a very small percentage (0.25%) of the federal criminal docket in fiscal year 2010. There were over eight times as many non-production prosecutions as production prosecutions in fiscal year 2010.

- In fiscal year 2010, the average prison sentence for production offenders was over 22 years (269.1 months), which represents a near doubling since fiscal 2004, the first year after the PROTECT Act (when the average sentence was 153.4 months) and a four-fold increase since 1992 (when the average prison sentence was 63.5 months). Average sentences steadily increased during the past two decades as a result of several amendments to both the penal statute and sentencing guideline governing production cases.

- In fiscal year 2010, the vast majority of production offenders sentenced under §2G2.1 (83.8%) were convicted under 18 U.S.C. § 2251, which, since the PROTECT Act, has carried a mandatory minimum prison sentence of 15 years.

- In fiscal year 2010, the average sentence for production offenders was approximately twice as long as the average sentence for offenders convicted of R/T/D offenses and approximately four times as long as the average sentence for offenders convicted only of possession.

- Downward variances and departures for reasons other than a defendant's substantial assistance to the authorities have steadily increased since *Booker* in production cases. In fiscal year 2004, 84.0 percent of production offenders received sentences within the applicable guideline ranges. By fiscal year 2010, 56.8 of production offenders received within range sentences, while 35.9 percent received below range sentences (excluding substantial assistance departures); by fiscal year 2011, 50.4 percent of production offenders received within range sentences, while 38.1 percent received below range sentences (excluding substantial assistance departures). In fiscal year 2010, in production cases in which a below-range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 24.5 percent (or an average reduction of 64 months); the average extent of government sponsored downward departures and variances (other than for an offender's substantial assistance) was 29.1 percent (or an average reduction of 93 months). In fiscal year 2011, in production cases in which a below-range sentence was imposed, the average extent of non-government sponsored downward departures and variances was 20.9 percent (or an average reduction of 62 months); the average extent of government sponsored downward departures and variances (other than for an

offender's substantial assistance) was 27.6 percent (or an average reduction of 75 months). As a result of these recent trends, during the past two fiscal years, the average sentence in production cases has begun to fall below the average guideline minimum for the first time. Previously, from fiscal year 1992 until fiscal year 2009, the average sentence was equal to or above the average guideline minimum in production cases.

- Production offenders' characteristics — with respect to average age, gender, race, nationality, criminal records, and socio-economic status — closely resemble non-production offenders' characteristics. The typical production offender in fiscal year 2010 was a white male United States citizen in his early forties who had at least some college education and was employed at the time of the offense. Although caution should be exercised in drawing conclusions based on the small number of production offenders studied, those offenders' reported rate of childhood sexual abuse was twice the prevalence rate for the general population of males and nearly twice the reported rate for offenders sentenced under the non-production guidelines.

- Nearly four out of five production offenders were in Criminal History Category I. Of those offenders with criminal histories, however, the vast majority (79.5%) had histories of sexual "contact" offenses. Approximately one in four §2G2.1 offenders received an enhanced sentence under §4B1.5 (Repeat and Dangerous Sex Offenses Against Minors).

- Victims in production cases were mostly female and prepubescent and knew the offenders (as most were relatives, family friends, or persons in a position of trust vis-à-vis the victims). Most cases involved only a single known victim.

Chapter 10

POST-CONVICTION ISSUES IN CHILD PORNOGRAPHY CASES

This chapter addresses several post-conviction issues in child pornography cases: (1) supervised release; (2) assessment and treatment of child pornography offenders' sexual disorders (in prison and on supervision); and (3) sex offender registration and civil commitment procedures applicable to sex offenders (including some child pornography offenders). These issues are relevant to the Commission's study of child pornography offenders because the vast majority of offenders, even many of those sentenced to lengthy prison sentences, eventually will return the community after service of their prison sentences. As discussed below, effective supervision and treatment of offenders (as a condition of supervision) are important means of reducing recidivism[1] and promoting public safety.

A. SUPERVISED RELEASE IN CHILD PORNOGRAPHY CASES

This section discusses the relevant statutory and guideline provisions governing supervised release and provides an analysis of relevant data.

1. *Statutory and Guideline Provisions*

a. Length of the Term of Supervision

The PROTECT Act of 2003 significantly increased supervised release terms in child pornography cases. For child pornography offenses committed before the enactment of the PROTECT Act, supervised release was governed by 18 U.S.C. § 3583(b), the general provision applicable to all federal offenses not carrying mandatory supervised release terms.[2] Section 3583(b) has no minimum term and one- to five-year maximum terms depending on the class of felony of which an offender was convicted. Before the PROTECT Act, all child pornography offenders without predicate convictions for sex offenses could be sentenced to a maximum of three years of supervised release because their offenses were either Class C or D felonies.[3] For offenses committed after the PROTECT Act, every child pornography offender sentenced to any amount of imprisonment for conviction of an offense in chapter 110, title 18, of the United States

[1] The Commission's recidivism study of child pornography offenders is discussed in Chapter 11.

[2] *See* 18 U.S.C. § 3583(b); *see also* United States v. Rivera-Maldonado, 560 F.3d 16, 18 n.1 (1st Cir. 2009).

[3] *See* 18 U.S.C. §§ 3559(a) & 3583(b)(2). Before the PROTECT Act, production offenders without a predicate conviction for a sex offense were subject to a statutory maximum of 20 years of imprisonment and non-production offenders without predicate convictions faced five- or 15-year statutory maximum terms of imprisonment. *See* Chapter 1 at 4 n.26 (noting that, in cases of offenders without predicate sex convictions, pre-PROTECT Act statutory maximum terms of imprisonment were five years for possession offenses, 15 years for R/T/D offenses, and 20 years for production offenses). Except for offenders convicted of simple possession, child pornography offenders with predicate convictions for sex offenses, who were all Class B felons, could receive a maximum of five years of supervised release. *See* 18 U.S.C. § 3583(b)(1). Simple possession offenders with predicate convictions, who were class D felons, could receive three-year maximum terms of supervised release. *See* 18 U.S.C. § 3583(b)(2).

Code,[4] must serve a mandatory minimum term of five years of supervised release and can be sentenced up to a maximum term of lifetime supervision.[5]

Both before and after the PROTECT Act, provisions in the sentencing guidelines concerning supervised release have instructed judges to impose at least the statutory minimum term and — as a policy statement — have "recommended . . . the statutory maximum term of supervised release" for all defendants convicted of "a sex offense."[6] The guidelines, consistent with the statutory definition in 18 U.S.C. § 3583(k), have defined "sex offense" to include all child pornography offenses in 18 U.S.C. §§ 2252 & 2252A.[7] As noted above, the PROTECT Act expanded the statutory maximum term of supervised release to lifetime supervision for all child pornography offenders. Therefore, the current guideline effectively recommends a lifetime term of supervised release for all child pornography offenders.

The current guideline's blanket recommendation of the statutory maximum — that is, lifetime — term of supervision for all child pornography offenders has been criticized because it was promulgated before the PROTECT Act raised the maximum term in child pornography cases from three years for most cases to a lifetime term for all cases.[8] Critics also have contended that the guideline's categorical recommendation of a lifetime term of supervision fails to distinguish among offenders with respect to their levels of risk and corresponding need for lifetime supervision.[9] The Fifth Circuit has noted that the Commission's policy statement recommending lifetime supervision for all child pornography offenders goes well beyond

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[4] Chapter 110 includes 18 U.S.C. §§ 2251, 2252, 2252A, and 2260 and, thus, covers all production and non-production child pornography offenses.

[5] *See* 18 U.S.C. § 3583(k); *see also* United States v. Presto, 498 F.3d 415, 417–18 (6th Cir. 2007) (discussing the PROTECT Act's amendment to § 3583(k)). By contrast, offenders convicted of an obscenity offense in chapter 71 of title 18 but sentenced under the child pornography guidelines — of whom there were five such offenders in fiscal year 2010, *see* Chapter 6 at 146 n.58 — are subject to the ordinary statutory supervised release provisions in 18 U.S.C. § 3583(b) because the PROTECT Act did not affect obscenity offenses in chapter 71. *See* 18 U.S.C. § 3583(k) (not listing any obscenity offense in chapter 71 of title 18, *see* 18 U.S.C. §§ 1460 *et seq.*). The obscenity offenses in 18 U.S.C. § 1466A — which explicitly concern obscene images of "a minor engaging in sexually explicit conduct" and which have the same *imprisonment* ranges as comparable violations of 18 U.S.C. § 2252A, *see* 18 U.S.C. § 1466A(a), (b) — are not subject to the *supervised release* ranges applicable to § 2252A offenses.

[6] *See* USSG §§5D1.1(a)(1) (Imposition of a Term of Supervised Release) & 5D1.2(b) (Term of Supervised Release) (2011) (policy statement "recommend[ing]" the "statutory maximum term of supervised release" for all offenders convicted of "a sex offense").

[7] USSG §5D1.2, comment. (n.1) (defining "sex offense" to include all child pornography offenses in 18 U.S.C. §§ 2252 & 2252A); *see also* 18 U.S.C. § 3583(k). The same policy statement and definition appeared in §5D1.2(c) and application note 1 of the pre-PROTECT guidelines. *See* USSG §5D1.2(c) (2002); *see also* §5D1.2, comment. (n.1) (2002).

[8] *See* United States v. Apodaca, 641 F.3d 1077, 1085–87 (9th Cir. 2011) (Fletcher, J., concurring); *see also* United States v. C.R., 792 F. Supp. 2d 343, 519–20 (E.D.N.Y. 2011) (rejecting guideline's recommendation for a lifetime term of supervised release for a non-production offender as "too severe and inhibitory of the total rehabilitation possible while defendant is still in his early twenties").

[9] *Apodaca*, 641 F.3d at 1088 (Fletcher, J., concurring) ("The Commission defined the term 'sex offense' not by attempting to classify various types of sex offenders with respect to their relative risks of recidivism or their needs for ongoing supervision and treatment, but by adopting Congress's definition of that term. . . . As the law now stands, Congress has permitted and the Sentencing Commission has recommended a lifetime term of supervised release for every child pornography offender. . . .").

Congress's decision to require a minimum mandatory five-year term of supervision for sex offenders.[10] Following the Third Circuit, the Fifth Circuit has held that a sentencing judge in a child pornography case commits reversible error by imposing a lifetime term "'blindly and without careful consideration of the specific facts and circumstances of the case before it.'"[11]

b. Conditions of Supervision

Federal statutory and guideline provisions set forth several mandatory or discretionary conditions of supervised release applicable to sex offenders generally, including both production and non-production child pornography offenders.[12] A discussion of such conditions — including legal challenges by offenders — appears in the Commission's 2010 report, *Federal Offenders Sentenced to Supervised Release.*[13] Common conditions include psycho-sexual assessments and treatment (including the requirement of polygraph testing), outright bans or limitations on the use of computers and the Internet, and limitations on offenders' ability to be near children (including their own) without supervision.[14] Appellate courts generally have upheld such conditions as reasonable so long as they are "narrowly tailored" and are "reasonably related" to the effective supervision and rehabilitation of child pornography offenders based on specific facts in the record supporting the need for such conditions.[15]

For instance, due to the now nearly ubiquitous use of Internet-enabled computers to commit child pornography offenses, district courts often impose a condition of supervision that restricts a child pornography offender from using a computer or the Internet without the prior approval of the supervising probation officer. Circuit courts generally have upheld such restrictions, even those for a substantial period of time, if an offender did more than simply use an Internet-enabled computer to collect child pornography (either by distributing child pornography via a computer or by attempting to communicate with a minor for sexual purposes).[16] However, in cases where the record shows that an offender used a computer and the

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[10] United States v. Alvarado, 691 F.3d 592, 598 (5th Cir. 2012) ("Congress clearly contemplated that there would be instances where less than the maximum [*i.e.*, a lifetime term] would be reasonable.").

[11] *Id.* at 598 & n.2 (citing United States v. Kuchler, 285 Fed. App'x 866, 870 n.2 (3d Cir. 2008)).

[12] *See* 18 U.S.C. § 3583(d) (requiring defendants convicted of qualifying sex offenses to register as sex offenders and permitting courts to order a condition allowing warrantless searches of such offenders' property, including computers, based solely on "reasonable suspicion" of unlawful conduct or other violation of supervised release); USSG §5D1.3(d)(7) (setting forth "recommended" conditions concerning treatment of sexual disorders, limitations on computer and Internet access, and searches of defendants' property, including their computers).

[13] The discussion of sex offender conditions appears on pages 20–27 of the supervised release report, available at http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf.

[14] *See id.*

[15] *See id.*

[16] *See id.* at 21–22; s*ee, e.g.*, United States v. Albertson, 645 F.3d 191, 197–99 (3d Cir. 2012) (holding that "a complete ban on the use of a computer and internet will rarely be" reasonable, except in cases where a defendant not only committed a child pornography offense using a computer and the Internet but also used or attempted to use them to communicate with a minor in a sexual manner); United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005) (reversing broad Internet restriction where "the record is devoid of evidence that he has ever used his computer for anything beyond simply possessing child pornography").

Internet solely to collect child pornography, some courts have considered a ban unreasonable because "such a ban renders modern life — in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website — exceptionally difficult."[17]

c. Revocation of Supervised Release

The primary statute governing supervised release, 18 U.S.C. § 3583, provides that, if a sex offender (including a child pornography offender)[18] violates the conditions of supervised release by committing an enumerated sex offense (including another child pornography offense),[19] revocation of supervised release is mandatory.[20] In addition, the court must impose a mandatory minimum term of five years of imprisonment.[21] The statute's use of the term "commit" does not require the offender to be convicted of a new sex offense in order for mandatory revocation and imprisonment to occur. A court need only find by a preponderance of the evidence that the offender committed a new sex offense while on supervised release.[22]

2. *Analysis of Supervised Release Data*

Even before the PROTECT Act, courts imposed terms of supervised release in virtually all child pornography cases in which a term of imprisonment was imposed. From 1992 through 2003, in both production and non-production cases, district courts imposed terms of supervised release in more than 98 percent of cases in which a term of imprisonment was imposed. In the pre-PROTECT Act cases, when the statutory maximum term of supervised release was three years for the vast majority of child pornography offenders, over 80 percent of child pornography offenders received three-year terms every year from 1992 until 2003.

As Figure 10–1 below shows, the average terms of supervised release for child pornography offenders rose dramatically in the years following the PROTECT Act.[23]

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[17] United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003).

[18] This statutory provision applies to "a defendant required to register under the Sex Offender Registration and Notification Act [SORNA]," which necessarily includes all defendants convicted of child pornography offenses under chapter 110 of title 18, United States Code. *See infra* notes 89–99 and accompanying text.

[19] A mandatory condition of supervision for all federal offenders is that they "not commit another Federal, State, or local crime during the term of supervision . . . ." 18 U.S.C. § 3583(d). Section 3583(k) supplements this standard provision in sex offenders' cases.

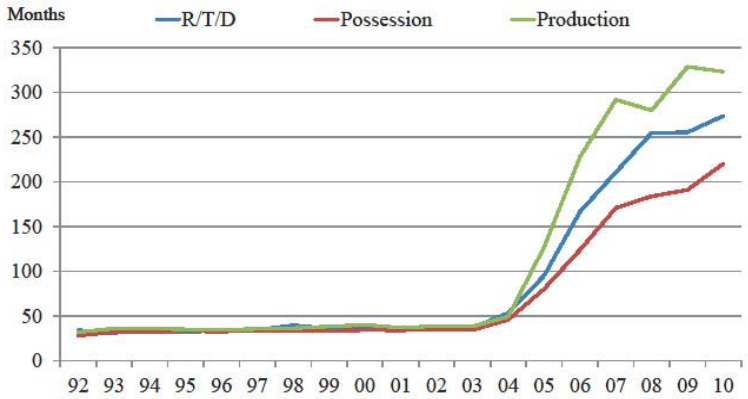
[20] 18 U.S.C. § 3583(k).

[21] *Id.*

[22] *See* United States v. Cunningham, 607 F.3d 1264, 1267–68 (11th Cir. 2010) (holding that supervised release revocation hearings are governed by the preponderance standard; further holding that revocations can be based on a district judge's finding of new criminal conduct and need not be based on a new criminal conviction); *see also* 18 U.S.C. § 3583(e)(3) (preponderance standard governs revocation hearings).

[23] Consistent with the Commission's treatment of lifetime terms in data analyses of prison sentence length, lifetime terms of supervision were treated as 470 months for purposes of computing the average term of supervision. Lifetime terms of supervised release were excluded entirely from calculation of average terms of supervised release

Figure 10-1
Child Pornography Offense Characteristics:
Mean Months of Supervised Release
Fiscal Years 1992-2010



Note: Lifetime supervision following release from prison is treated as 470 months for computation purposes.
SOURCE: U.S. Sentencing Commission, 1992-2010 Datafile, USSCFY92-10.

Table 10–1 below compares fiscal year 2010 supervised release data concerning child pornography offenders to data concerning federal offenders generally. Child pornography offenders — both production and non-production offenders — received terms of supervision in a larger percentage of cases than federal offenders generally and also received significantly longer average terms of supervision. As shown in Table 10–1, 100 percent of offenders convicted of receipt, transportation, or distribution (R/T/D) offenses or production offenses and 96.9 percent of offenders convicted of possession received terms of supervised release, compared to 82.7 percent of all federal offenders sentenced to a term of supervised release in fiscal year 2010.[24] In fiscal year 2010, the average term of supervised release imposed for defendants convicted of production was 323.0 months; the average term imposed for defendants convicted of R/T/D offenses was 273.7 months; and the average term imposed for offenders convicted of possession was 220.3 months. By comparison, the average term of supervised release for federal offenders generally in fiscal year 2010 was 42.6 months.[25]

for all offenders in the Commission's 2010 report on supervised release because only a small percentage of all federal offenders receive such terms and inclusion of lifetime terms would thus skew the analysis. *See* U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 50 (2010). In this report, however, lifetime terms of supervised release were included in the data analysis because a significant percentage of such offenders receive lifetime terms (*see* Figure 10–2, *infra*). Excluding life terms entirely from the analysis in this report would substantially underreport the actual average term of supervised release for this offense.

[24] "Possession" offenders include five offenders convicted of obscenity offenses involving sexual images of minors. Of the 874 offenders who were convicted of possession, 27 (3.1%) were not sentenced to terms of supervised release; all received sentences of probation.

[25] The data contained in Table 10–1 concern the terms *imposed* at sentencing and do not reflect the average amount of supervised release *served* by offenders. Sentencing courts can revoke or terminate terms of supervised release

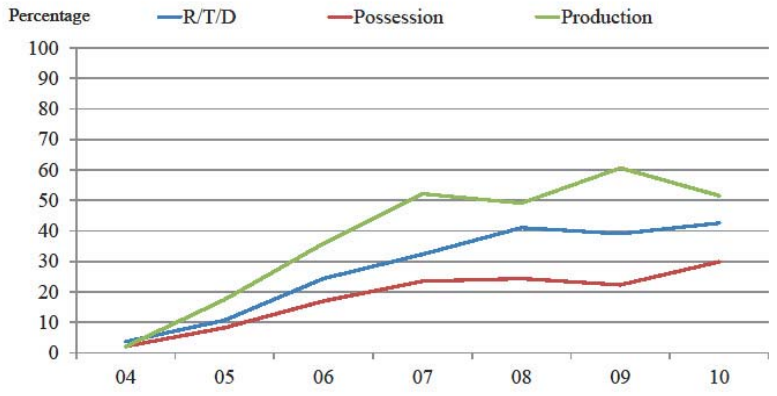
Table 10-1
Offenders Sentenced to a Term of Supervised Release
Comparison of All Child Pornography Offenders
Fiscal Year 2010

	Prison Term Imposed				Supervised Release Imposed			Average Prison (months)	Average Supervised Release (months)
	Total	N	%		N	%		Months	Months
All Offenses	83,946	74,660	88.9		68,699	81.8		50.1	42.6
Non-Production CP									
R/T/D	813	813	100.0		813	100.0		129.2	273.7
Possession	902	875	97.0		874	96.9		62.9	220.3
Production CP	207	207	100.0		207	100.0		267.1	323.0

Note: "Prison Term Imposed" includes all offenders who received prison only or prison/community confinement split sentence.
SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10.

Figure 10–2 below demonstrates the growth in the number of lifetime terms of supervised release for production and non-production offenders after the PROTECT Act was enacted.

Figure 10-2
Child Pornography Offenders
Sentenced to Lifetime Supervision
Fiscal Years 2004-2010

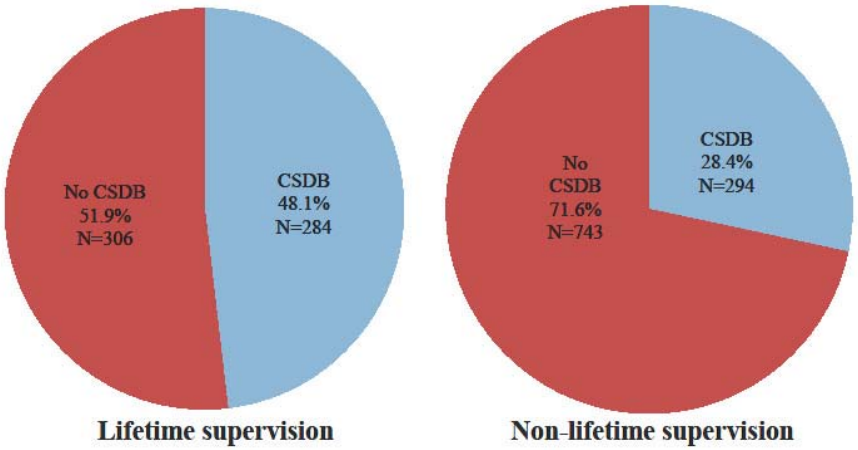


Note: Lifetime supervision following release from prison became the statutory maximum supervision term for offenses committed on or after April 30, 2003 following passage of the PROTECT Act of 2003.
SOURCE: U.S. Sentencing Commission, 2004-2010 Datafile, USSCFY04-10.

under certain circumstances, *see* 18 U.S.C. § 3583(e), so the length of the term imposed is not necessarily the same as the length of the term served. Meaningful data on the average term of supervision *served* by child pornography offenders sentenced after the PROTECT Act of 2003 are not yet available because relatively few offenders have been released and had the opportunity to serve extended terms of supervision.

Sentencing data suggest that judges who impose lifetime terms of supervision in non-production cases do so in part in response to an offender's history of criminal sexually dangerous behavior ("CSDB").[26] Fiscal year 2010 non-production cases in which offenders received a lifetime term of supervision had a significantly higher rate of CSDB than cases in which offenders received less than lifetime terms (48.1% compared to 28.4%), as shown in Figure 10–3 below.

Figure 10-3
Non-Production Offense Characteristics:
CSDB by Lifetime and Non-Lifetime Supervision
Fiscal Year 2010



SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10. Of the 590 cases, twenty-four cases excluded in which a prison term was not ordered.

B. EVALUATION AND TREATMENT OF CHILD PORNOGRAPHY OFFENDERS' SEXUAL DISORDERS

Psycho-sexual treatment is a recommended condition of supervision for all child pornography offenders.[27] Many offenders also receive treatment in federal prison before being released on supervision. This section first describes the psychological evaluation and treatment of child pornography offenders. It next specifically addresses the closely related topic of risk assessment of offenders.

[26] Criminal sexually dangerous behavior is discussed in Chapter 7.

[27] *See* USSG §5D1.3(d)(7)(A) (special condition of supervised release for sex offenders, including all child pornography offenders, requires "the defendant to participate in a program . . . for the treatment and monitoring of sex offenders").

1. *Treatment Generally*

According to many experts, the typical sex offender who presents with a sexual disorder, including pedophilia, cannot be "cured" (*i.e.*, his psychiatric disorder cannot be entirely eradicated).[28] However, according to the Center for Sex Offender Management ("CSOM"), a project funded by the United States Department of Justice, Office of Justice Programs,[29] some recent studies show that appropriate "treatment interventions . . . are associated with lower rates of recidivism — some of them very significant."[30] For that reason, "treatment is an essential component of a comprehensive sex offender management system."[31]

Experts disagree about how to measure the effectiveness of treatment programs. Debates have ensued about such issues as the metric used (recidivism versus changes in sexually deviant beliefs), the proper sample size, whether treatment alone (as opposed to treatment in conjunction

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[28] *See, e.g.*, William Marshall, *Appraising Treatment Outcomes with Sexual Offenders*, in SEXUAL OFFENDER TREATMENT 268 (W. Marshall et al., eds., 2006) (stating that sex offender "treatment [can] reduce, but unfortunately not eliminate, the number of future victims"); Belinda Brooks-Gordon, *Psychological Interventions for Treatment of Adult Sex Offenders: Treatment Can Reduce Reoffending Rates but Does not Provide a Cure*, 333 BMJ [formerly known as BRITISH MEDICAL JOURNAL] 5 (2006); U.S. DEPT. OF JUSTICE, NAT'L INSTITUTE OF CORRECTIONS, QUESTIONS AND ANSWERS ON ISSUES RELATED TO THE INCARCERATED MALE SEX OFFENDER 5–6 (Oct. 1988), (available at http://static.nicic.gov/Library/007404.pdf) (stating that "[s]ex offenders are not cured" but noting that "[s]ome, but not all, sex offenders can be treated successfully"). One possible exception to the general rule that sexual disorders cannot be cured involves rare offenders whose sexual disorders are related to a physical abnormality in their brains that can be permanently altered through medical treatment. These rare offenders do appear capable of being "cured." *See, e.g.*, David Eagleton (a professor of neuroscience at Baylor College of Medicine), *The Brain on Trial*, THE ATLANTIC (July 2011) (recounting the case of a man who, at the age of 40, first began to collect child pornography and engage in child molestation but who permanently discontinued such sexual deviancy after surgical removal of "massive tumor in his orbitofrontal cortex").

[29] The CSOM is a federally-funded private entity jointly created in 1996 by DOJ's Office of Justice Programs, the National Institute of Corrections, and the State Justice Institute. Its mission includes providing "useful, current, and accessible information" to government officials and private treatment providers who manage sex offenders. *See* "About CSOM," http://www.csom.org/about/about.html (last visited Oct. 26, 2012).

[30] CSOM, *Sex Offender Treatment in the Context of Supervision*: *Effectiveness of Sex Offender Treatment ("Review of the Research")*, http://www.csom.org/train/supervision/long/04_02_02.html (last visited Oct. 26, 2012) (discussing several studies of the effectiveness of treatment of sex offenders); *see also* U.K. MINISTRY OF JUSTICE NAT'L OFFENDER MANAGEMENT SERVICE, WHAT WORKS WITH SEX OFFENDERS? 1 (2010) ("Large-scale research indicates that sex offenders who receive treatment, in both prison and community settings, have a lower sexual reconviction rate than those who do not receive treatment."); R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis*, 36 CRIM. JUST. & BEHAV. 865 (2009) (meta-analysis of studies on the efficacy of sex offender treatment programs; finding that the unweighted mean recidivism rate for the treatment group was almost half of that for sex offenders not treated); PEGGY HEIL & KIM ENGLISH, CAL. DEP'T OF CORR. AND REHAB., PRISON SEX OFFENDER TREATMENT: RECOMMENDATIONS FOR PROGRAM IMPLEMENTATION 1 (2007) ("While the efficacy of sex offender treatment remains a debated topic, many studies show that treatment participation is correlated with lower officially recorded recidivism rates.") (citing numerous recidivism studies). Some experts believe that sex offenders who are psychopaths will not respond favorably to treatment. *See, e.g.*, Michael Seto & H.E. Barbaree, *Psychopathy, Treatment Behavior, and Sexual Offender Recidivism*, 14 J. INTERPERSONAL VIOLENCE 1235 (1999).

[31] CSOM, *The Comprehensive Approach to Sex Offender Management*, at 5 (Nov. 2008), http://www.csom.org/pubs/Comp_Approach_Brief.pdf (last visited Oct. 26, 2012).

with other factors) reduces recidivism, and what conclusions may be drawn given the low base rate of *known* — versus actual — recidivism generally.[32]

Treatment of sex offenders, including child pornography offenders, has several goals. The larger goal is preventing recidivism, including sexual recidivism (*i.e.*, the commission of a new sex offense, including a new child pornography offense). Subsidiary treatment goals include addressing criminogenic needs, reducing or eliminating distorted beliefs about sexuality, fostering acceptance of responsibility by offenders, and developing empathy for victims.[33] Experts in the field agree that effective treatment requires individualized assessment and treatment.[34]

Generally speaking, the prevailing mode of treatment for child pornography offenders does not appear to differ significantly from the treatment of other types of sex offenders, including offenders convicted solely of "contact" sex offenders. Some "[m]odifications . . . have been implemented that consider the role that the [I]nternet plays in the [child pornography] offense process."[35] In particular, effective treatment of child pornography offenders typically must address problematic Internet use such as compulsion or an offender's involvement, if any, in Internet-based sexually deviant "communities" of other offenders.[36]

In order to design appropriate treatment, clinicians typically first administer a psychosexual evaluation to determine: amenability to treatment; recommended types and intensity of treatment; level of risk for sexual and non-sexual recidivism; and level of criminal justice supervision required.[37] A complete psychosexual evaluation will typically include a

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[32] *See e.g.*, David K. Ho & Callum C. Ross, *Editorial: Cognitive Behaviour Therapy for Sex Offenders. Too Good to be True?* 22 CRIM. BEHAV. & MENTAL HEALTH 1 (2012); Kevin L. Nunes, Kelly M. Babchishin & Franca Cortoni, *Measuring Treatment Change in Sex Offenders*, 38 CRIM. JUST. & BEHAV. 157 (2011) (contending that individuals show only "modest" positive change after treatment).

[33] *See, e.g.,* CSOM, *Comprehensive Approach to Sex Offender Management*, *supra* note 31, at 5; Kevin L. Nunes, Kelly M. Babchishin & Franca Cortoni, *Measuring Treatment Change in Sex Offenders*, 38 CRIM. JUST. & BEHAV. 157 (2011); Leigh Harkins & Anthony R. Beech, *A Review of the Factors that Can Influence the Effectiveness of Sexual Offender Treatment: Risk, Need, Responsivity & Process Issues*, 12 AGGRESSION & VIOLENT BEHAV. 615, 618–19 (2007) (discussing different treatment goals including, *inter alia*, confronting and changing distorted attitudes about sexuality, promoting healthy social functioning, and preventing recidivism).

[34] *See* Harkins & Beech, *supra* note 33, at 616; Testimony of Dr. Jennifer A. McCarthy, Assistant Director and Coordinator, Sex Offender Treatment Program, New York Center for Neuropsychology, to the Commission, at 113 (Feb. 15, 2012) ("McCarthy Testimony").

[35] Prepared Statement of Dr. Jennifer McCarthy to the Commission, at 5–6 (Feb. 15, 2012) ("McCarthy Statement").

[36] *Id.* Implementation of treatment regimes tailored to child pornography offenders — called "i-SOTP" (short for "Internet Sex Offender Treatment Programs") — first occurred in the United Kingdom in 2006. *See* David Middleton, *From Research to Practice: The Development of the Internet Sex Offender Treatment Programme (i-SOTP)*, 5 IRISH PROBATION J.49 (2008). Results of a preliminary study concerning the effectiveness of the i-SOTP "appear[] to be sufficiently encouraging," although a long-term study of the effectiveness of the program will require more time to pass. David Middleton et al., *Does Treatment Work with Internet Sex Offenders? Emerging Findings from the Internet Sex Offender Treatment Program (I SOTP)*, 15 J. SEXUAL AGGRESSION 5, 17 (2009).

[37] CSOM, *Comprehensive Approach to Sex Offender Management: Clinical Assessments*, *supra* note 31, at 4–5.

clinical interview during which a thorough history is taken including the offender's sexual history (interests, behaviors, and sexual partners), the history of any physical or sexual abuse inflicted on the offender, substance abuse history, and mental health and medical history.[38] The evaluation may include a personality assessment[39] and risk assessment.[40]

One factor of particular interest in creating a treatment plan is an offender's deviant sexual attitudes, especially attitudes toward children. Cognitive distortions appear to play a significant part in offenders' interest in child pornography and also some offenders' proclivities to commit sexual contact offenses against children.[41] The clinical interview thus often will include discussion of the offender's sexual interests and beliefs regarding children. However, the evaluator often also typically will rely on non-verbal tests to determine whether an offender has pedophilic, hebephilic, or other paraphilic interests,[42] because offenders tend to minimize their behavior or deny deviant thoughts.[43] Two common such assessments are penile phallometric tests ("PPT") (which measure physical arousal to sexual stimuli) and visual response time (VRT) tests (which measure visual response to images of persons from different genders and age groups).[44]

According to experts, "[t]here is a variety of accepted treatment and behavior management programs" for sex offenders.[45] Sex offenders, including child pornography offenders, are most commonly treated with cognitive behavioral therapy (CBT),[46] often involving

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[38] McCarthy Testimony, *supra* note 34, at 109.

[39] *Id.*

[40] Risk assessment is discussed in Section B.3., *infra.*

[41] *See* Martin C. Calder, *The Internet: Potential, Problems, and Pathways to Hands-on Sexual Offending in* CHILD SEXUAL ABUSE & THE INTERNET: TACKLING THE NEW FRONTIER 2 (Martin C.. Calder ed., 2004); Ethel Quayle & Max Taylor, *Child Pornography and the Internet: Perpetuating a Cycle of Abuse*, 23 DEVIANT BEHAV. 331 (2002).

[42] McCarthy Testimony, *supra* note 34, at 109.

[43] *Id.* at 150; *see also* Theresa A. Gannon, Kirsten Keown & Devon L.L. Polaschek, *Increasing Honest Responding on Cognitive Distortions in Child Molesters: The Bogus Pipeline Revisited*, 19 SEX ABUSE 5, 5–6 (2007).

[44] The PPT will typically expose the subject to different images and measure the change in bloodflow based on the type of image. *See* FABIAN M. SALEH et al., SEX OFFENDERS: IDENTIFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES 89–118 (Oxford 2009); MANAGING ADULT SEX OFFENDERS: A CONTAINMENT APPROACH 14–3 (Kim English et al., eds. 1996); Gene Abel et al., *Classification Models of Child Molesters Utilizing the Abel Assessment for Sexual Interest*, 25 *CHILD ABUSE & NEGLECT* 703 (2001).

[45] Association for the Treatment of Sexual Abusers (ATSA), *Sex Offender Treatment for Adult Males* 1 (2008), http://atsa.com/sites/default/files/ppSOAdultMaleTx.pdf (last visited Dec. 20, 2012).

[46] Testimony of Dr. Gene A. Abel, Medical Director, Behavioral Medicine Institute, to the Commission, at 92 (Feb. 15, 2012) ("Abel Testimony"); McCarthy Testimony, *supra* note 34, at 113; *see also* COSM, *Sex Offender Specific Treatment in the Context of Supervision*, *supra* note 30 (finding that "[c]ognitive-behavioral approaches appear most promising" as a mode of sex offender treatment). A related form of treatment is referred to as "psycho-educational" therapy. Psycho-educational techniques "focus[] on increasing offenders' empathy for the victim while also teaching them to take responsibility for their sexual offenses." *See* U.S. Dept. of Justice, Office of Justice Programs (Bureau of Justice Assistance), *What Are Sex Offender Programs/Strategies?* https://www.bja.gov/evaluation/program-corrections/sops1.htm (last visited Dec. 20, 2012).

both individual and group therapy.[47] CBT combines elements of behavioral therapy, which focuses on external offender behaviors, with cognitive therapy, which focuses on internal thought processes.[48] The individualized CBT for child pornography offenders relies on, among other things, an offender's motivations for using child pornography, sexual interests, participation in an online community of offenders, and predilection for contact offenses or other sexually dangerous behavior. If a mental health provider were able to access and review the offender's previous child pornography collection or, at a minimum, a forensic report regarding the collection, the provider's ability to develop a more finely tailored program of treatment would be enhanced.[49] According to some clinical practitioners, CBT in conjunction with additional relapse prevention support, including polygraph testing (discussed further below), appears to be effective for most child pornography offenders.[50] In addition to CBT, treating psychiatrists also may prescribe medication (*i.e.,* serotonin-specific reuptake inhibitor drugs or, in some cases, anti-androgenic medication).[51]

Experts believe that the appropriate duration of treatment, including follow-up "maintenance" to prevent relapse, "depends on a variety of factors, including the program or practitioner's approach and the offender's characteristics, offense patterns, level of risk to recidivate, and community support."[52] Dr. Gene Abel, M.D., a psychiatric expert on sex offenders who testified before the Commission at its 2012 public hearing on child pornography offenses, recommended a period of treatment and follow-up "maintenance" ranging from five to ten years for the typical non-production offender.[53] For some offenders, he opined, life-time maintenance is required.[54]

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[47] *See* Michael Knapp, *Treatment of Sex Offenders* 13–5, *in* MANAGING ADULT SEX OFFENDERS: A CONTAINMENT APPROACH (Kim English et al., eds., 1996) ("Group therapy provides the best format for confronting ongoing denial [by offenders], increasing an offender's acceptance of deviance, and maximizing accountability. . . . For sex offenders, individual therapy cannot begin to match the effectiveness of group therapy.").

[48] Harvey Milkman & Kenneth Wanberg, *Cognitive-Behavioral Treatment: A Review & Discussion for Corrections Professionals,* NAT'L INST. OF CORR., at xii (2007).

[49] McCarthy Testimony, *supra* note 34, at 122–24 (testifying that, "if we have information from the [forensics] report to say this guy focused primarily on images that were depicting minors under the age of 12, that's extremely valuable information with regard to treatment"). However, according to Dr. McCarthy, treatment providers today do not typically have access to information about the nature of an offender's child pornography collection (other than a general description of the specific images for which he was convicted). *See id.* at 122–24.

[50] *See, e.g.*, Abel, Testimony, *supra* note 46, at 92–93 ("How effective is that treatment? It's quite effective. Treating adults, 93 to 95 percent success if [official supervision] is involved, and if polygraphs are done every six months, and if cognitive behavioral treatment is used.").

[51] D.M. Greenberg & J.M.W. Bradford, *Treatment of the Paraphilic Disorders: A Review of the Role of the Selective Serotonin Reuptake Inhibitors*, 9 SEXUAL ABUSE: A J. OF RES. AND TREATMENT 349 (1997); D.J. Stein et al., *Serotonergic Medications for Sexual Obsessions, Sexual Additions and Paraphilias*, 53 J. CLINICAL PSYCHIATRY 267 (1992); Barry M. Maletzky et al., *The Oregon Depo-Provera Program: A Five-Year Follow-Up*, 18 SEXUAL ABUSE: A J. OF RES. AND TREATMENT 303 (2006); *see also* McCarthy Testimony, *supra* note 34, at 116 (testifying that occasionally "psychopharmacology may be used" in treatment but is not common "because there's a lot of side effects to this medication").

[52] ATSA, *Sex Offender Treatment for Adult Males*, *supra* note 45, at 1.

[53] *See* Abel Testimony, *supra* note 46, at 136–37 (recommending at least five to ten years of treatment, including "maintenance," for the typical child pornography offender). Dr. Abel opined that CBT usually is successfully

Polygraph testing of sex offenders is widely accepted by experts as a critically important corollary to effective treatment. In this context, polygraph testing is not intended to develop incriminating evidence, but instead is used as a "truth facilitator" for sex offenders to accomplish the goals of treatment.[55] "Like urinalysis testing with drug offenders, the polygraph examination is a tool to gauge [a sex] offender's progress and compliance with treatment and supervision expectations."[56] According to senior federal probation officers with expertise in supervising sex offenders: "Polygraph exams may be used to aid supervision and treatment, and officers may discuss the polygraph results with the treatment provider and the offender. Frequently, the offender will admit to violations [of the conditions of supervision] before the polygraph is administered."[57] Use of polygraphs in sex offender treatment has been recommended by the Association for the Treatment of Sexual Abusers.[58]

2. *Treatment in Prison and on Supervision*

Treatment of child pornography offenders may occur while they are in federal prison and, as noted above, is a standard condition of their supervision (on probation or supervised release).

a. Treatment While in Prison

The Federal Bureau of Prisons ("BOP") has comprehensive sex offender management strategy, including for offenders serving sentences for child pornography offenses. According to the BOP:

> With the passage of the Walsh Act [in 2006[59]], the BOP has further expanded its monitoring, evaluation, and treatment programs for sex offenders. As required by the Walsh Act, a specialized sex offender program is offered in each BOP region. Inmates with a history of sexual offenses may be designated to the Sex Offender Management Program (SOMP), at one of six institutions: FMC Devens; United States

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implemented with "120 contacts" between an offender and treatment provider. *Id.* at 136. He further opined that "maintenance [should be] really long, and the maintenance is just as important as the treatment . . . . [W]hatever treatment you have, it doesn't count unless it's maintained over time." *Id.*

[54] *See id.* at 137.

[55] Jami Krueger, *The Use of the Polygraph in Sex Offender Management*, RESEARCH BULLETIN 3, at 12 (N.Y. State Div. of Probation and Correctional Alternatives), http://nicic.gov/Library/023570 (last visited Dec. 20, 2012); *see also* Kim English et al., *The Value of Polygraph Testing in Sex Offender Management: Research Report Submitted to the National Institute of Justice* (December 2000), https://www.ncjrs.gov/pdffiles1/nij/grants/199673.pdf; *see also* McCarthy Testimony, *supra* note 34, at 117–22 (Feb. 15, 2012) (testifying about the effective use of polygraphs in treatment); Abel Testimony, *supra* note 46, at 132 (opining that, while "polygraphs are not perfect," they are "exceedingly useful" in the treatment of such offenders because the typical offender in treatment tends to be dishonest about his sexual preferences and/or sexual history with children).

[56] HEIL & ENGLISH, *supra* note 30, at 30.

[57] Adam Graves & Mike Jones, *The Containment Model and its Impact on Sex Offender Policy*, 36 NEWS & VIEWS [newsletter of U.S. Probation and Pretrial System] 8 (Aug. 1, 2011).

[58] English et al., supra note 47, at 15–3.

[59] The Adam Walsh Act is discussed at *infra* note 100 and accompanying text.

> Penitentiary (USP) Marion; USP Tucson; Federal Correctional Institution (FCI) Seagoville; FCI Petersburg; and FCI Marianna. Assignment is made in accordance with the security level of the individual. An inmate amenable to treatment is offered participation in the Sex Offender Treatment Program (SOTP-NR) offered at all SOMP institutions. SOTP-NR offers inmates individualized nonresidential treatment, ordinarily involving six to eight hours of programming per week, over a six month period. All participation in non-residential treatment services is voluntary.[60]

BOP also has a "residential" treatment program for sex offenders (including child pornography offenders):

> Inmates at any BOP institution may choose to volunteer for an intensive residential sex offender treatment program (SOTP-R) offered at FMC Devens. The BOP reviews each application for the SOTP-R, considering such factors as the seriousness of the inmate's sexual offending history, the inmate's disciplinary record, and the amount of time remaining on the inmate's sentence. The SOTP-R is a therapeutic community, housed in a 112-bed specialized unit. The program employs a wide range of cognitive-behavioral and relapse prevention techniques to help the sex offender manage his sexual deviance both within the institution and in preparation for release. Ordinarily, participants complete the program in 12 to 18 months.[61]

b. The "Containment Model": Treatment of Offenders on Supervision

It is widely accepted among treatment providers that "prison treatment will be more effective if it is followed by community-based containment services, including supervision, treatment, and polygraph testing."[62] Like many of their counterparts in the state parole and probation systems, federal probation officers currently implement what is known as the "containment model" of supervision of sex offenders, including child pornography offenders, on federal probation or supervised release.[63] The containment model is based on the close cooperation of the supervising officer, a mental health treatment provider, and a polygraph

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[60] *See* BOP, *Legal Resource Guide to the Federal Bureau of Prisons* 28–29 (2008), http://www.bop.gov/news/PDFs/legal_guide.pdf. (last visited Dec. 12, 2012).

[61] *Id.* at 29; *see also* Kathleen Horvatits, *Sex Offender Treatment Programs at the Federal Bureau of Prisons* 36 NEWS & VIEWS [newsletter of U.S. Probation and Pretrial System] 4 (Aug. 1, 2011).

[62] HEIL & ENGLISH, *supra* note 30, at 1.

[63] *See* Graves & Jones, *supra* note 57, at 8 ("In the supervision of sex offenders, our system has relied on [the book,] *Managing Adult Sex Offenders: A Containment Approach* [(Kim English et al., eds., 1996)]. Since the book's release in 1996, it has steadily become respected system-wide as the blueprint for the community supervision of sex offenders.").

examiner.[64] Kim English, one of the leading developers of the containment model, has described it in the following manner:

> The containment approach operates in the context of multi-agency collaboration, explicit policies, and consistent practices that combine case evaluation and risk assessment, sex offender treatment, and intense community surveillance, all designed specifically to maximize public safety. . . . There are three anchors in containment-focused risk management: (1) supervision, (2) therapy, and (3) polygraph examinations. Each benefits from the distinct function of the others. The criminal justice supervision activity is informed and improved by the information obtained in sex-offender-specific therapy, and therapy is informed and improved by the information obtained during well-conducted post-conviction polygraph examinations. Each anchor must be perceived by the offender as separate yet aligned with the other.[65]

According to the Center for Sex Offender Management, "[a]gencies that have moved to a Containment Approach are hopeful that the combination of these three resources will prove significantly effective in reducing re-offense rates."[66] The CSOM also has noted "promising results" of a recent study of the efficacy of sex offender treatment in the specific context of the containment model.[67] It is widely accepted that the containment model has become a "best practice" to be implemented in supervising sex offenders in both the federal system and many state systems.[68]

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[64] *Id.*; *see also* MANAGING ADULT SEX OFFENDERS: A CONTAINMENT APPROACH, *supra* note 47, at 2–5–2–6, 2–10–2–12 (discussing the "containment approach," which "seeks to hold sex offenders accountable through the combined use of both the offenders' internal controls and external controls through criminal justice control measures, and the use of the polygraph to monitor internal controls and compliance with external controls").

[65] Kim English, *The Containment Approach to Managing Sex Offenders,* 34 SETON HALL L. REV. 1255, 1257, 1262 (2004).

[66] CSOM, *Sex Offender Treatment in the Context of Supervision*: *Effectiveness of Sex Offender Treatment*, *supra* note 30.

[67] *Id.*; *see also* SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 542 (Laws & O'Donohue eds., 2d ed. 2008) (likewise noting "promising results" from studies of the effectiveness of psycho-sexual treatment in the specific context of the containment model).

[68] *See* Graves & Jones, *supra* note 57, at 8 (noting that, since the mid-1990s, the containment model "has steadily become respected system-wide as the blueprint for the community supervision of sex offenders"); Roger Pimentel & Jon Muller, *The Containment Approach to Managing Defendants Charged With Sex Offenses*, 74 FED. PROB. 24, 24 (2010) ("The containment approach . . . is an accepted, effective way to manage sexual offenders, based on empirical data and theoretical concepts consistent with the best available information from the field of community corrections."); *see also* Kevin Walkow, *Chapter 219: Chelsea's Law*, 42 MCGEORGE L. REV. 656, 671 (2011) ("The Containment Model is considered the best practice in sex offender management."). Similarly, a representative of the federal defender community, who testified before the Commission in February 2012, opined that child pornography offenders "can be treated through this containment model." Testimony of Deirdre von Dornum, Assistant Federal Defender, Federal Defenders of New York, to the Commission, at 388 (on behalf of federal and community defenders) (Feb. 15, 2012).

Although child pornography offenders make up a small percentage of offenders under federal supervision,[69] their supervision requires "extraordinary" resources,[70] and "[p]robably no other offender population offers management challenges in the way that sex offenders do."[71] Success in implementing the containment model thus depends on adequate resources and proper training of the professionals who implement it.[72]

3. *Risk Assessments of Child Pornography Offenders*

A threshold issue in approaching individualized treatment and supervision of a sex offender is assessing a particular offender's risk for sexual recidivism. Because a significant percentage of child pornography offenders either have a history of criminal sexually dangerous behavior[73] and/or are pedophiles,[74] the need to assess their risk of engaging in sexually dangerous behavior is critical. Mental health experts who treat sex offenders generally agree that an actuarial risk assessment of a sex offender, particularly when used in conjunction with a treatment provider's clinical assessment, is a better means of predicting sexual recidivism than a provider's clinical judgment alone.[75] An actuarial risk assessment, which uses a validated "instrument" such as the Static-99,[76] "is based on the presence or absence of a limited number of pre-specified factors" associated with recidivism.[77] However, there is some debate about the

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[69] As discussed in Chapters 6 and 9, in fiscal year 2010, non-production child pornography offenders were 2.0% of federal offenders sentenced and production offenders were .025% of all federal offenders sentenced. *See* Chapter 6 at 126 Chapter 9 at 247.

[70] Michelle Spidell & Trent Cornish, *Introduction to the Special Issue on Supervision of Sex Offenders and Location Monitoring in the Federal Probation and Pretrial Services System*, 74 FED. PROB. 2, 2 (Sept. 2010).

[71] CTR. FOR SEX OFFENDER MGMT. (CSOM), ENHANCING THE MANAGEMENT OF ADULT AND JUVENILE SEX OFFENDERS: A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS 56 (2007) ("CSOM HANDBOOK").

[72] *See id.* at 9–13.

[73] *See* Chapter 7 at 181 (approximately one-third of all federal non-production offenders in fiscal year 2010 had histories of criminal sexually dangerous behavior).

[74] *See* Chapter 4 at 75 (noting that some experts believe that a majority of child pornography offenders are pedophiles).

[75] *See, e.g.*, Dennis Doren, *Recidivism Risk Assessments: Making Sense of Controversies*, *in* SEXUAL OFFENDER TREATMENT 3 (W. Marshall et al., eds., 2006). Several different risk assessments instruments are used by treatment providers. *See* R. Karl Hanson, *Risk Assessment, ATSA Information Package* (Association for Treatment of Sexual Abusers), 2–4 (2000), http://www.atsa.com/sites/default/files/InfoPack-Risk.pdf (last visited Dec. 20, 2012) (discussing the different instruments); Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility, and Accountability*, 40 AMER. CRIM. L. REV. 1443 (2003) (same).

[76] *See* Static99 Clearinghouse "Overview," http://www.static99.org (last visited Dec. 20, 2012) (describing the Static-99 risk assessment instrument).

[77] Douglas Mossman et al., *Risky Business Versus Overt Acts: What Relevance Do "Actuarial," Probabilistic Risk Assessments Have For Judicial Decisions on Involuntary Psychiatric Hospitalization*, 11 HOU. J. HEALTH & L. POL'Y 365 (2012) ("Over the past two decades, for example, several teams of psychologists have developed 'actuarial risk assessment instruments' . . . to aid in quantifying the level of risk — that is, the probability — that an evaluee will engage in certain kinds of [illegal] behavior during specified future periods of time. These instruments get the name 'actuarial' because they implement a judgment process similar to methods used by insurance companies to assess probabilities of certain events (*e.g.*, deaths) and to make decisions about premiums (*e.g.*, for life insurance). In both cases, an actuarial judgment of risk is based on the presence or absence of a limited number of

predictive value of such assessments for different subgroups of sex offenders, in particular those who have no known history of committing sexual "contact" offenses.[78] A child pornography offender's risk of committing contact sex offenses generally can be assessed using a validated risk assessment instrument where the offender has a history of committing one or more contact sex offenses.[79] Social science research on risk assessments applicable to child pornography offenders with no known history of CSDB "is just beginning to emerge."[80] Currently, there is no validated risk assessment instrument applicable to such offenders — with respect to both future CSDB (in particular, sexual contact offenses) and subsequent non-production child pornography offending.[81]

Emerging research has focused on the "two major dimensions of risk" — sexual deviance and antisociality[82] — for sex offenders generally and child pornography offenders specifically. Such research, which is nascent, has suggested certain specific factors that, particularly in combination, may be relevant to predicting sexual recidivism by child pornography offenders.[83] Because existing research on the predictive value of these factors, whether alone or in

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pre-specified factors with known, empirically established relationships to an outcome. Although the scope and implementation styles [of such assessments] vary, they generally direct mental health professionals to gather information about a specific set of 'risk factors' . . . The evaluator then assigns numerical values to these factors according to some preset formula to produce an estimate of risk — a numerical probability . . . .").

[78] *See* Loretta J. Stalans, Robyn Hacker & Mary E. Talbot, *Comparing Nonviolent, Other-Violent & Domestic Batterer Sex Offenders: Predictive Accuracy of Rish Assessments on Sexual* Recidivism, 37 CRIM. JUST. & BEHAV. 613, 613 (2010); Martin Rettenberger et al*., Prospective Actuarial Risk Assessment: A Comparison of Five Risk Assessment Instruments in Different Sexual Offender Subtypes*, 54 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 169, 170 (2010).

[79] *See* Angela W. Eke & Michael C. Seto, *Risk Assessment of Child Pornography Offenders*, at 163, INTERNET CHILD PORNOGRAPHY: UNDERSTANDING AND PREVENTING ON-LINE CHILD ABUSE (K. Ribisl & E. Quayle eds., 2012) ("Well-validated risk measures are already available for child pornography suspects who have a known history of contact sexual offending."); Kelly M. Babchishin et al., *The Characteristics of Online Sex Offenders: A Meta-Analysis*, 23 SEXUAL ABUSE 92, 94 (2011) ("For online offenders who already have a known contact sex offense [history], current risk assessment . . . would be applicable."); *but cf.* United States v. C.R., 792 F. Supp. 2d 343, 459–60 (E.D.N.Y. 2011) (crediting an expert witness who testified that STATIC-99, a risk assessment instrument for offenders who committed "contact" sex offenses, was not appropriately used on an offender who was convicted of a child pornography offense but whose only known "contact" sex offense was proved by a "self-report" by the offender rather than by a prior conviction).

[80] Eke & Seto, *supra* note 79, at 155; *see also* Jody Osborn et al., *The Use of Actuarial Risk Assessment Measures with UK Internet Child Pornography Offenders*, 2 J. OF AGGRESSION, CONFLICT, & PEACE RES. 16 (2010).

[81] Eke & Seto, *supra* note 79, at 155; *see also* Abel Testimony, *supra* note 46, at 107 (testifying that risk assessment instruments for child pornography offenders with no contact offense history currently do not exist but may be developed in the future).

[82] Eke & Seto, *supra* note 79, at 153.

[83] *Id.* at 156, 160 (noting several such factors: (1) an offender's general criminal history and, in particular, prior commission of a violent or sexual offense; (2) an offender's prior failure on judicial supervision; (3) an offender's youthful age at the time of his first arrest (for any offense); (4) an offender's history of substance abuse; (5) an offender's low education level; (6) an offender's admitted sexual interest in children; (7) an offender's possession of child pornography depicting prepubescent children; and (8) the prevalence of male victims portrayed in the child pornography possessed by the offender).

combination, is extremely limited, caution should be exercised in using such specific factors to predict CSDB (including the commission of new child pornography offenses), particularly when such factors are considered in isolation. For instance, the Commission's special coding project of fiscal year 2010 non-production cases found that offenders with a history of criminal sexually dangerous behavior and offenders with no such history had virtually identical prevalence rates of substance abuse, even though this is one of the factors cited as relevant to predicting sexual recidivism.[84]

Some researchers have concluded that the single most significant factor associated with criminal sexually dangerous behavior committed by child pornography offenders (in particular, their commission of sexual contact offenses) is their degree of antisociality, as measured on an antisocial behavior scale.[85] This recent research concerning child pornography offenders is consistent with earlier research that concluded that antisociality, when coupled with sexual deviance, is a strong predictor of sexual recidivism among sex offenders generally.[86] Because antisociality is typically manifested during an offender's childhood[87] and further because the typical PSR does not contain extensive information about criminal and other antisocial acts committed by offenders before the age of majority,[88] the Commission's special coding project of child pornography cases was unable to specifically examine antisociality among offenders.

C. SEX OFFENDER REGISTRATION AND CIVIL COMMITMENT ISSUES FACING CHILD PORNOGRAPHY OFFENDERS

All offenders convicted of a federal child pornography offense are now subject to sex offender registration laws. In addition, a small percentage of federal child pornography offenders may face civil commitment after serving their prison sentences. This section discusses those two post-conviction issues.

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[84] *See* Chapter 7 at 197 n.93.

[85] *See* Austin F. Lee et al., *Predicting Hands-On Child Sexual Offenses Among Possessors of Internet Child Pornography*, 18 PSYCH., PUB. POL'Y, AND L. 644 (2012). In their study, the researchers asked offenders various questions related to antisocial behavior, such as an offender's history of committing violent offenses, childhood bullying behavior, and misconduct resulting in expulsion from school. *See id.* Assessing antisociality often requires knowledge about an offender's youth (in particular, whether he engaged in antisocial acts before the age of 15 years old). *See* AMERICAN PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, TEXT REVISIONS (DSM-IV-TR) 645–650 (4th ed. 2000) (requiring, for a diagnosis of antisocial personality disorder, that "[t]here is evidence of [antisociality] before [the] age [of] 15 years").

[86] *See* R.K. Hanson & K. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. OF CONSULTING AND CLINICAL PSYCHOL. 1154 (2005) (meta-analysis of 82 different studies involving 29,540 sex offenders from several different countries, including the U.S.; primary findings were that deviant sexual interests and antisocial orientation were primary predictors of sexual recidivism).

[87] *See* DSM-IV-TR, *supra* note 85, at 645–50.

[88] *Cf.* USSG §4A1.2(d) (limiting consideration of offenses committed prior to age 18 for purposes of determining an offender's criminal history category).

1. *Sex Offender Registration*

A standard condition of supervised release for federal offenders convicted of child pornography offenses is the requirement that they comply with any applicable sex offender registration laws.[89] In 2006, the Sex Offender Registration and Notification Act ("SORNA") established a new federal sex offender registration program for the states, the District of Columbia, federal territories, and Indian reservations to adopt minimum standards for registration.[90] Under SORNA, a sex offender — including a child pornography offender — is required to register and maintain current information in each jurisdiction in which he is convicted, employed, resides, or attends school, and also report on a periodic basis to the local authorities responsible for monitoring registered sex offenders.[91] The Act established a three-tiered system for the duration of the registration requirement based on the seriousness of the sex offense giving rise to the requirement to register.[92] Offenders convicted of production or distribution of child pornography are "Tier II" offenders,[93] while offenders convicted of receipt or possession of child pornography are "Tier I" offenders.[94] SORNA also created a new federal offense for failing to register as a sex offender as required by the Act, with a statutory maximum of ten years of imprisonment.[95] In fiscal year 2011, 364 offenders were sentenced for a criminal violation of SORNA.[96]

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[89] *See* 18 U.S.C. § 3583(d); USSG §5D1.3(a)(7).

[90] Adam Walsh Child Protection and Safety Act, Pub. L. No. 109–248, 120 Stat. 587 (2006).

[91] 42 U.S.C. § 16901 et seq. Offenders must report at different intervals (ranging from every three months to once each year) depending on the severity of their sex offense history. When they report, they are required to update basic information (such as their addresses) and allow the authorities to take a photograph of them. *See* U.S. DEP'T OF JUST., NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION (2008) (75 Fed. Reg. 38030).

[92] *See* 42 U.S.C. § 16911. A "Tier I sex offender" is defined as "a sex offender other than a Tier II or Tier III sex offender" and is required to keep the registration current for 15 years. 42 U.S.C. § 16911(2) & 16915(a)(1). A "Tier II sex offender" is defined as a "sex offender other than a Tier III sex offender whose offense is punishable by imprisonment for more than 1 year" and "is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor: sex trafficking [18 U.S.C. § 1591]; coercion and enticement [Section 2422(b)]; transportation with the intent to engage in criminal sexual activity [Section 2423(a)]; abusive sexual contact [Section 2244]; or involves the use of a minor, solicitation of a minor, or production or distribution of child pornography; or occurs after the offender becomes a Tier I offender." 42 U.S.C. § 16911(3). A Tier II sex offender is required to keep the registration current for 25 years. 42 U.S.C. § 16915(a)(2). A "Tier III sex offender" is defined as a "sex offender whose offense is punishable by imprisonment for more than 1 year" and "is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: aggravated sexual abuse or sexual abuse [Sections 2241, 2242]; or abusive sexual contact [Section 2244] against a minor who had not attained the age of 13 years; involves a kidnapping of a minor [. . . .] or; occurs after the offender become a Tier II offender." 42 U.S.C. § 16911(4). A Tier III sex offender is required to keep the registration current for life. 42 U.S.C. § 16915(a)(3).

[93] *See* 42 U.S.C. § 16911(3).

[94] *See* 42 U.S.C. § 16911(2) & (5)(A)(iii); *see also* NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION, *supra* note 91, 75 Fed. Reg. at 38047.

[95] 18 U.S.C. § 2250.

[96] *See* U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 79 (2011) (Table 28) (noting number of offenders sentenced under USSG §2A3.5).

SORNA further provides that, in federal criminal prosecutions, "[t]he court shall order, as an explicit condition of [federal] supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act."[97] The sentencing guidelines accordingly provide as a mandatory condition of supervised release that all sex offenders register as required under SORNA.[98]

According to the United States Court of Appeals for the Fifth Circuit, the registration requirement for sex offenders is not a sufficient substitute for the imposition of supervised release because the requirement to register, while mandating that offenders periodically report and provide the authorities with certain basic information, does not provide either a rehabilitative component or intensive monitoring of offenders.[99]

2. *Civil Commitment*

Federal sex offenders, including offenders convicted of child pornography offenses, are subject to the possibility of an indefinite civil commitment beyond the conclusion of their criminal sentences if they are determined by courts to be sexually dangerous persons.[100] Any federal offender can be certified as sexually dangerous by the Attorney General or the Director of the Bureau of Prisons ("BOP"). Once the person has been certified, his release is stayed until a court hearing is conducted to determine whether he is a sexually dangerous person.[101] If the court determines that the offender is a sexually dangerous person, the offender is committed to the custody of the Attorney General[102] until he is no longer considered sexually dangerous or

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[97] 18 U.S.C. § 3583(d).

[98] USSG §5D1.3(a)(7). "Sex offense" under this guideline includes any offense in chapter 110 of title 18 of the United States Code, save a "recordkeeping offense." *See* USSG §5D1.2, comment. (n.1). *See also* United States v. Kerr, 472 F.3d 517 (8th Cir. 2006) (holding that condition of supervised release requiring registration as a sex offender was warranted even though the offender, convicted of possession and distribution of child pornography, was not a child molester).

[99] United States v. Armendariz, 451 F.3d 352, 361 (5th Cir. 2006) (discussing a state sex offender registration program in place prior to SORNA, and finding that "without federal supervised release, the sentence provides no mechanism to ensure that [the offender] will receive the supervision he needs upon his release from prison to prevent the urge to recidivate and to address the psychological component of the crime . . ." and further citing congressional intent in allowing lifetime supervised release for some sex offenses "in response to the same concerns regarding the offender's potential for recidivism and need for counseling") (citing H.R. Rep. No. 108–66, at 49–50 (2003); *but cf.* United States v. C.R., 792 F. Supp. 2d 343, 519–520 (E.D.N.Y. 2011) (sentencing child pornography offender below the recommended maximum lifetime term of supervised release because it was considered "too severe and inhibitory of the total rehabilitation possible while [the offender] is still in his early twenties" and observing that the offender would, "in any event, be subject to long-term supervision under the state and federal sex offender registration and notification laws").

[100] The Adam Walsh Child Safety and Protection Act of 2006, Pub. L. No. 109–248, § 302(4), 120 Stat. 587 (codified at 18 U.S.C. § 4248). Any offender in the custody of the BOP, committed to the custody of the Attorney General, or against whom criminal charges have been dismissed because of mental conditions can be certified by the Attorney General or the Director of BOP as a "sexually dangerous person" if certain conditions are met. *See generally* United States v. Comstock, 130 S. Ct. 1949, 1954–55 (2011) (discussing the Adam Walsh Act's civil commitment procedures).

[101] 18 U.S.C. § 4248(a).

[102] 18 U.S.C. § 4248(d).

will not be sexually dangerous to others if released "under a prescribed regimen of medical, psychiatric, or psychological care or treatment."[103]

To meet its burden of establishing that an offender is a sexually dangerous person,[104] the government must prove by clear and convincing evidence that the offender: (1) engaged in or attempted to engage in sexually violent conduct or child molestation at some point in the past; (2) suffers from a serious mental illness, abnormality, or disorder; and, as a result, (3) would have serious difficulty in refraining from sexually violent conduct or child molestation if he were to be released.[105] The Act does not require a prior conviction for a "contact" child molestation offense and, consequently, some convicted child pornography offenders have been civilly committed based on evidence satisfying the three prongs of the Act.[106]

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[103] 18 U.S.C. § 4248(d)(2).

[104] A "sexually dangerous person" is defined as "a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." "Sexually dangerous to others" is further defined to mean that "the person suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty refraining from sexually violent conduct or child molestation if released." 18 U.S.C. § 4247(a)(5), (a)(6).

[105] 18 U.S.C. §§ 4247(a)(5)–(6) & 4248. BOP regulations provide: "In determining whether a person will have 'serious difficulty in refraining from sexually violent conduct or child molestation if released,' [BOP] mental health professionals may consider, but are not limited to, evidence: (a) Of the person's repeated contact, or attempted contact, with one or more victims of sexually violent conduct or child molestation; (b) Of the person's denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging or attempting to engage in sexually violent conduct or child molestation; (c) Established through interviewing and testing of the person or through other risk assessment tools that are relied upon by mental health professionals; (d) Established by forensic indicators of inability to control conduct, such as: (1) Offending while under supervision; (2) Engaging in offense(s) when likely to get caught; (3) Statement(s) of intent to re-offend; or (4) Admission of inability to control behavior; or (e) Indicating successful completion of, or failure to successfully complete, a sex offender treatment program." 28 CFR § 549.95.

[106] *See, e.g.*, *Comstock* 130 S. Ct. at 1955 (noting three offenders in that appeal, whom the Attorney General had moved to civilly commit under the Act after they had served their prison sentences, were originally in the BOP's custody based on convictions for non-production child pornography offenses).

An issue that has arisen in Adam Walsh Act litigation is whether a federal inmate's commission of a non-production child pornography offense by itself constitutes "child molestation" under the Act. Although the statute does not provide a definition of "child molestation," in 2008, the BOP established regulations that state "child molestation" is "any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years." 28 C.F.R. §§ 549.92 and 549.93. The BOP's definition — which equates all types of "sexual exploitation" of children with "child molestation" — is broad enough to encompass many types of non-contact sex offenses against children, including child pornography offenses. To date, no court has deemed an inmate's prior commission of a non-production child pornography offense — without evidence that the offender also engaged in some type of sexually dangerous behavior — to be "child molestation" under the Adam Walsh Act. Some courts, however, have held that an offender's child pornography offense conduct, when considered together with sexually dangerous behavior, is relevant to the determination of whether he would have serious difficulty in refraining from sexually violent conduct or child molestation if he were to be released. *See, e.g.*, United States v. Volungus, No. 07-12060, 2012 WL 1066396, at *10 (D. Mass. Mar. 8, 2012) ("[W]hile this case stands apart from others where respondents have had an undeniable history of [contact] offending, proof of other 'hands-on' sexual contact with minors is not a *sine qua non* of the government's case for commitment, though it obviously has significant evidentiary value where it is available. . . . Volungus has not been just a passive consumer of child pornography. Even in the viewing and downloading of internet pornography, he has been obsessively active. . . . More importantly, Volungus has participated in chat rooms . . . to meet other participants who were, or who he wanted to

D. CONCLUSION

- Before the PROTECT Act of 2003, the vast majority of child pornography offenders sentenced to imprisonment received three-year terms of supervised release, the statutory maximum term then in effect for all child pornography offenders without predicate convictions for sex offenses. After the PROTECT Act, all child pornography offenders are subject to a statutory mandatory minimum term of five years of supervised release and a statutory maximum term of lifetime supervision. In fiscal year 2010, average terms of supervised release were 323.0 months for production offenders, 273.7 months for R/T/D offenders, and 220.3 for possession offenders.

- The sentencing guideline provision concerning supervised release for sex offenders, including child pornography offenders, recommends the "statutory maximum" term of supervised release for all such offenders.[107] Because the PROTECT Act increased the statutory maximum term of supervision from three years for most child pornography offenders to a lifetime term for all offenders convicted of any offense in 18 U.S.C. §§ 2252 & 2252A, the guideline effectively recommends a lifetime term of supervision for all child pornography offenders. Judicial critics of this provision have contended that the guideline's recommendation sweeps too broadly by failing to require judges to assess the specific risks posed by particular offenders and their corresponding need for a lifetime term. The Commission intends to study whether the guideline should be amended in response to this criticism.

- Standard conditions of supervision include psycho-sexual treatment. Emerging research has shown that sex offender treatment using commonly accepted treatment modalities such as cognitive-behavioral therapy is generally effective in reducing recidivism, particularly if implemented as part of the containment model. The containment model involves close cooperation between the supervising officer, the treatment provider, and a polygraph examiner.

- Actuarial risk assessments of sex offenders have become a standard part of supervision and treatment. Validated assessment instruments currently exist for sex offenders with a history of "contact" sex offenses but have not yet been developed for child pornography offenders with no known history of contact offenses. Researchers are currently seeking to develop such an actuarial instrument. An offender's degree of sexual deviance and antisociality appear to be the two general factors that are most associated with sexual recidivism.

- Once child pornography offenders finish their federal prison sentences, they are subject to sex offender registration laws (the violation of which is a federal

believe were, minor females . . . While these do not qualify literally as 'hands-on' encounters, they were nonetheless affirmative encounters, a step beyond passive consumption.").

[107] USSG §5D1.2(b).

offense) and the possibility of civil commitment if an offender is deemed to be a serious risk of engaging in sexually violent behavior or child molestation in the future.

Chapter 11

RECIDIVISM BY CHILD PORNOGRAPHY OFFENDERS

A. INTRODUCTION

One of the primary issues facing sentencing judges and policy-makers regarding federal child pornography offenders is the extent to which offenders sentenced under the non-production guidelines recidivate — and, in particular, engage in new sex offenses ("sexual recidivism") — after reentering the community.[1] The conventional assumption is that the rate of recidivism (in particular, sexual recidivism) by federal child pornography offenders is high.[2] As discussed below in this chapter, the Commission's study of known recidivism by child pornography offenders suggests that the rate of known recidivism (in particular, sexual recidivism) may not be as high as commonly believed.

Most existing studies of recidivism either involved an insufficient number of subjects[3] or focused on offenders sentenced outside the United States.[4] One exception is an as yet unpublished study of federal child pornography offenders by researchers from the Federal Bureau of Prisons ("BOP"), which is discussed below. In order to supplement the existing research on recidivism and focus on a large number of federal child pornography offenders, the Commission conducted a recidivism study of federal non-production offenders sentenced during fiscal years 1999 and 2000.[5]

The Commission selected federal non-production offenders sentenced in fiscal years 1999 and 2000 to account for and balance two primary research requirements: (1) the need to provide for a minimum two-year follow-up period during which the vast majority of a specific

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[1] *See, e.g.*, United States v. Cunningham, 669 F.3d 723, 728 (6th Cir. 2012) ("With respect to Defendant's risk of recidivism, the [sentencing] court expressed concern regarding studies demonstrating an increased level of recidivism among child sex offenders who viewed child pornography . . . ."); United States v. Pugh, 515 F.3d 1179, 1199–1200 (11th Cir. 2008) (noting that the legislative history of 18 U.S.C. § 3583(k), which increased the statutory maximum term of supervised release to a lifetime term for sex offenders, including all child pornography offenders, was in response to Congress' concern about the "high rate of recidivism" by such offenders).

[2] *See, e.g.*, *Conference Report on S.151, PROTECT Act of 2003*, 149 CONG. REC. H2950–01, H2966 (daily ed. Apr. 9, 2003) ("Recidivism is a huge problem in sexual exploitation cases.").

[3] *See, e.g.*, Richard Wollert et al., *Federal Internet Child Pornography Offenders — Limited Offense Histories and Low Recidivism Rates*, *in* VII THE SEX OFFENDER 2–1 (Barbara K. Schwartz ed., 2011) (study of 72 federal child pornography offenders in the United States).

[4] *See, e.g.*, Angela W. Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders: An Extended Prospective Follow-up Study*, 35 LAW & HUM. BEHAV. 466 (2011) (recidivism study of Canadian child pornography offenders). That study is addressed *infra* at 306-07.

[5] Recidivism (in particular, sexual recidivism) by child pornography offenders should be distinguished from "precidivism" by such offenders, which was discussed in Chapter 7 in connection with criminal sexually dangerous behavior ("CSDB") committed *before* an offender's original arrest on federal child pornography charges. *See* Chapter 7 at 169.

cohort of offenders were in the community;[6] and (2) the need to study a relatively modern offender cohort whose crimes were committed when computers and Internet use were common (in order to provide recidivism data relevant to current offenders). Offenders from fiscal years 1999 and 2000 satisfied both criteria to a sufficient degree. The sentencing period (fiscal years 1999 and 2000) was early enough to ensure that the vast majority of those offenders, including most of those with the longest prison sentences imposed, were released from prison for at least two years at the time of the Commission's study yet recent enough that the typical offender then, like current offenders, used a computer during the commission of his child pornography offense.[7]

After presenting the results of the Commission's study, this chapter also compares the Commission's research to several other recidivism studies — including studies involving: (1) child pornography offenders, (2) state "contact" sex offenders, and (3) federal offenders generally and, in particular, a comparable demographic segment of the entire federal offender population (*i.e.*, white male United States citizens).

B. METHODOLOGY OF THE COMMISSION'S RECIDIVISM STUDY

In order to examine the rate of known recidivism of non-production offenders sentenced during fiscal years 1999 and 2000, the Commission first identified all offenders sentenced under the applicable non-production guidelines, USSG §§2G2.2 and 2G2.4, who could be matched to the Record of Arrest and Prosecution database ("RAP sheets") of the National Crime Information Center ("NCIC") of the Federal Bureau of Investigation's ("FBI") Criminal Justice Information Services Division[8] and then tracked them after release from prison (or, for a small percentage of offenders, on probation) for at least two years. Data on offender and offense characteristics of this group, including any history of criminal sexually dangerous behavior ("CSDB"), were collected from the relevant sentencing documents in their instant federal child pornography cases.[9]

Although RAP sheets are generally considered to be the single best source for recidivism studies, they necessarily underreport offenders' actual rate of recidivism.[10] Some amount of

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[6] As explained below, in order to be valid, a recidivism study requires an average follow-up period of at least three years and, for studies of sex offenders, ideally an even longer period. *See infra* note 24. Because average sentence lengths for non-production offenders sentenced during fiscal years 1999 and 2000 were much shorter than average sentences later imposed pursuant to the PROTECT Act sentencing scheme, the vast majority of offenders sentenced in fiscal years 1999 and 2000 were released from prison in sufficient time to allow for an average follow-up period well above two years. *See* Chapter 6 at 132 (Figure 6–4) (showing that average prison sentences for non-production offenders sentenced in fiscal years 1999 and 2000 was two years for offenders convicted of possession and three to four years for offenders convicted of receipt or distribution).

[7] As noted *infra* in Table 11–2, 81.7% of the offenders sentenced in fiscal years 1999 and 2000 used a computer.

[8] The FBI's compilation of an individual's criminal identification, arrest, conviction, incarceration, and revocation information is known as the Interstate Identification Index. This information is also known as a Record of Arrest and Prosecution ("RAP"). The RAP database contains information voluntarily reported by law enforcement agencies across the country as well as information provided by other federal agencies. It contains information on felonies, misdemeanors, and certain municipal and traffic offenses.

[9] *See* Chapter 7 at 202– 03 (discussing CSDB histories of this cohort).

[10] As the Commission noted in a prior recidivism study: "The recidivism literature recognizes that the FBI offender 'RAP' sheets are the most accurate and readily available data source for repeat criminal behavior. However, 'RAP'

criminal activity by offenders during or after supervision is undiscovered or unreported during the period of observation. As a result, RAP sheets can only be used to determine the rate of *known recidivism.* Particularly for sex offender recidivism studies, RAP sheets will underreport the actual recidivism rate of offenders. It is widely accepted among researchers that sex offenses against children often go unreported or undetected[11] and, for that reason, do not appear on RAP sheets. This so-called "dark figure" in sex offender research always should be considered in assessing the results of a sex offender recidivism study based solely on reported arrests or convictions.[12] For the foregoing reasons, the findings of the Commission's recidivism study should be viewed as a conservative measurement of actual recidivism.[13]

The Commission's final study group included 610 offenders who satisfied four conditions:

1. They were sentenced under the non-production guidelines in fiscal years 1999 or 2000;

2. Their original sentencing documents (*e.g.*, presentence reports) provided information about relevant offense and offender characteristics (*e.g.*, demographic information and criminal sexually dangerous behavior);

3. They were matched successfully to RAP sheets; and

4. They were available to be tracked in the community for a minimum of two years[14] immediately after release following service of prison sentences[15]

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sheets can contain errors or partial information. For example, 'RAP' sheets only contain information on offenses for which offender fingerprints were obtained. Additionally, depending on the reporting policies and practices of local jurisdictions, arrest dispositions may not always be transferred to the FBI for inclusion on 'RAP' sheets. 'RAP' sheets will under report actual criminal behavior, and will under report convictions resulting from arrests." U.S. SENT'G COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 4–6 (2004) (available at http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf).

[11] *See* Ryan C.W. Hall & Richard C. W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 460–61 (2007) (noting that studies show that only an "estimated 1 in 20 cases of child sexual abuse is reported or identified" and that "an arrest was made in only 29% of reported juvenile sexual assaults").

[12] *See* Albert D. Biderman & Albert J. Reiss, Jr., *On Exploring the "Dark Figure" of Crime*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 1 (1967); *see also* United States v. McIlrath, 512 F.3d 421, 425 (7th Cir. 2008) (Posner, J.) ("Estimates of recidivism are bound to be too low when one is dealing with underreported crimes such as sex offenses.").

[13] An alternative approach to studying recidivism involves self-report data (*i.e.*, offenders' admissions, typically made during therapy, about their criminal relapses). *See* Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders*, *supra* note 4, at 466–67 (comparing studies based on official reports such as arrest or conviction records with studies based on "self-report" data).

[14] The period of time after which an offender is released from incarceration or is otherwise at liberty in the community—commonly called "street time" — is the time during which the offender is at risk of committing recidivist acts. Recidivism studies must necessarily measure recidivism during this period. Inclusion of periods of time when the offender was not at liberty would otherwise inflate the time the offender was at risk and avoided failure. *See* William D. Bales et al., *Recidivism of Public and Private State Prison Inmates in Florida*, 4 CRIMINOLOGY & PUB. POL'Y 57 (2005). Offenders were removed from the sample if they had little or no street time

(or, in the case of a small minority, during service of their probation terms) for their federal child pornography offenses (*i.e.*, not detained in connection with another offense, deported, or otherwise lost to the study), or until their first recidivism event, whichever came first.

There were a total of 724 non-production offenders sentenced in fiscal years 1999 and 2000. Of these 724, 673 had sufficient court documentation regarding offense and offender characteristics to conduct this analysis. Of those 673, 610 offenders could be successfully matched to RAP sheets and also were in the community for a minimum of two years after release from prison or the commencement of their probation. Those 610 offenders were included in the Commission's analysis. Of the 610 offenders, the vast majority 552 (90.5%) were sentenced to some term of imprisonment (with an average prison term of 33 months) followed by a term of supervised release (with an average supervised release term of 35 months), while 58 offenders (9.5%) were sentenced to probation (*i.e.*, those offenders were not sentenced to a term of imprisonment).

For this study, *known recidivism* is defined as any of the following events occurring within the study period following an offender's release from incarceration or commencement of a probationary sentence:[16]

- an arrest that led to a conviction for a felony or qualifying misdemeanor offense;
- an arrest with no case disposition information available;[17] or
- a reported "technical" violation of the conditions of an offender's probation or supervised release that led to an arrest or revocation.[18]

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after service of the sentence and therefore did not have a sufficient follow-up period. For example, non-citizen offenders were typically deported immediately after release from the federal prison system, and thus had no street time. Some offenders were removed from the community subsequent to their original release (usually due to re-incarceration), and such time "off the streets" was subtracted from their follow-up periods. If these offenders returned to the community during the study period, their street time recommenced at that juncture.

[15] Release following service of a prison sentence means release from the custody of the Federal Bureau of Prisons ("BOP") into the community for the first time following incarceration for the federal child pornography offense of interest.

[16] The arrest/revocation date, most serious crime, and disposition (if available) were coded from each recidivism event following release for purposes of reporting time to recidivism and crime type. Some offenders had more than one event following release.

[17] RAP sheets did not always report the ultimate disposition of a case following an arrest. Consistent with other recidivism studies, arrests without dispositions were counted as well as arrests resulting in convictions. *See* Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 333 (2002) ("[A]rrest is a better indicator of offender recidivism than is conviction.") The Commission's study, like other studies, assumes that false arrests are exceptional and that the typical arrest of an offender on supervision reflects recidivism (including "technical" violations of the conditions of supervision).

[18] Revocations of probation or supervised release result from violations of the conditions of supervision related to either: (1) the commission of a new crime, or (2) "technical" violations (or both). For this analysis, violations which were reported without dispositions were included along with violations that led to some type of reported sanction (*e.g.*, imprisonment). It should be noted, however, that only rarely did an offender's RAP sheet merely report an arrest on a warrant based on an *alleged* violation of supervision. Typically, a RAP sheet reported a court's

New criminal arrests or convictions include felony offenses and, with certain exceptions,[19] misdemeanors that were committed while an offender was on supervision or after supervision was terminated.[20] Arrests with dispositions of an acquittal or dismissal of all charges were treated as non-recidivism events. If a RAP sheet showed both an arrest and conviction for the same event, it was treated solely as a conviction.

As reflected in the findings of the Commission's study that appear below in Part C, the Commission classified offenders' recidivism events as *general recidivism* and *sexual recidivism.* General recidivism refers to any criminal justice failure which resulted in either an arrest (with or without a conviction) for a new criminal offense or an arrest (without or without a revocation) for a "technical" violation of the offender's conditions of supervision. Sexual recidivism refers to arrests (with or without a conviction) for sexual offenses only, both contact and non-contact offenses, including new child pornography offenses but excluding arrests for failure to register as a sex offender.[21] Sexual recidivism is a subset of general recidivism.

"Technical" violations of supervision encompass a wide range of behavior, including absconding from supervision, refusing to participate in mental health or substance abuse treatment, and failing drug tests. In addition, sex offenders typically are subject to additional restrictions, such as prohibitions on associating with minors or frequenting places where minors regularly appear, and accessing the Internet without permission.[22] Some child pornography offenders commit violations that, while non-criminal, raise serious questions about public safety.[23] Unlike non-criminal "technical" violations such as failure to report to a probation officer as directed, failure to register as a sex offense is a criminal offense; however, it was treated as a "technical" violation of the conditions of supervision because it involved no additional criminal act unrelated to the defendant's status as a sex offender and his failure to comply with the conditions of supervision.

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finding of a violation of the conditions of supervised release followed by some type of sanction (usually an additional term of imprisonment).

[19] Consistent with the list of excluded minor offenses contained in USSG §4A1.2(c)(2), the Commission's study excluded certain petty misdemeanors (*e.g.*, public intoxication) as recidivism events.

[20] RAP sheets provide the date of arrest but do not ordinarily provide information about the date of the offense. Thus, it is possible that a small number of the arrests or convictions mentioned on RAP sheets were for offenses committed *before* an offender was released on supervision. Such offenses would not qualify as "recidivism" because they occurred before an offender reentered the community following his federal prosecution for a non-production child pornography offense.

[21] The different types of contact and non-contact sex offenses are discussed in detail in Chapter 7 in relation to the Commission's study of sexually dangerous behavior. *See* Chapter 7 at 175–78.

[22] *See* U.S. SENT'G COMM'N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 20–27 (2010).

[23] *See, e.g.*, United States v. Molignaro, 649 F.3d 1,1–2 (1st Cir. 2011) (child pornography defendant's supervised release was revoked based on his frequenting places where unrelated children were present and also by failing to participate in sex offender therapy); United States v. Musso, 643 F.3d 566, 568–70 (7th Cir. 2011) (child pornography defendant's supervised release was revoked based on his failure to participate in sex offender therapy; for being alone with an unrelated young child; for possessing sexually suggestive, albeit non-pornographic, photos of minors, *i.e.*, a girl wearing only a bra and underwear; and for taking photos of "scantily-clad teenage girls" with his cell phone).

Information about offenders' violations of the conditions of their probation or supervised release is not routinely reported to the NCIC in the same manner as other information about criminal justice failures. Typically, an offender's alleged violation of the conditions of supervised release will be reported to the NCIC only if the offender was arrested pursuant a judicial warrant based on a petition filed by the supervising probation officer and then fingerprinted by the United States Marshal Service. In some cases, an offender on supervision who violates the conditions of his supervision is not arrested and, instead, is summoned to court (where his conditions are modified as a sanction), or his conditions are modified as a sanction without the offender ever appearing in court (by agreeing to the modification out of court). In such cases, it is highly unlikely that the offender's violation of the conditions of release would ever be reported to NCIC and appear on the offender's RAP sheet. Thus, the data in the Commission's recidivism study concerning violations of the conditions of supervision undercount the actual number of offenders who violated the conditions of their supervision. Only violations that resulted in an arrest of an offender are treated as recidivism events.

Using data from RAP sheets, the Commission analyzed offenders' records from their dates of release into the community — which, for the earliest offender, began on October 26, 1998, and, for the latest offender, began on March 30, 2008 — until the date that the RAP sheets were prepared for this study, March 30, 2010. The Commission's study required a minimum 24-month follow-up period (unless a recidivism event occurred before 24 months), and the average follow-up period in the Commission's study was 102 months (eight years and six months), well in excess of the period generally considered sufficient for a recidivism study of sex offenders.[24] Because these offenders were sentenced under the law in effect before the PROTECT Act, the typical statutory maximum term of supervised release was three years.[25] Therefore, many offenders tracked in this study were not under judicial supervision during a substantial portion of the study period.

The study methodology employed for the present study is consistent with previous Commission studies of offender recidivism and also is similar to the protocol previously followed by the Bureau of Justice Statistics in its recidivism study (discussed below in Part D).[26]

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[24] Generally, a follow-up period of at least three to five years is considered necessary for a strong recidivism study of sex offenders. *See* R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply To Sexual Offenders: A Meta-Analysis*, 39 CRIM. JUST. & BEHAV. 865, 887 (2009); *but cf.* Niklas Langstrom, *Long-Term Follow-Up of Criminal Recidivism in Young Sex Offenders: Temporal Patterns and Risk Factors*, 8 PSYCHOL., CRIME & LAW 41 (2002) (noting that recent studies indicate that risk for criminal reoffending by adult sex offenders may persist for decades after the index offense). Because the members of the Commission's study group were released at various times from October 26, 1998, until March 30, 2008, the Commission was unable to track the members of the study group in a coterminous manner over a discrete time period. Of the 610 members of the study group, seven (1.2%) had follow-up periods that were 24 months or greater but less than 36 months; 21 (3.4%) had follow-up periods that were 36 months or greater but less than 60 months; and 582 (95.4%) had follow-up periods that were 60 months or greater. The average follow-up period for all 610 offenders was eight and one-half years.

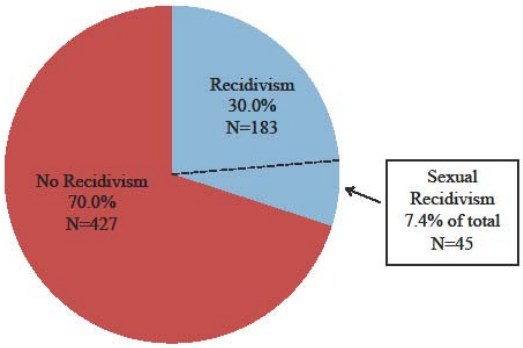
[25] *See* Chapter 10 at 271.

[26] *See* U.S. SENT'G COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 4–6 (2004) (available at http://www.ussc.gov/Research/Research_Publications/Recidivism/200405_Recidivism_Criminal_History.pdf); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002).

C. RESULTS OF THE COMMISSION'S RECIDIVISM STUDY

Figure 11–1 and Table 11–1 below show the results of the Commission's recidivism study. Figure 11–1 depicts the rate of general recidivism and notes the subset of sexual recidivism. Table 11–1 breaks down recidivism events by sexual recidivism and other types of criminal justice failures. It first shows sexual offenses, divided by contact sex offenses, new child pornography offenses, and other non-contact sex offenses (excluding failure to register as a sex offender); it then shows non-sexual offenses (including failure to register as a sex offender) and technical violations. Table 11–1 below also shows whether recidivism events resulted in a conviction or simply an arrest for a new criminal offense and separately reports revocations for technical violations. As noted above, the minimum follow-up period reflected in the data presented below was 24 months, and the average follow-up period for all members of the study group was eight and one-half years.

Figure 11-1
Non-Production Offender Characteristics: Recidivism
Fiscal Years 1999-2000 (N=610)



Note: Percentage may not sum to exactly 100% due to rounding. The average follow-up period after offender release into the community was 102 months (eight years and six months), with a minimum of 24 months.
SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Special Coding Project.

Table 11-1
Non-Production Offenders:
Most Serious Criminal Justice Failure
Fiscal Years 1999-2000

Type of Behavior	N	Percent (total of 183 cases)
Sexual Recidivism		
Contact sex conviction	11	6.0
Non-production CP conviction	9	4.9
Any other sex conviction	4	2.2
Contact sex arrest	11	6.0
Non-production CP arrest	5	2.7
Any other sex arrest	5	2.7
Subtotal	**45**	**24.6**
Non-Sexual Recidivism		
Any other conviction	26	14.2
Any other arrest	26	14.2
Sex offender registration violation	22	12.0
Any other violation	64	35.0
Subtotal	**138**	**75.4**
Total (General Recidivism)	**183**	**100.0**

Note: A single offender appears in one category, with sexual contact and convictions taking precedence. Percentages may not sum to exactly 100% due to rounding. This study involves an average follow-up of 8 ½ years.
SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Coding Project.

As reflected in Figure 11–1 above, the general recidivism rate was 30.0 percent (183 of 610 offenders).[27] As shown in Table 11–1 above, failures were almost evenly split between arrests or convictions for new crimes and arrests or revocations for others violations of the conditions of their supervision:

- 15.9 percent (97 of 610 offenders) were arrested for (and in some cases convicted of) a new criminal offense; and

- 14.1 percent (86 of 610 offenders) violated the conditions of their supervision or failed to register or report as sex offenders without an arrest for any other new criminal offense.

The sexual recidivism rate for all offenders was 7.4 percent (45 of the 610 cases). Of those 45 offenders:

- 22 offenders (or 3.6% of all 610 cases) were arrested for or convicted of sexual "contact" offenses (*e.g.*, rape or sexual assault of a child or adult);

- 14 offenders (2.3% of the 610 cases) were arrested for or convicted of a subsequent child pornography offense; and

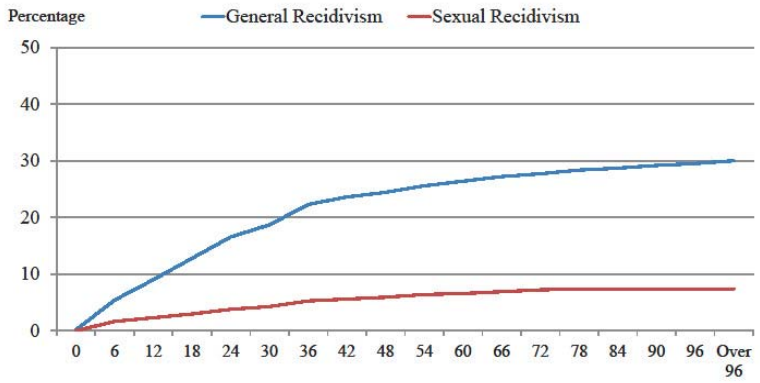
[27] General recidivism was higher for offenders whose instant non-production offense involved receipt, transportation, and distribution ("R/T/D") offenses (*i.e.*, those sentenced under USSG §2G2.2) (33.7%) than for those sentenced under the former possession guideline, USSG §2G2.4 (25.5%).

- the remaining nine offenders (1.5% of the 610 offenders) were arrested for or convicted of a non-contact sex offense involving obscenity or commercial sex.[28]

Of the 97 offenders who were arrested for any type of new offense during the eight-and-one-half-year follow-up period, the vast majority (77, or 79.4%) were arrested once during the period. Twenty offenders (20.6%) were arrested more than once during the follow-up period. Similarly, of those 86 offenders whose recidivism was limited to violating the conditions of their supervised release or probation, 67 (77.9%) did so once, while the remaining 19 offenders (22.1%) violated their conditions more than once. Furthermore, of the 97 offenders who committed new criminal offenses, 41 (42.3%) were both arrested for a new criminal offense and also had at least one other violation of the conditions of their supervision.

The period of time between reentry into the community and the recidivism event is measured as the "street time" that the offender was at risk until the first arrest, conviction, or revocation (whichever came first).[29] Figure 11–2 below shows the general and sexual recidivism rates over time in six month increments. As shown, recidivism increased at a relatively steady rate for approximately the first three years following release and then grew at a much slower rate thereafter. The statutory maximum period of supervised release for the vast majority of this cohort of offenders was three years.[30] Thus, as reflected in Figure 11–2, approximately two-thirds of offenders recidivated during their terms of supervision, and one-third recidivated after their supervision ended. A small number of offenders recidivated for the first time after being in the community for more than five years.

Figure 11-2
Non-Production Offender Characteristics: Recidivism
Fiscal Years 1999-2000



SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Special Coding Project.

Figure 11–3 below shows that the general recidivism rate for offenders in Criminal History Category I was substantially lower than the general recidivism rate for offenders in higher Criminal History Categories. Because relatively few offenders

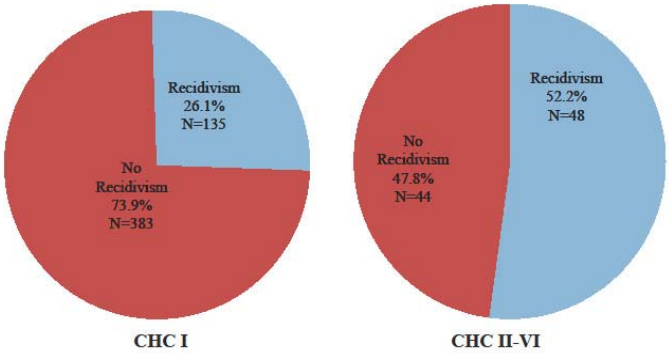
[28] The obscenity and prostitution offenses were not described in detail on the RAP sheets. For purposes of the Commission's study, they are listed under the rubric of sex offenses although the actual offense conduct in these cases remains unknown.

[29] For those offenders with more than one recidivism event, the total follow-up period was computed to exclude periods of re-incarceration. That is, the total follow-up period was computed as time since release after deducting any time the offender was not at risk of recidivism subsequent to the original release (*e.g.*, incarceration on revocation of supervised release), so as not to inflate the actual street time.

[30] *See* Chapter 10 at 271.

recidivated with a new sexual offense, the numbers were too small for meaningful comparisons of such offenders in each of the Criminal History Categories. Thus, Figure 11–3 is only concerned with general recidivism rates by Criminal History Category.

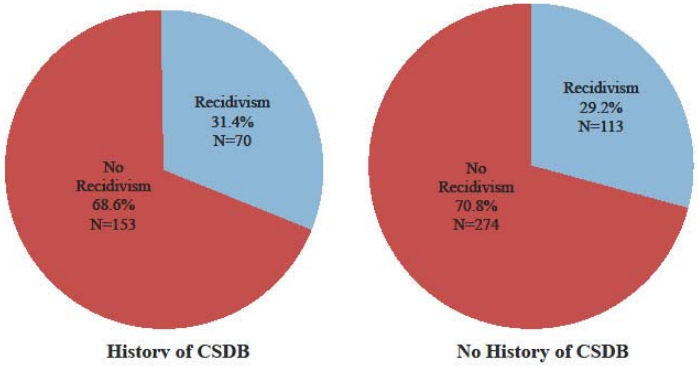
Figure 11-3
Non-Production Offender Characteristics:
General Recidivism by Criminal History Category
Fiscal Years 1999-2000 (N=610)



Note: Percentage may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Special Coding Project.

Figure 11–4 below shows the general recidivism rate for offenders with a prior history of CSDB (*i.e.*, CSDB predating their arrest on their instant federal child pornography charges), compared to the general recidivism rate for offenders without a CSDB history. The rates for the two groups were similar (31.4% for CSDB offenders and 29.2% for non-CSDB offenders).

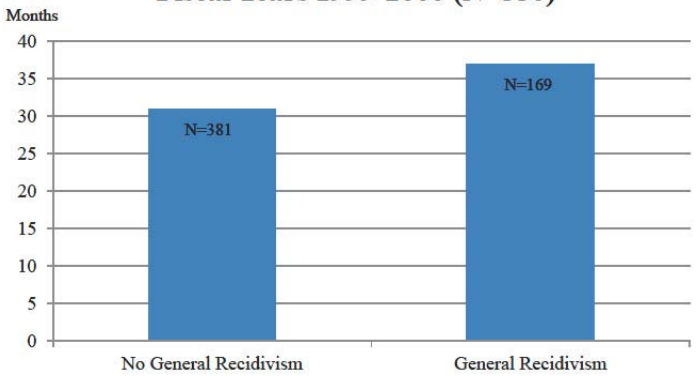
Figure 11-4
Non-Production Offender Characteristics:
General Recidivism by History of CSDB
Fiscal Years 1999-2000 (N=610)



Note: Percentage may not sum to exactly 100% due to rounding.
SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Special Coding Project.

Caution should be exercised in drawing conclusions from this data analysis because, in addition to the other limitations concerning the Commission's recidivism study discussed above: (1) this particular analysis only refers to general recidivism (including technical violations of conditions of supervision), as opposed to sexual recidivism;[31] and (2) the Commission was unable to control for the type of supervision involved (in particular, how closely offenders were supervised and the degree of restraints on their liberty).[32]

Figure 11-5
Average Prison Term for Recidivist and Non-Recidivist Child Pornography Offenders
Fiscal Years 1999-2000 (N=550)



Note: The figure excludes 58 offenders who received terms of probation and two offenders with missing sentencing information.
SOURCE: U.S. Sentencing Commission, 1999-2000 Datafile, USSCFY99-00 and FBI RAP Sheet Coding Project.

Finally, the Commission's study compared the average amount of imprisonment originally imposed on the offenders who recidivated with the average amount of imprisonment originally imposed on those offenders who did not recidivate.[33] The Commission's analysis found that the average sentence of imprisonment for the 381 non-recidivist offenders was 31 months. By comparison, the average sentence for the 169 recidivist offenders was 37 months. Therefore, offenders who recidivated had a 22.6 percent longer average term of imprisonment originally imposed than offenders who did not recidivate. The results of the Commission's analysis should be viewed with caution because there may be other factors explaining why the average lengths of the terms of imprisonment were different for the recidivists and non-recidivists (*e.g.*, on average, the recidivists had more serious criminal histories, which increased their guideline ranges).[34]

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[31] The number of cases for analysis was too small to allow for meaningful comparisons of *sexual recidivism* rates between the two groups of offenders. As discussed in Chapter 7, social science research indicates that an offender's history of CSDB is a risk factor for sexual recidivism. *See* Chapter 7, at 170 & n.7.

[32] CSDB offenders' rate of general recidivism may have been similar to the rate for offenders without a history of CSDB because high risk sex offenders on conditional release (*i.e.*, typically those with histories of CSDB) are generally more closely supervised than lower risk sex offenders — in particular, with a stricter application of the "containment model," which may have deterred violations of supervision. *See* Chapter 10 at 279-81 (discussing that treatment and supervision of child pornography offenders vary depending on the risk that such offenders pose according to risk assessments); *see also* JUDICIAL CONFERENCE OF THE UNITED STATES, 8 GUIDE TO JUDICIARY POLICY: PROBATION AND PRETRIAL SERVICES, Ch. Two (Policy Statements), § 230 (2011) ("Not all persons . . . convicted of sex offenses are alike. Rather, they present a spectrum of criminogenic risk and therapeutic need. Officers' . . . supervision techniques should vary accordingly.").

[33] The Commission excluded from the above analysis the 58 offenders who received terms of probation rather than terms of imprisonment, and two offenders whose cases had insufficient documentation.

[34] As discussed above, recidivists had longer average criminal histories than the non-recidivists. *See supra* Figure 11–3.

D. RELEVANCE OF THE COMMISSION'S RECIDIVISM STUDY TO CURRENT CHILD PORNOGRAPHY OFFENDERS

This section addresses the relevance of the Commission's recidivism study of offenders sentenced in fiscal years 1999 and 2000 to current federal child pornography offenders. Since the late 1990s, new technologies related to personal computers and the Internet have greatly expanded the types and volume of child pornography possessed by typical offenders.[35] Furthermore, since 2000, the child pornography guidelines and corresponding penal statutes have undergone significant changes.[36] Given these technological and legal changes, it is appropriate to compare the study group from fiscal years 1999 and 2000 with modern non-production offenders to assess whether the Commission's findings regarding the earlier cohort have continuing relevance to modern offenders. Using data from both the Commission's regular annual datafiles from fiscal years 1999, 2000, and 2010, and the Commission's special coding project of non-production cases from those same three fiscal years, this section compares the earlier cohort with the more recent cohort.[37] As discussed below, the two cohorts appear similar enough in relevant respects for the findings of the Commission's recidivism study of the offenders sentenced in fiscal years 1999 and 2000 to have continuing relevance to current non-production offenders.

As demonstrated in Table 11–2 below, offenders in both groups were very similar with respect to race, gender, age, education, and criminal history. Most offenders in both groups had little or no prior criminal record, and approximately one-third of offenders in each time period had a known history of CSDB.

Table 11-2
Comparison of Non-Production Offenders
Fiscal Years 1999-2000 & Fiscal Year 2010

	FY1999-2000	FY2010
Offender Characteristics		
% White	93.3%	88.8%
% Male	99.7%	99.4%
Average Age (years)	41	42
Median Education Level	Some College	Some College
% Reported Not Sexually Abused as Child	85.7%	82.3%
% Employed at Time of Arrest	84.9%	75.2%
Criminal History and CSDB		
% CHC I	84.6%	81.7%
% SDB	36.7%	35.1%
Specific Offense Characteristics		
% Use of Computer	81.7%	96.3%
% Depiction of Image of Child Under 12	87.2%	96.2%

SOURCE: U.S. Sentencing Commission, 2010 Datafile, USSCFY10 and FBI RAP Sheet Coding Project.

It is more difficult to compare the two groups of offenders based on the application of the sentencing guidelines in their cases (in particular, the frequency of specific offense characteristics) because significant

[35] *See* Chapter 3 at 41–43.

[36] *See* Chapter 1 at 4.

[37] As discussed in Chapters 6 and 7, the Commission conducted an extensive coding project of 1,654 non-production cases sentenced in fiscal year 2010 and 660 non-production cases sentenced in fiscal years 1999 and 2000. *See* Chapter 6 at 144; Chapter 7 at 202.

changes in the non-production guidelines have occurred during the past decade.[38] There are only a limited number of direct comparisons that can be made between the specific offender characteristics in the non-production guidelines in effect in fiscal years 1999 and 2000 and the non-production guidelines in effect in fiscal year 2010. Only two specific offender characteristics that applied in the fiscal year 1999–2000 cases have direct counterparts in the current version of USSG §2G2.2, *i.e.*, use of a computer and images depicting victims under the age of 12. In both periods, the vast majority of offenders received a 2-level increase for use of a computer in commission of the pornography crime and a 2-level increase for having pornographic material involving a minor under the age of 12 years, though both specific offender characteristics were more commonly applied in 2010.

While the child pornography guidelines have undergone a number of significant changes, offender and offense profiles have remained similar in most respects.[39] Typical offenders from both fiscal years 1999 and 2000 and fiscal year 2010 were white male United States citizens with a virtually identical average age who were employed at the time of the offense; they had no criminal records, no reported history of sexual abuse as a child, and some college education. The vast majority of offenders in both groups used a computer to commit their offenses and possessed images of prepubescent minors. Finally, approximately one-third of offenders, past and present, had a history of criminal sexually dangerous behavior. Given the many similarities in offense and offender characteristics, there is sufficient reason to believe that, in the context of supervision and recidivism, the findings of the Commission's study of the 1999–2000 cohort are relevant to offenders who will be sentenced in the modern era and ultimately supervised in the future.

Non-production offenders sentenced in the current period will spend significantly longer periods in prison, on average, compared to the offenders sentenced in fiscal years 1999 and 2000.[40] Whether those longer sentences will affect the recidivism rates — positively or negatively — remains to be seen.[41] In addition, while the earlier cohort of offenders generally had a three-year statutory maximum term of supervised release, current non-production offenders are subject to a statutory minimum five-year period of supervised release, and the average term of supervision is approximately four times that amount.[42] Whether substantially longer terms of

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[38] *See* Chapter 6 at 124–25.

[39] The Commission's coding project of the fiscal years 1999 and 2000 cases does not include data concerning the specific manners of distribution and receipt of child pornography. Clearly, computer technology has changed significantly in the past decade — in particular, the growth of peer-to-peer file-sharing. Nevertheless, as noted, the vast majority of offenders in fiscal years 1999 and 2000 used computers (and the Internet) in connection with their crimes.

[40] *See* Chapter 6 at 132 (Figure 6–4); Chapter 8 at 210–12.

[41] *See, e.g.*, LIN SONG, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED 1 (1993) ("Study findings indicate that the effect of incarceration (versus other sentencing options) and sentence length on recidivism is complex and is likely to be offender-specific. For some offenders, incarceration and longer confinement seem to increase the risk of recidivism. For other offenders, the likelihood of reoffense will either be unaffected or reduced by longer terms of incarceration."), http://www.wsipp.wa.gov/rptfiles/IncarcRecid.pdf (last visited Dec. 20, 2012).

[42] *See* Chapter 10 at 271-72.

supervised release will affect the recidivism rates — positively or negatively[43] — also remains to be seen. Results of this study could be compared to a future recidivism study of the fiscal year 2010 cohort using the same methodology employed by the present study.

E. COMPARISON OF THE COMMISSION'S RECIDIVISM STUDY TO OTHER RELEVANT RECIDIVISM STUDIES

In order to offer some perspective concerning the results of the Commission's present recidivism study, it is helpful to compare the findings of several other recidivism studies — including others involving child pornography offenders, as well as recidivism studies involving offenders convicted of "contact" sex offenders and federal offenders generally.

1. *Other Studies of Child Pornography Offenders*

The Commission's findings are similar to two recent recidivism studies based on official records (as opposed to self-report data) of a comparable number of adult male child pornography offenders. The first study — which has not yet been published but the results of which were publicly presented in 2009 — was conducted by researchers at the Federal Bureau of Prisons (BOP) and thus is directly relevant for comparison with the Commission's study.[44] The BOP study concerned 870 production and non-production child pornography offenders released from the BOP between 2002 and 2005 and reviewed for evidence of recidivism with an average follow-up period of 3.8 years. Regarding general recidivism rates, 221 of the 870 (25.4%) child pornography offenders were arrested or convicted for a new criminal offense or were arrested or revoked for a "technical" violation. Fifty offenders (5.7%) engaged in sexual recidivism, which the study defined as new non-production child pornography offenses, other non-contact sex offenses, or contact sex offenses.

The second study, which has been published in a peer-reviewed journal,[45] involved 541 adult male Canadian child pornography offenders. That study, which had an average follow-up time of 4.1 years (compared to the Commission's 8.5 years), found that 175 of the 541 offenders (32.3%) had one or more criminal justice failures (arrests or convictions for new criminal offenses or violations of the conditions of their conditional release leading to arrests or revocations). Sixty offenders (11.1%) engaged in *sexual recidivism*: 28 of the 60 offenders engaged in contact or non-contact sexual offenses (other than child pornography offenses), while the other 32 committed new non-production child pornography offenses.[46] A recidivism study of foreign offenders should be viewed with caution in extrapolating its findings to American offenders because the foreign offenders were not subject to American penal laws and may have involved a cohort of offenders with different characteristics. Nevertheless, the close similarities

[43] Longer terms of supervision may deter some offenders from committing new offenses but also present other offenders with an increased opportunity to violate the conditions of supervision.

[44] Erik Faust, Cheryl Renaud & William Bickart, *Predictors of Re-offense Among a Sample of Federally Convicted Child Pornography Offenders*, Paper Presented at the 28th Annual Conference of the Association for the Treatment of Sexual Abusers (Oct. 2009).

[45] *See* Eke et al., *Examining the Criminal History and Future Offending of Child Pornography Offenders*, *supra* note 4, at 467.

[46] *See id*. at 471.

between the known recidivism rates of the two groups of North American offenders (the vast majority of whom were white males) is noteworthy.

2. *BJS Recidivism Study of State Sex Offenders Released in Fiscal Year 1994*

In 2003, the Bureau of Justice Statistics (BJS) published the results of its large-scale study of known recidivism by 9,691 sex offenders released from state prisons in 1994 and tracked for three years following their reentry into the community. The BJS study offers an additional point of comparison to the Commission's recidivism study of non-production offenders (which had an average eight-and-a-half year follow-up period).[47] The BJS study consisted of sex offenders who had committed traditional sex "contact" offenses (*i.e.*, rape, statutory rape, or sexual assault, against either children or adults),[48] but it did not include offenders convicted only of child pornography offenses. The BJS study, which used RAP sheets, defined recidivism in a similar manner to the Commission's definition, *i.e.*, arrest for or conviction of any new criminal offense (any felony and many serious misdemeanors), as well as "technical" violations of conditions of parole leading to re-incarceration.[49]

The findings of the BJS study were as follows: 43 percent of the 9,691 sex offenders (4,163) were arrested for or convicted of any type of new criminal offense and, of that group, 517 (5.3% of the entire cohort studied) were arrested or convicted of a new "contact" sex offense.[50] As a separate finding, the BJS study found that 38.6 percent of the 9,691 sex offenders were returned to prison, including 2,656 offenders whose sole basis for returning to prison was a "technical" violation of the conditions of their supervision.[51] The BJS study did not state how many of the 2,656 "technical violation" offenders also had been *arrested* (but not convicted and sentenced to a new term of incarceration) for a new criminal offense. It seems likely that the two groups — those arrested for or convicted of a new criminal offense and those returned to prison for a "technical" violation — overlapped only to some extent. Thus, the *general recidivism* rate (as defined above by the Commission) for the 9,691 sex offenders in the BJS study likely exceeded the rate of arrest or conviction for new offenses (43%).[52]

It is noteworthy that the general recidivism rate found in the Commission's study of non-production offenders using a comparable three-year average follow-up period (as opposed to an eight-and-one-half year average follow-up period) was 22.3 percent, and the rate of new

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[47] *See* U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS (BJS), RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003).

[48] *See id.* at 1, 3.

[49] *Id.* at 5–6.

[50] *Id.* at 13. The BJS study only reported new "contact" sex offenses (*i.e.*, rape and sexual assault offenses, against either adults or children). *See id.* at 34. It is unclear from the BJS study whether new non-contact sex offenses (*e.g.*, child pornography offenses, indecent exposure) fell within the "other offense" category reported in the study. *See id.* at 34 (Table 41).

[51] *Id.* at 14.

[52] Another 2003 BJS recidivism study of 272,111 offenders sentenced to state prisons for *all* types of offenses (with only a very small percentage being sex offenders, *i.e.*, 3.6%) found even higher rates of recidivism during a 3-year follow-up period. *See* BJS, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2003) (67.5% rate of new arrests or convictions and 26.4% rate of "technical" violations resulting in a return to prison).

"contact" sex offenses was 2.6 percent. These lower rates for both general recidivism and new contact sex offenses likely reflect the fact that all of the BJS study group had known histories of contact sex offenses, while only one-third of the child pornography offenders in the Commission's study had known histories of CSDB (not all of which involved contact sex offenses).[53] As discussed in Chapter Seven, social science research indicates that an offender's history of CSDB (in particular, sexual contact offenses) is a risk factor for sexual recidivism.[54]

3. *Recidivism by Federal Offenders Generally*

In 2004, the Commission published the results of a large-scale recidivism study of a stratified, random sample of 6,062 United States citizens who were sentenced under the federal sentencing guidelines for all types of federal offenses in fiscal year 1992, using a two-year follow-up period.[55] Table 11–3 below compares the Commission's current study of recidivism by child pornography offenders to the Commissioner's earlier recidivism study of all federal offenders. To allow for a meaningful comparison, Table 11–3 refers only to fiscal year 1992 data concerning white male United States citizen offenders, the group most comparable to the typical federal child pornography offender,[56] and only white male United States citizen non-production offenders from fiscal years 1999–2000 (566 of the 610 total members of the study group). To allow for a meaningful comparison, the recidivism rates of the non-production offenders sentenced in fiscal years 1999 and 2000 are shown two ways: first, using a two-year follow-up period, and, second, using the full eight-and-one-half year follow-up period.

As shown in Table 11–3 below, the overall two-year recidivism rate for the two groups is similar (17.4% rate for the fiscal year 1992 cohort versus a 16.6% rate for the child pornography cohort). However, when controlling for prior criminal record, including separating Criminal History Category I by 0 and 1 criminal history points, the two-year general recidivism rate for child pornography offenders is somewhat higher than the 1992 cohort (8.2% rate for the fiscal year 1992 cohort with no criminal history points versus a 12.5% rate for the child pornography cohort with no criminal history points; 13.1% rate for the fiscal year 1992 cohort with one criminal history point versus a 17.6% rate for the child pornography cohort with one criminal history point). The reason the overall recidivism rates (considering offenders in all Criminal History Categories) are similar is that the child pornography group has a higher percentage of Criminal History Category I offenders (84.9% as compared to 64.5% for the fiscal year 1992 group of all types of offenders), whose recidivism rate is the lowest of all criminal history categories.

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[53] *See* Chapter 7 at 202.

[54] *See id.* at 170 & n.7.

[55] *See* U.S. SENT'G COMM'N, MEASURING RECIDIVISM, *supra* note 26.

[56] Both groups were restricted to white males because the child pornography group is overwhelmingly white and male. Consistent with the 2004 study, the fiscal year 1992 data are weighted to represent the entire comparable population United States white male citizen offenders sentenced under the federal guidelines in fiscal year 1992.

Table 11-3
Comparison of Child Pornography Recidivism for White Male Offenders
Fiscal Year 1992 & Fiscal Years 1999-2000

	FY92 Recidivism Sample	FY92 General Recidivism Rate Within Two Years		FY99-00 Child Pornography Offenders		General Recidivism Rate Within Two Years		General Recidivism Rate Full Follow-Up Period	
	N	N	%	N	%	N	%	N	%
Total	11,888	2,064	17.4	566	100.0	94	16.6	172	30.4
Criminal History									
Category I	7,670	708	9.2	478	100.0	63	13.2	126	26.4
Zero Points	6,144	504	8.2	415	100.0	52	12.5	107	25.8
One Point	1,478	194	13.1	51	100.0	9	17.6	17	33.3
Categories II-VI	4,218	1,356	32.1	88	100.0	31	35.2	46	52.3

Note: Twelve FY99-00 cases and 48 weighted FY92 cases have missing criminal history points.
SOURCE: U.S. Sentencing Commission, FY92 Recidivism Sample (2003 weighted data) and 1999-2000 Datafile, USSCFY92 and USSCFY99-00 and FBI RAP Sheet Coding Project.

A similar comparison can be made to data concerning the revocation rate for all federal offenders sentenced to supervised release. In its 2010 report, *Federal Offenders Sentenced to Supervised Release*, the Commission noted that the revocation rate for all federal offenders serving terms of supervised release has been 33.0 percent in recent years, but that the rate for offenders who were in Criminal History I at the time of their original sentencing was 18.7 percent.[57] Those revocation rates are not fully comparable to the two-year failure rates reported in Table 11–3 for two reasons: (1) not all criminal justice failures found in the Commission's recidivism studies would necessarily have resulted in revocations of the offenders' supervised release (*e.g.*, misdemeanor offenses and "technical" violations do not always result in revocations);[58] and (2) revocations of supervised release may result from offenders' violations occurring after two years following an offender's reentry into the community (although the average revocation occurs after only 17 months of supervision).[59] Nevertheless, despite these differences, the revocation data for all federal offenders appear generally consistent with the Commission's findings concerning the rate of general recidivism by child pornography offenders.

[57] *See id.* at 62, 67. That report is available at http://www.ussc.gov/Research/Research_Publications/Supervised_Release/20100722_Supervised_Release.pdf.

[58] *See, e.g.*, USSG §7B1.3(a) (discussing the different types of supervised release violations and their consequences).

[59] FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE, note 57, at 63.

F. CONCLUSION

The Commission's recidivism study of 610 offenders sentenced under the non-production child pornography guidelines in fiscal years 1999 and 2000 and other relevant recidivism studies allow for the following conclusions:

- The known *general recidivism* rate for federal non-production offenders studied by the Commission was 30.0 percent during an average follow-up period of eight and one-half years after the offenders' reentry into the community.

- Those offenders' known *sexual recidivism* rate, a subset of the general recidivism rate, during that same follow-up period was 7.4 percent. The known "contact" sexual recidivism rate, a subset of the overall sexual recidivism rate, was 3.6 percent.

- Because there are sufficient similarities in offense and offender characteristics between the offenders sentenced in fiscal years 1999 and 2000 and current federal non-production offenders, the findings of the Commission's recidivism study appear to have continuing relevance to current offenders.

- The known general and sexual recidivism rates found in the Commission's study of federal non-production offenders are comparable to the known general and sexual recidivism rates reported in two recent child pornography recidivism studies by BOP and Canadian researchers.

- The known general recidivism rate and known sexual "contact" offense recidivism rate found in the Commission's study are lower than such rates for contact sex offenders tracked by BJS in a large-scale study of such sex offenders released from state prisons in 1994.

- The known general recidivism rate found in the Commission's study is similar to the known general recidivism rate for a comparable segment of the total federal offender population (*i.e.*, United States citizen white male federal offenders) studied by the Commission in 2004, as well as the supervised release revocation rate for federal offenders generally (as discussed in the Commission's 2010 report on supervised release).

Chapter 12

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS TO CONGRESS

A. INTRODUCTION

This chapter contains (1) the Commission's findings and conclusions, and (2) the Commission's recommendations to Congress concerning revisions to the sentencing scheme in child pornography cases. Most of the Commission's findings, conclusions, and recommendations concern cases in which offenders are sentenced under USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) for non-production offenses. As discussed in Parts C and D, *infra*, the statutory and guideline penalty scheme in such cases should be revised to reflect current offense conduct, evolving modes of electronic communications and other technologies used by offenders, and knowledge gained from emerging social science research. Such revisions are needed to more fully differentiate among offenders based on their culpability and sexual dangerousness. Separate findings and conclusions concerning cases in which offenders are sentenced under USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) for producing child pornography are set forth below in Part E, *infra*.

B. MAJOR FINDINGS CONCERNING §2G2.2 CASES

1. *All child pornography offenses are extremely serious because they both perpetuate harm to victims and normalize and validate the sexual exploitation of children.*

Child pornography offenses inherently involve the sexual abuse and exploitation of children. Victims are harmed initially during the production of child pornography, but the perpetual nature of the distribution of images on the Internet causes a significant, separate, and continuing harm to victims. Many victims live with persistent concern over who has seen images of their sexual abuse and suffer by knowing that their images are being used for sexual gratification and for the purpose of "grooming" new victims.[1]

Child pornography offenses are international crimes. Countless images depicting the sexual abuse of children are transmitted both domestically and internationally to offenders across the world, each of whom may redistribute the same image. Once an image is distributed via the Internet, it is impossible to eradicate all copies of it or to control access to it.[2] The harm to victims is thus lifelong.

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[1] *See* Chapter 5 at 107–114.

[2] *See* Chapter 3 at 41, 64.

Non-production child pornography offenses normalize and validate the sexual exploitation of children, which contributes to the sexual abuse of new victims in at least three different ways. First, some sex offenders use child pornography to "groom" children into believing that sex with adults is appropriate.[3] Second, for some individuals, obtaining sexual gratification through the use of child pornography is a risk factor for other sex offending against minors because child pornography may strengthen existing tendencies in ways that can create a "tipping-point effect" if other risk factors related to antisociality or sexual deviancy are also present. Some research posits that, for some higher-risk offenders, child pornography permits a progression from viewing child pornography to sex offending against minors.[4] Third, offenders' participation in Internet "communities" in which members promote and share child pornography validates the sexual exploitation of children and may lead to the production of new child pornography images (and the consequent sexual abuse of children) by other community members.[5]

2. *Very young victims are commonly depicted in child pornography today.*

Commission data show that virtually all offenders (96.3%) possess images of minors who were prepubescent or under 12 years of age.[6] The Commission's data concerning federal non-production child pornography offenses do not allow for a further gradation of victims' ages. However, a leading study of federal and state offenders in 2006 found that approximately half of child pornography offenders possessed one or more images depicting the sexual abuse of a child under six years old. That same study found that approximately one-quarter of offenders possessed one or more images depicting the sexual abuse of a child two years old or younger.[7]

3. *Significant technological changes related to the commission of child pornography offenses have occurred in recent years.*

During the past three decades — especially since the enactment of the PROTECT Act of 2003 — dramatic technological changes have occurred that have greatly facilitated the commission of child pornography offenses. Innovations in digital cameras and videography as well as in computers and Internet-related technology, such as peer-to-peer ("P2P") file-sharing programs,[8] have been used by offenders in the production, mass distribution (both commercial and non-commercial distribution), and acquisition of child pornography. These technological changes have resulted in exponential increases in the volume and ready accessibility of child

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[3] *See* Chapter 4 at 77, 102.

[4] *See id.* at 102–03.

[5] *See id.* at 97–98.

[6] *See id.* Chapter 8 at 209.

[7] *See* Chapter 4 at 87.

[8] The Commission's examination of 382 federal non-production cases from the first quarter of fiscal year 2012 revealed that 74.5% of USSG §2G2.2 offenders who received child pornography used P2P file-sharing programs to do so and that 85.3% who distributed child pornography used P2P programs to do so. The Commission's examination of a large sample of 345 federal non-production cases from fiscal year 2002 revealed that no offenders sentenced that year had used P2P file-sharing programs during the commission of their non-production offenses (according to their presentence reports). *See* Chapter 6 at 155.

pornography, including many graphic sexual images involving very young victims, a genre that previously was not as widely circulated as it is today. As a result of such changes, entry-level offenders now easily can acquire and distribute large quantities of child pornography at little or no financial cost and often in an anonymous, indiscriminate manner.[9]

Several provisions in the current sentencing guidelines for non-production offenses — in particular, the existing enhancements for the nature and volume of the images possessed, an offender's use of a computer, and distribution of images[10] — originally were promulgated in an earlier technological era.[11] Indeed, most of the enhancements, in their current or antecedent versions, were promulgated when offenders typically received and distributed child pornography in printed form using the United States mail.[12] As a result, enhancements that were intended to apply to only certain offenders who committed aggravated child pornography offenses are now being applied routinely to most offenders.

4. *The Internet has facilitated the growth of child pornography "communities," and offenders have varying degrees of engagement in such communities.*

Child pornography offenders who are involved with others in Internet-based child pornography "communities" (*e.g.*, Internet "chat rooms" devoted to child sexual exploitation) normalize and validate sexual exploitation of children, promote the "market" for child pornography, and may directly or indirectly encourage others to produce new images of child pornography.[13] Offenders have varying degrees of engagement in such communities. Commission data do not directly address offenders' community involvement, but the Commission's special coding project of fiscal year 2010 §2G2.2 cases revealed different types of distribution behavior suggesting at least some level of community involvement.

Nearly two-thirds of all §2G2.2 offenders in fiscal year 2010 distributed child pornography to others. The distribution conduct of a majority of those offenders (53.4%) was limited to "impersonal" distribution (*i.e.*, "open" P2P file-sharing programs such as LimeWire), which involved anonymous, indiscriminate distribution and no two-way communication between the offender who shared his images and persons who obtained them from the offender's computer.[14] By contrast, 41.2 percent of those offenders who distributed child pornography — or approximately one-fourth of all non-production offenders in fiscal year 2010[15] — engaged in "personal" distribution to one or more adults[16] (*e.g.*, emailing images to another adult or using a

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[9] *See* Chapter 3 at 41–43; Chapter 4 at 85 & n.78.

[10] *See* USSG §2G2.2(b)(2), (3), (4), (6) & (7).

[11] *See* Chapter 1 at 6.

[12] *See id.*

[13] *See* Chapter 4 at 92–97.

[14] *See* Chapter 3 at 53 (discussing such "open" P2P file-sharing).

[15] *See* Chapter 6 at 150– 51 & n.70 (noting that 445 of the 1,654 non-production offenders in fiscal year 2010, or 26.9%, engaged in "personal" distribution to one or more adults).

[16] According to the presentence reports ("PSRs") in their cases, an additional 3.7% of offenders distributed child pornography to real or perceived *minors* (typically via email or an instant-messaging service ("IM")) but did not appear to have distributed to or communicated with other adults concerning child pornography. An additional 1.7%

"closed" P2P file-sharing program such as Gigatribe). Such offenders almost invariably engaged in two-way communication with one or more other offenders concerning child pornography or child sexual exploitation. A reasonable inference from the nature of such "personal" distribution of child pornography to other adults is that such offenders were involved in or were seeking to become involved in (or even create) a child pornography "community" on the Internet.[17]

5. *A significant percentage of §2G2.2 offenders have histories of criminal sexually dangerous behavior that occurred before or concomitantly with their child pornography offenses.*

An important issue confronting judges, policy-makers, and other stakeholders in the criminal justice system concerns sexually abusive, exploitative, or predatory conduct committed previously by offenders convicted of non-production offenses, a significant percentage of whom are pedophiles, according to some experts. Such conduct, committed in addition to offenders' non-production offenses, increases their culpability and suggests heightened sexual dangerousness.[18] Existing studies, which have employed different methodologies and examined different offender populations (including offenders outside the United States), have yielded inconsistent findings concerning the prevalence of such conduct.[19] The Commission engaged in a special research project that reviewed virtually all federal non-production child pornography cases from fiscal year 1999, 2000, and 2010 — as well as a large sample of such cases from fiscal year 2012 — to provide reliable data concerning the percentage of federal offenders sentenced under the non-production child pornography guidelines who have known histories of criminal sexually dangerous behavior ("CSDB"). For purposes of this report, CSDB comprises three different types of criminal sexual conduct: (1) actual or attempted "contact" sex offenses occurring before or concomitantly with offenders' commission of non-production child pornography offenses; (2) "non-contact" sex offenses occurring before or concomitantly with offenders' commission of a non-production child pornography offenses;[20] and (3) prior non-production child pornography offenses (if the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender). After examining the PSRs in a total of 2,696 non-production child pornography cases,

of the offenders who distributed child pornography did so in manners that did not permit a determination of whether their intended recipients were other adults (*e.g.*, posting images on photo-sharing websites). *See* Chapter 6 at 151 n.68.

[17] *See id.* at 151.

[18] *See* Chapter 7 at 170–71.

[19] *See id.* at 171-74 (discussing the existing studies); *see also* Michael Seto et al., *Contact Sex Offending by Men With Online Sexual Offenses*, 23 SEXUAL ABUSE 124 (2011) (meta-analysis of 24 international studies, which found that approximately one in eight "online offenders" — the vast majority of whom were child pornography offenders — had an "officially known contact sex offense history," but estimating that a much higher percentage, approximately one in two, in fact had committed prior contact sexual offenses based on offenders' "self-report" data in six studies).

[20] Contact offenses include sexual molestation offenses (rape and sexual assault). Non-contact offenses include enticing a minor to engage in sexual conduct via the Internet (*e.g.*, "cybersex" via a webcam), knowingly distributing child pornography to a real or perceived minor, and sexual voyeurism and exhibitionism offenses. *See* Chapter 7 at 174-78.

the Commission found that, during the past decade, approximately one in three offenders had engaged in one or more types of CSDB predating their prosecutions for their non-production offenses. The rate of CSDB reflected in prior convictions or findings in PSRs was 33.9 percent for offenders sentenced in fiscal years 1999–2000, 31.4 percent for offenders sentenced in fiscal year 2010, and 33.0 percent for offenders sentenced in the first quarter of fiscal year 2012.[21]

Significantly, the Commission's study had certain limitations that resulted in its being underinclusive in certain important respects. The study did not include CSDB that was not reported to or detected by the authorities or otherwise not recounted in PSRs. The Commission coded offenders' CSDB only as reflected in: (1) convictions for sex offenses; (2) findings in PSRs that offenders had engaged in CSDB (which did not result in convictions); and (3) unresolved allegations of CSDB in PSRs.[22] It is well established that the *actual* rate of offenders' CSDB is higher than the *known* rate because official records of known sex offenses by child pornography offenders fail to account for all such sex offenses.[23] In addition, the Commission's study is underinclusive of all conduct reflecting offenders' sexual dangerousness insofar as the study was limited to prior sexually dangerous behavior that amounted to a *criminal offense* and did not include *non-criminal* acts of sexually deviant behavior.[24] The Commission's review of PSRs revealed a variety of non-criminal but sexually deviant conduct indicating sexual dangerousness (*e.g.*, an offender's collection of children's underwear associated with his collection of child pornography or an offender's "diary" containing graphic descriptions of his sexual fantasies concerning children).[25]

6. *Guideline penalty ranges and average sentences, both imprisonment and supervised release terms, have substantially increased in significant part because of the statutory and guideline amendments resulting from the PROTECT Act of 2003.*

The average guideline minimum for non-production child pornography offenses in fiscal year 2004 — the last full fiscal year when the guidelines were mandatory and the first full fiscal year after the enactment of the PROTECT Act — was 50.1 months of imprisonment, and the average sentence imposed was 53.7 months. By fiscal year 2010, as a larger percentage of cases was affected by the provisions of the PROTECT Act that increased penalty levels, the average

[21] *See* Chapter 7 at 181, 201–02.

[22] *See id.* at 179. The Commission was limited to coding such information from PSRs because the Commission does not receive other documents that may contain relevant information concerning criminal sexually dangerous behavior (*e.g.*, transcripts of court proceedings). The Commission's study reports unresolved allegations separately from CSDB reflected in prior convictions and findings in PSRs. *See* Chapter 7 at 181-82.

[23] *See id.* at 179–80.

[24] The Commission could not code non-criminal sexually dangerous behavior in reviewing PSRs as a result of difficulties in classifying such varied behavior without a bright-line standard such as criminality. Existing social science research has only undertaken to determine the prevalence of *criminal* sexually dangerous behavior among child pornography offenders. *See generally* Seto et al., *supra* note 19.

[25] *See* Chapter 7 at 176. Such sexual deviance, even if not criminal, is a risk factor for sexual recidivism. *See* Chapter 10 at 286.

guideline minimum was 117.5 months of imprisonment, and the average sentence imposed was 95.0 months.[26]

Typical guideline penalty ranges and average sentences of imprisonment have increased since fiscal year 2004 in significant part because of: (1) a growth in the number and severity of enhancements following the PROTECT Act amendments; and (2) an increase in the incidence of the underlying conduct and circumstances triggering such enhancements resulting from changes in typical offense conduct, particularly in the technology used, during the past decade.[27] In particular, four of the six enhancements in §2G2.2(b) — together accounting for 13 offense levels — now apply to the typical non-production offender.[28] In fiscal year 2010, §2G2.2(b)(2) (images depicting pre-pubescent minors) applied in 96.1 percent of cases; §2G2.2(b)(4) (sado-masochistic images) applied in 74.2 percent of cases; §2G2.2(b)(6) (use of a computer) applied in 96.2 percent of cases; and §2G2.2(b)(7) (images table) applied in 96.9 percent of cases.[29] Thus, sentencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now routinely apply to the vast majority of offenders. Higher penalty ranges and average sentences also have resulted from the statutory mandatory minimum penalties created by the PROTECT Act, which apply in approximately half of all §2G2.2 cases today and which result in higher base offense levels under the guidelines for offenders convicted of offenses carrying such mandatory minimum penalties.[30]

Supervised release terms in child pornography cases also have increased significantly since the PROTECT Act. The PROTECT Act raised the maximum statutory term of supervised release from three years for most child pornography offenders to a lifetime term for all child pornography offenders and also created a statutory mandatory minimum term of five years for all such offenders. In fiscal year 2010, the average term of supervised release for non-production offenders was approximately 20 years (220.3 months for offenders convicted of possession and 273.7 months for offenders convicted of R/T/D offenses); the average term of supervised release for offenders sentenced under the production guideline was nearly 27 years.[31] The sentencing guidelines currently recommend the statutory maximum term of lifetime supervision for all child pornography offenders.[32]

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[26] *See* Chapter 1 at 8; *see also id.* at 4 (discussing the PROTECT Act).

[27] *See* Chapter 6 at 123–25, 137–41; *see also* Chapter 8 at 208–12.

[28] *See* Chapter 8 at 209 (Table 8-1).

[29] The images table contains incremental enhancements depending on the number of images. The majority of offenders receiving an enhancement based on the images table (69.6%) received the maximum enhancement of 5 levels based on their possession of 600 or more images. *See* Chapter 6 at 141.

[30] *See* Chapter 2 at 32; Chapter 6 at 146.

[31] *See* Chapter 10 at 271–76.

[32] *See id.* at 272.

7. *A variety of charging, plea bargaining, and sentencing practices have contributed to widespread and growing sentencing disparities in §2G2.2 cases.*

Sentencing disparities in non-production cases have increased significantly since fiscal year 2004, the last full fiscal year in which guidelines were mandatory and the first full fiscal year after the enactment of the PROTECT Act (when most offenders were still subject to lower statutory and guideline sentencing ranges). In fiscal year 2004, within range sentences were imposed in 83.2 percent of cases of offenders sentenced under the non-production guidelines. By fiscal year 2011, within range sentences were imposed in only 32.7 percent of such cases. Below range sentences were imposed in nearly two-thirds of the fiscal year 2011 cases; 48.2 percent of such cases had non-government sponsored variances or departures and 14.6 percent had government sponsored variances or departures (other than for offenders' substantial assistance pursuant to USSG §5K1.1 (Substantial Assistance to Authorities (Policy Statement)).[33]

As part of its analysis of sentencing disparities, the Commission studied sentencing and charging practices in §2G2.2 cases from fiscal year 2010. The Commission's study of a large sample of similarly situated §2G2.2 offenders in Criminal History Category I revealed substantial sentencing disparities resulting from how they were charged and the manner in which the guidelines were applied. On average, offenders charged and convicted of possession but whose PSRs or plea agreements reflected that they knowingly received child pornography were sentenced to a 52-month term of imprisonment, while similarly situated offenders charged and convicted of receipt were sentenced to an 81-month term of imprisonment. On average, offenders charged and convicted of possession but who distributed child pornography in exchange for other child pornography, as found by courts in applying the guideline's specific offense characteristic for distribution, received a sentence of 78 months; similarly situated offenders charged and convicted of distribution received an average sentence of 132 months.[34]

Such sentencing disparities resulted from four practices by many courts and parties in §2G2.2 cases that limited offenders' sentencing exposure under the statutory and guideline sentencing scheme: (1) charging decisions, whereby offenders were charged only with possession offenses despite their commission of receipt and/or distribution offenses;[35] (2) plea agreements containing guideline stipulations regarding sentencing enhancements that limited offenders' sentencing exposure under the guidelines; (3) non-government sponsored variances and departures; and (4) government sponsored variances and departures (other than for offenders' substantial assistance to the government).[36] The Commission's special coding project of 1,654 §2G2.2 cases from fiscal year 2010 revealed that one or more of these practices

[33] *See* Chapter 1 at 7.

[34] *See* Chapter 8 at 215, 219 (Figures 8-3 & 8-7).

[35] The Commission's special coding project of USSG §2G2.2 cases from fiscal year 2010 revealed that 53.1% of offenders were convicted of possession only, while 97.5% of offenders engaged in knowing receipt and/or distribution conduct. *See* Chapter 6 at 146–47. The Commission's special coding project of §2G2.2 cases from the first quarter of fiscal year 2012 yielded similar findings. *See id.* at 152– 53 (finding that 95.8% of fiscal year 2012 offenders knowingly received and/or distributed child pornography, but 50.5% were convicted of possession only).

[36] *See* Chapter 8 at 219–25.

occurred in nearly 80 percent of cases. The Commission's analysis also showed that no offender or offense characteristics (*e.g.*, an offender's military service record, history of CSDB, or distribution of child pornography) appeared to account for these practices in most cases. Rather, geographical differences in charging, plea bargaining, and sentencing practices among the 94 districts appear to be the strongest factor explaining whether one or more of these practices limiting sentencing exposure was used.[37]

Finally, appellate review of sentences in non-production cases has not reduced the growing disparities at the district court level. Indeed, differing approaches among the circuit courts today concerning both district courts' categorical rejection of §2G2.2 on "policy" grounds and the "substantive reasonableness" of significant downward variances from the applicable guidelines ranges have contributed to the sentencing disparities.[38]

8. *Emerging research indicates that child pornography offenders with clinical sexual disorders may respond favorably to appropriate psycho-sexual treatment, particularly if administered pursuant to the "containment model."*

Many experts believe that sex offenders, including child pornography offenders, with clinical sexual disorders cannot be "cured." Nevertheless, some studies indicate that psycho-sexual treatment may be effective in reducing recidivism for many sex offenders.[39] Emerging research on the effectiveness of psycho-sexual treatment administered as part of the "containment model" is especially promising and warrants further study. The containment model involves close cooperation among the treatment provider, a polygraph examiner, and a qualified probation officer or other supervising officer. The containment model is now widely considered to be a "best practice" to be implemented in supervising sex offenders, including federal child pornography offenders. The success of the containment model depends on adequate resources and proper training of the professionals who administer it.[40]

9. *The Commission's study of 610 offenders sentenced under the non-production guidelines in fiscal years 1999 and 2000 found that their rate of known general recidivism was 30.0 percent and their rate of known sexual recidivism (a subset of general recidivism) was 7.4 percent.*

The Commission conducted a study of the rate of known recidivism by federal offenders sentenced under the non-production guidelines during fiscal years 1999 and 2000. In evaluating any recidivism study, particularly one involving sex offenders, caution should be exercised because the known recidivism rate is lower than the actual recidivism rate.[41] Using Federal Bureau of Investigation Record of Arrest and Prosecution or "RAP" sheets, the Commission tracked the 610 offenders during an average eight-and-one-half year follow-up period after their reentry into the community and found a rate of known general recidivism of 30.0 percent (183 of

[37] *See id.* at 227–38.

[38] *See id.* at 238–44.

[39] *See* Chapter 10 at 277–78.

[40] *Id.* at 283–84.

[41] *See* Chapter 11 at 295.

the 610 offenders). General recidivism was measured by arrests for or convictions of any felony or serious misdemeanor offense (including sex offender registration violations) as well as "technical" violations of the conditions of supervision resulting in an arrest or revocation. The Commission found that the offenders' rate of sexual recidivism, which is a subset of general recidivism, was 7.4 percent (45 of the 610 offenders). Sexual recidivism was measured by arrests for or convictions of a sexual offense (including a new child pornography offense but excluding a sex offender registration violation). Twenty-two of those 45 offenders (or 3.6% of the 610 offenders) were arrested for or convicted of sexual "contact" offenses.[42]

The Commission's study also found that the general recidivism rate of the members of the study group with a known history of CSDB was similar to the general recidivism rate of the members of the study group without a known history of CSDB. Because the number of the study group who engaged in sexual recidivism was very small (45 offenders), the Commission's study could not offer a meaningful comparison of the sexual recidivism rates of offenders with CSDB histories and offenders without CSDB histories. Social science research, however, indicates that an offender with a CSDB history is more likely to engage in sexual recidivism than an offender without such a history.[43]

The Commission's findings concerning offenders' general and sexual recidivism rates are similar to the findings of two recent child pornography offender recidivism studies by other researchers (one study of federal offenders and the other of Canadian offenders).[44] In addition, the rate of known general recidivism by the Commission's study group is similar to the rate of known general recidivism by a comparable segment of the entire federal offender population (*i.e.*, white male United States citizen offenders), and the study group's general recidivism rate and sexual "contact" offense recidivism rate were lower than the equivalent rates of state "contact" sex offenders.[45]

10. *Federal laws regarding victim notification and restitution present unique challenges for victims of federal non-production child pornography offenses.*

Under the Crime Victims' Rights Act (CVRA),[46] codified at 18 U.S.C. § 3771, federal law enforcement officials must notify a child pornography victim (or his or her guardian if the victim is still a minor) each time the officials charge an offender with a child pornography offense related to an image depicting the victim. Because images circulate widely on the Internet, it is not unusual for some victims to receive multiple official notifications each week. Such notifications can be emotionally traumatic because they serve to remind the victims that the images of their sexual abuse are indelible and increasingly widespread. Although under the CVRA victims may opt out of receiving such notice, doing so may prevent them from obtaining

[42] *See id.* at 299–301.

[43] *See id.* at 302–03.

[44] *See id.* at 306–07.

[45] *See id.* at 307– 08 (noting that the sexual contact offense recidivism rate of the state sex offenders was 5.3% over a three-year follow-up period, while the sexual contact recidivism rate of the federal child pornography offenders was 2.6% over a comparable three-year follow-up period).

[46] *See* Justice for All Act of 2004, Pub. L. No. 108–405, tit. I, § 102, 118 Stat. 2260, 2261-64 (Oct. 30, 2004).

restitution and otherwise exercising their rights as victims. Thus, even as the victims' rights laws have empowered child pornography victims and enabled them to be involved in the criminal justice process, the notification process itself has had the unintended and incidental effect of exacerbating the harms associated with the ongoing distribution of the images for some victims.[47]

In recent years, some victims of child pornography offenses have started to attempt to enforce their statutory right to restitution in 18 U.S.C. § 2259 against non-production offenders who have had no connection to the victims other than in the possession, receipt, or distribution of their images. Federal courts have struggled with calculating restitution for these victims and have reached different outcomes. Courts uniformly have found that child pornography victims are "victims" of the offenses under § 2259 and have suffered harm. Many district courts have refused to order restitution, however, because they have concluded either that a non-production child pornography offense was not the "proximate cause" of the victim's injury or that it would be impossible to apportion a specific amount of restitution owed by an individual defendant. Other district courts either have not required proximate cause or have found proximate cause and then attempted to calculate an appropriate restitution award. This uncertainty has now extended to the appellate level where a split in the federal circuit courts has developed regarding the process of awarding restitution for child pornography victims.[48]

C. COMMISSION'S RECOMMENDATIONS FOR THE NON-PRODUCTION (§2G2.2) GUIDELINE

1. *Amendments to USSG §2G2.2*

The Commission believes that the following three categories of offender behavior encompass the primary factors that should be considered in imposing sentences in §2G2.2 cases:

1) the content of an offender's child pornography collection and the nature of an offender's collecting behavior (in terms of volume, the types of sexual conduct depicted in the images, the ages of the victims depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technology);

2) the degree of an offender's engagement with other offenders — in particular, in an Internet "community" devoted to child pornography and child sexual exploitation; and

3) whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense.

[47] *See* Chapter 5 at 115–17.

[48] *See id.* at 117–18.

The first two factors primarily relate to retribution (*i.e.*, the need to impose "just punishment" to reflect "the seriousness of the offense" and harm caused to victims),[49] although they also may relate to the need to incapacitate certain sexually dangerous offenders.[50] The third primarily relates both to retribution as well as to the need for incapacitation (for those offenders who pose a significant risk of sexually recidivating if not incarcerated for a significant period of time).[51] The Commission believes that the other purposes of punishment — deterrence and rehabilitation[52] — likewise will be served by a revised sentencing scheme that gives appropriate weight to all three factors and that also provides for proper treatment for offenders with psycho-sexual disorders.[53]

The presence of aggravating factors from any of these three categories, even without the presence of any aggravating factors from the other two categories, warrants enhanced punishment depending on the degree that aggravating factors from that category are present in a particular case. The presence of aggravating factors from multiple categories generally would warrant a more severe penalty than the presence of aggravating factors from a single category.

The current sentencing scheme in §2G2.2 places a disproportionate emphasis on outmoded measures of culpability regarding offenders' collections (*e.g.*, a 5-level enhancement under §2G2.2(b)(3)(B) for possession of 600 or more images of child pornography, which the typical offender possesses today). At the same time, the current scheme places insufficient emphases on other relevant aspects of collecting behavior as well as on offenders' involvement in child pornography communities and their sexual dangerousness. As a result, the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior. At the same time, it results in unduly lenient ranges for other offenders who engaged in aggravated collecting behaviors not currently addressed in the guideline, who were involved in child pornography communities, or who engaged in sexually dangerous behavior not qualifying for an enhancement in the current penalty scheme. The guideline thus should be revised to more fully account for

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[49] 18 U.S.C. § 3553(a)(2)(A) (stating that sentences should "reflect the seriousness of the offense" and "provide just punishment for the offense"); *see also* Tapia v. United States, 131 S. Ct. 2382, 2387 (2011) (referring to this statutory purpose of punishment as "retribution").

[50] As discussed elsewhere in this report, existing social science evidence is inconclusive whether involvement in a child pornography "community" is associated with an increased risk of "contact" sex offending and other criminal sexually dangerous behavior. The Commission's own empirical study of child pornography cases did not clearly establish such an association. *See* Chapter 4 at 94 (discussing the social science research); Chapter 7 at 193 (discussing Commission's findings). Although the existing research is nascent, it appears that the extent of an offender's sexual deviance (as reflected in part in the content of his child pornography collection) may be a risk factor for contact offenses in some cases. *See* Chapter 10 at 286.

[51] *See* Chapter 7 at 170 (an offender's history of CSDB is a risk factor for sexual recidivism).

[52] *See Tapia*, 131 S. Ct. at 2387 ("The[] four considerations [in 18 U.S.C. § 3553(a)(2)(A)-(D)] — retribution, deterrence, incapacitation, and rehabilitation — are the four purposes of sentencing generally, and a court must fashion a sentence 'to achieve the[se] purposes ... to the extent that they are applicable' in a given case. [18 U.S.C.] § 3551(a)."); *see also* 28 U.S.C. § 991(b)(1)(A) (directing the Sentencing Commission to "establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in" § 3553(a)(2)(A)-(D)).

[53] *See* Chapter 10 at 277–85 (discussing psycho-sexual treatment of sexual disorders).

each of the three factors. Such a revision should reflect recent changes in offense conduct and knowledge gained from emerging social science research and also better account for the variations in offenders' culpability and their sexual dangerousness.[54]

Consistent with the position of the Department of Justice,[55] the Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines.[56] If such legislation were enacted, the Commission would proceed to draft a comprehensive revision of the child pornography guidelines according to the Commission's regular procedures for amendment pursuant to 28 U.S.C. § 994(o). Public comment would be sought, a public hearing would be held, and the proposed revision would be submitted for congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p). The Commission requests Congress to provide the Commission with authority to revise the entire guideline structure.

Without congressional action, the Commission is able nevertheless to amend the child pornography guidelines in a more limited manner that better reflects the three sentencing factors discussed above. As shown in Appendix E of this report, which contains an analysis of the provenance of each section of the current version of §2G2.2, a number of its provisions were promulgated on the Commission's own initiative — not as a result of a specific congressional directive or by direct statutory amendment — and, thus, could be amended pursuant to 28 U.S.C. § 994(o) (subject to congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p)).

The Commission outlines below its broader vision of revisions to the guidelines to better reflect the Commission's findings and conclusions above.

a. Offenders' Collecting Behavior

The current penalty scheme in non-production cases focuses primarily on an offender's child pornography collection. Three of the six enhancements in §2G2.2 concern the content of offenders' collections: (1) a 2-level enhancement for possession of images of a pre-pubescent minor, (2) a 4-level enhancement for possession of sado-masochistic images or other depictions of violence, and (3) a 2- to 5-level enhancement for collections of a certain number of images (with increments ranging from ten or more images to 600 or more images).[57] Because these

[54] *See generally* 28 U.S.C. § 991(b)(1)(C) (requiring the Commission to promulgate guidelines that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process").

[55] *See* Letter from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 6 (June 28, 2010) ("We think the report to Congress ought to recommend legislation that permits the Sentencing Commission to revise the sentencing guidelines for child pornography offenses.").

[56] *See* U.S. SENT'G COMM'N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 11-49 (2009) (discussing how the current guidelines have been influenced by both a series of congressional directives since 1991 and also the direct amendments to the guidelines in the PROTECT Act of 2003).

[57] *See* USSG §2G2.2(b)(2), (4) & (7). While the Commission has generally defined the term "image" consistently with the statutory definitions of "visual depiction" and "child pornography" in 18 U.S.C. § 2256(5) & (8) and specifically defined the term to take account of child pornography videos, *see* §2G2.2, comment. (n. 4) (citing 18

three provisions (including the maximum 5-level enhancement for possession of 600 or more images) now apply to a majority of offenders,[58] they add a significant 11-level cumulative enhancement based on the content of the typical offender's collection. The current guideline thus does not adequately distinguish among most offenders regarding their culpability for their collecting behaviors. Furthermore, the 11-level cumulative enhancement, in addition to base offense levels of 18 or 22,[59] results in guideline ranges that are overly severe for some offenders in view of the nature of their collecting behavior.

The Commission recommends that §2G2.2(b) be updated to account more meaningfully for the current spectrum of offense behavior regarding the nature of images, the volume of images, and other aspects of an offender's collecting behavior reflecting his culpability (*e.g.*, the extent to which an offender catalogued his child pornography collection by topics such as age, gender, or type of sexual activity depicted; the duration of an offender's collecting behavior; the number of unique, as opposed to duplicate, images possessed by an offender).[60] Such a revision should create more precisely calibrated enhancements that provide proportionate penalty levels based on the aggravating circumstances present in the full range of offenders' collecting behavior today.

b. Offenders' Engagement in Child Pornography Communities

The Commission's study of the manners in which offenders distribute child pornography suggests that approximately one-quarter of all non-production offenders sentenced in federal court today have had some level of involvement in child pornography communities.[61] There currently is no enhancement in §2G2.2 aimed at offenders' involvement in such communities. The existing enhancement for distribution of child pornography, §2G2.2(b)(3), indirectly punishes some offenders for their involvement with child pornography communities, insofar as Internet-based communities such as Internet chat rooms or bulletin boards dedicated to child exploitation serve as forums in which offenders often trade child pornography. However, that enhancement — in particular, its incremental 2- to 7-level enhancements for different types of distribution[62] — was not designed to punish community involvement *per se*.[63] Similarly, the 2-

U.S.C. § 2256(5) & (8) and also providing that each video "shall be considered to have 75 images"), the Commission has authority to revise the definition of "image."

[58] *See* Chapter 8 at 209 (noting that, in fiscal year 2010, USSG §2G2.2(b)(2) applied to 96.3% of cases; §2G2.2(b)(4) applied to 74.2% of cases, and §2G2.2(b)(7)(D), the maximum 5-level enhancement for possessing 600 or more images, applied to 67.6% of cases).

[59] *See* Chapter 2 at 32.

[60] *See* Chapter 4 at 80–92 (discussing the manners in which offenders today collect child pornography and the nature and volume of images possessed by typical offenders).

[61] *See* Chapter 6 at 151 & n.70.

[62] *See* USSG §2G2.2(b)(3)(A)-(F).

[63] *See* Chapter 6 at 151–52 (discussing the manner in which USSG §2G2.2(b)(3) applies to offenders' distribution conduct indicating "community" involvement compared to its application to other offenders' distribution conduct not suggesting "community" involvement).

level enhancement for use of a computer, §2G2.2(b)(6), applies in virtually every case and, thus, fails to differentiate among offenders with respect to their involvement in communities.[64]

A new guideline provision specifically dealing with offenders' community involvement, as distinct from their distribution conduct, could better differentiate among offenders' culpability based on their degree of such community involvement.[65] In addition, the guideline could be amended to better distinguish between more and less culpable distribution conduct while remaining "technology-neutral" (and, thus, remain relevant in view of inevitable future changes in technologies). The enhancement in §2G2.2(b)(3) was created before the widespread use of P2P file-sharing programs and other types of emerging technologies by non-production offenders.[66] Therefore, a revised guideline should better differentiate among offenders based both on their degree of community involvement and the nature of their distribution conduct.[67]

c. Offenders' Known Histories of Sexually Dangerous Behavior

Non-production offenders' histories of criminal sexually dangerous behavior (CSDB) result in increased penalty ranges for some offenders. Some offenders receive the guideline's "pattern of activity" enhancement under §2G2.2(b)(5) and/or the statutory enhancement for having a predicate conviction for a sex offense under 18 U.S.C. §§ 2252(b) or 2252A(b). In addition, depending on the operation of the guidelines' criminal history rules,[68] offenders with

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[64] *See id.* at 139.

[65] By focusing on "community" involvement, the Commission is not intending to suggest that mere association with others who generally advocate child sexual exploitation is a basis by itself for criminal punishment. Rather, a convicted child pornography offender's involvement with other child pornography offenders in actual or virtual "communities" — whereby child sexual exploitation generally and child pornography specifically are validated through the community members' words and actions — is sufficiently related to the offenses of possession, receipt, or distribution of child pornography such that the First Amendment would not bar consideration of that association as an aggravating factor at sentencing. *See* United States v. Simkanin, 420 F.3d 397, 417 n.22 (5th Cir. 2005) (approving of a prior unpublished decision affirming a district court's upward departure based on a child pornography defendant's membership in the North American Man Boy Love Association; stating that such a departure did not violate the First Amendment); *see also* Dawson v. Delaware, 503 U.S. 159, 165 (2002) (holding that "the Constitution does not erect a per se barrier to the admission of [a defendant's] beliefs or associations at sentencing simply because those beliefs and associations are protected by the First Amendment").

[66] The distribution enhancement was in the original version of the guideline (promulgated in 1987). The last time the Commission amended the distribution enhancement was to clarify that "distribution includes advertising and posting [child pornography] on a website for public viewing . . . ." USSG App. C, amend. 664 (Nov. 1, 2004). This clarification in the definition of "distribution" did not specifically concern P2P file-sharing programs.

[67] *See* Prepared Statement of Prof. Bryan N. Levine, Ph.D., Professor of Computer Science, University of Massachusetts, to the Commission, at 1 (Feb. 15, 2012) (contending that offenders' involvement in child pornography communities and use of sophisticated computer technologies "are important aspects of this crime and its offenders that are not taken into account by the current guidelines"); *see also* Joint Prepared Statement of James Fottrell, Steve Debrota, and Francey Hakes, U.S. Department of Justice, to the Commission, at 17 (Feb. 15, 2012) ("The Commission should . . . consider adding new specific offense characteristics [to the guideline] to better differentiate among offenders, such as by accounting for offenders who communicate with one another and in so doing, facilitate and encourage the sexual abuse of children and the production of more child pornography, as well as for offenders who create and administer the forums where such communication is taking place.").

[68] *See* USSG §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

convictions for sex offenses also may receive criminal history points for those convictions and be subject to higher guideline ranges for that reason. Some offenders with CSDB histories, however, are not subject to higher penalty ranges under the statutory or guideline provisions. The Commission's study of 1,654 §2G2.2 offenders in fiscal year 2010 found that 520 (31.4%) had histories of CSDB reflected in prior convictions or findings in their PSRs. Of those 520 offenders, 230 (44.2%) received the guideline's pattern of activity enhancement and/or the statutory enhancement for having a predicate conviction for a sex offense.[69] Typically, offenders with CSDB histories did not receive a guideline or statutory enhancement for their CSDB because the legal requirements of the current enhancement provisions were not met.[70] In addition, the Commission's study of offenders with CSDB histories showed that a majority were in Criminal History Category I based on the operation of the guidelines' criminal history rules.[71] Therefore, the current non-production penalty scheme does not fully account for the variations in offenders' known histories of criminal sexually dangerous behavior.

Not only does the current penalty scheme not account for offenders' known CSDB histories in some cases, it also is silent concerning non-criminal sexually deviant behavior suggesting sexual dangerousness.[72] An amendment to the guidelines should better address a broader range of offenders' sexual dangerousness and provide for a more nuanced approach depending on the number and type of acts of sexually dangerous behavior in an offender's history.[73]

2. *Supervised Release Terms for Child Pornography Offenders*

The Commission will continue to study subsection (b) of USSG §5D1.2(Term of Supervised Release), which recommends that courts impose "the statutory maximum term of

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[69] *See* Chapter 7 at 187. Of those 230 offenders, 58 received both the guideline and statutory enhancements, 110 received only the guideline enhancement, and 62 received only the statutory enhancement. USSG§2G2.2(b)(3)(C)-(E) — which provide for 5- to 7-level enhancements for distributing child pornography to a minor — also may punish a certain type of criminal sexually dangerous behavior (typically in connection with "travel" or "enticement" cases) occurring during the course of a non-production offense. Those provisions applied in only 2.7% of §2G2.2 cases in fiscal year 2010.

[70] The guideline's pattern-of-activity enhancement requires *two* predicate acts and the statutory enhancements require a prior *conviction* (as opposed to a finding in a PSR). *See* Chapter 7 at 187.

[71] *See id.* at 195 (376 of the 581 offenders with CSDB histories were in Criminal History Category I).

[72] *See id.* at 176 (discussing non-criminal sexually dangerous behavior); *see also* Chapter 10 at 286 (discussing an offender's sexual deviancy as a risk factor for sexual recidivism). Such non-criminal sexually dangerous behavior may warrant increased punishment. *See, e.g.*, United States v. Cunningham, 669 F.3d 723, 727, 735–36 (6th Cir. 2012) (finding that a sentencing court did not err in considering a USSG §2G2.2 offender's "legal" self-recorded "rape fantasy," involving the defendant's filming "himself masturbating to [non-pornographic, legal] photographs of . . . a young child" and "sen[ding] [the] video to another offender . . . along with lascivious audio commentary of the act").

[73] The non-criminal nature of such relevant conduct indicating sexual dangerousness would not prevent its consideration at sentencing. *See* United States v. Arce, 118 F.3d 335, 340-41 (5th Cir. 1997) (approving use of evidence of "non-criminal" relevant conduct supporting an upward departure); United States v. McKnight, 17 F.3d 1139, 1147 (4th Cir. 1994) (same); *cf.* Pepper v. United States, 131 S. Ct. 1229, 1235 (2011) (stating that "no limitation shall be placed on information" considered at sentencing) (citing 18 U.S.C. § 3661 and Williams v. New York, 337 U.S. 241 (1949)).

supervised release" for all offenders convicted of a sex offense, including any child pornography offense. That guideline effectively recommends a lifetime term of supervision for all child pornography offenders because the current statutory maximum term of supervision for any offender convicted of a child pornography offense is "any term of years not less than 5, or life."[74] The recommendation in §5D1.2(b) was made before the enactment of the PROTECT Act of 2003, which raised the statutory maximum term of supervision from three years for most child pornography offenders to a lifetime term for all child pornography offenders.[75] The Commission is considering amending the guideline in a manner that provides guidance to judges to impose a term of supervised release within the statutory range of five years to a lifetime term that is more tailored to individual offender's risk and corresponding need for supervision.

D. POSSIBLE CHANGES TO THE NON-PRODUCTION CHILD PORNOGRAPHY STATUTES

In addition to legislation providing the Commission with authority to revise the child pornography guidelines in a comprehensive manner, the Commission recommends two statutory amendments that Congress should consider: first, an amendment that aligns the statutory penalties for the offenses of receipt and simple possession and, second, an amendment to the statutory provisions governing notice to, and restitution for, victims of non-production offenses. In addition, Congress may wish to revise the current statutory penalty structure to differentiate among the various types of distribution conduct by non-production offenders today. These potential statutory changes are discussed below.

1. *Statutory Penalties*

The current statutory range of imprisonment for possession is zero to ten years of imprisonment if an offender possessed child pornography depicting a minor 12 years of age or older who was not then prepubescent and zero to 20 years of imprisonment if an offender possessed child pornography depicting a prepubescent minor or a minor under 12 years of age. The current statutory range of imprisonment for receipt is five to 20 years of imprisonment for R/T/D offenses (whatever the age or sexual development of the minors depicted). Defendants with predicate convictions for sex offenses face increased statutory imprisonment ranges of ten to 20 years for a possession offense (whatever the age or sexual development of the minors depicted) and 15 to 40 years for R/T/D offenses.[76]

Since Congress's 1990 legislation adding simple possession to the list of prohibited acts, the Commission has taken the position that, because receipt is "a logical predicate" to possession, "there appears to be little difference in the offense seriousness between typical receipt cases and typical possession cases."[77] For similar reasons, the Criminal Law Committee

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[74] 18 U.S.C. § 3583(k).

[75] *See* Chapter 10 at 272.

[76] *See* Chapter 2 at 26. Until late 2012, the statutory maximum penalty for all possession offenses was 10 years (for offenders without a predicate conviction for a sex offense). *See* Chapter 1 at 5.

[77] U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 11, 41 (June 1996); Letter of Judge William W. Wilkins, Jr., Chair, U.S. Sentencing Commission, to Hon. Edward R. Roybal, Chairman, House Subcommittee on Treasury,

of the Judicial Conference recently has recommended that Congress remove the statutory mandatory minimum penalty for receipt because "there is no meaningful difference between receipt [and] possession."[78] In the Commission's 2010 survey of judges, a clear majority stated that current statutory penalty levels for receipt cases are excessive.[79] The Commission's special coding project of fiscal year 2010 non-production child pornography cases found that there were inconsistent charging practices that resulted in significant unwarranted sentencing disparities among offenders charged with receipt and similarly situated offenders charged with possession.[80]

In deciding whether to align the statutory penalties for receipt and possession, Congress would need to review its previous decision that the punishment for receipt should mirror the higher penalty range for distribution rather than the lower penalty range for possession.[81] That decision appears to have been predicated on two beliefs — first, that aligning the penalties for receipt with the penalties for distribution rather than with the penalties for possession was important for law enforcement purposes; and, second, that receipt offenses often contributed to the commercial child pornography market.[82] As explained below, neither reason has the same force today because of changed circumstances.

Postal Service, and General Government, Committee on Appropriations, U.S. House of Representatives (Aug. 7, 1991), included in the *Congressional Record* at 137 CONG. REC. H6736-02 (daily ed. Sept. 24, 1991).

[78] *See* Testimony of Chief U.S. District Judge M. Casey Rodgers, U.S. District Court for the Northern District of Florida, to the Commission, at 367, 370 (Feb. 15, 2012) (on behalf of the Criminal Law Committee) ("I would urge the Commission to seek repeal of the [statutory m]andatory [m]inimum sentence for receipt offenders.").

[79] In the survey, 71% of the 639 judges who responded to questions regarding child pornography offenses stated that the statutory mandatory minimum penalty for receipt was too high. *See* U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010, Questions 1 & 8 (June 2010). The Commission suggested in its recent report on mandatory minimum penalties that "mandatory minimum penalties for certain non-contact child pornography offenses may be excessively severe and as a result are being applied inconsistently." U.S. SENT'G, COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 369 (Oct. 2011).

[80] *See* Chapter 8 at 213–15. The fiscal year cases examined by the Commission were ones in which the statutory maximum sentence was ten years for possession and 20 years for receipt (for offenders without a predicate conviction for a sex offense). In late 2012, the statutory maximum sentence for possession was increased to 20 years for defendants who possessed child pornography depicting a prepubescent minor or a minor under 12 years of age (a type of child pornography possessed by the vast majority of offenders today). *See* Chapter 1 at 5; *see also* Chapter 8 at 209 (noting that 96.3% of non-production offenders possessed such images in fiscal year 2010). Some of the sentencing disparities in 2010 resulted from the prior ten-year statutory maximum for possession offenders. *See* Chapter 8 at 217, 219. However, additional disparities resulted from the fact that the possession statute did not (and still does not) carry a mandatory minimum penalty and also from the fact that offenders convicted of receipt have a higher base offense level under USSG §2G2.2(a) than offenders convicted of possession. *See id.* at 215. The latter disparities presumably will continue to occur notwithstanding the current possession statute.

[81] *See* Chapter 2 at 27–28. As discussed in Chapter 2, Congress did not criminalize possession in 1977, when it first criminalized receipt and distribution, and only added possession to the list of prohibited acts in 1990 (with lower penalties than those for receipt and possession). When possession was criminalized in 1990, although it had lower *statutory* penalties than receipt, the Commission decided to align the *guideline* penalties for receipt and possession because it considered the two offenses to be very similar in nature and different from distribution. In 1991, Congress rejected the Commission's decision to align the guideline penalties for receipt and possession. *See id.* at 28–30.

[82] *See id.* at 29–30.

Congress's first reason related to the manner in which law enforcement officials in the early 1990s detected and prosecuted offenders who trafficked in child pornography. At the time that Congress first criminalized possession in 1990, many offenders who distributed child pornography used the United States postal system to do so. United States postal inspectors often used "reverse sting" operations to detect such offenders and prosecute them for receipt.[83] Prosecutors often filed receipt charges against such offenders rather than distribution charges because, at that time, it generally was easier to prove the offense of receipt than the offense of distribution based on the success of "reverse sting" operations.[84] Today, however, law enforcement officials primarily detect offenders on the Internet and, in particular, can detect and prosecute *distribution* — which typically occurs through the use of P2P file-sharing programs[85] — as or more easily than receipt.[86] Therefore, in view of these changes in offense conduct and law enforcement techniques, the prior rationale for aligning the penalties for receipt with the higher penalties for distribution — rather than aligning the penalties for receipt with the lower penalties for possession — no longer exists.

The second apparent reason that Congress cited for punishing receipt more harshly than possession in the early 1990s was that a large percentage of offenders who received child pornography did so by paying for it and, thus, financially contributed to the commercial child pornography industry.[87] That reason also has been undercut by technological changes in offense conduct during the past two decades. Although paying consumers of child pornography still exist today, in recent years the *non-commercial* market for child pornography has "exploded," and the commercial market has assumed a much smaller portion of the overall market.[88] As non-

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[83] *See, e.g.*, United States v. Gifford, 17 F.3d 462 (1st Cir. 1994) (noting that the defendant, who both distributed and received child pornography, was detected by a U.S. Postal inspector in 1990 in a "reverse-sting" operation and ultimately was charged and convicted of receipt).

[84] *See* Chapter 2 at 29 (quoting from 1990 floor statements of Senator Helms and Representative Wolf).

[85] *See* Chapter 6 at 154–55.

[86] *See* Testimony of Assistant U.S. Attorney Steve DeBrota (Northern District of Indiana), to the Commission, at 282 (Feb. 15, 2012) ("[I]n my opinion, forensically proving receipt has been oversold. It's actually easier to prove where they're doing it, distribution, than it is receipt. Receipt is tricky. Distribution, the forensics evidence tends to be easier.").

[87] *See* Chapter 2 at 29 (quoting from Senator Helms).

[88] *See* Testimony of Ernie Allen, President and CEO, National Center for Missing and Exploited Children, Institute of Medicine, Committee on Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States, The National Academies (Jan. 12, 2012) ("I believe that the problem of commercial child pornography has shrunk dramatically. However, the non-commercial distribution of child pornography has exploded. . . . There are millions of child pornography images being traded online by individuals who view them for sexual gratification. Offenders can access them for free on all platforms of the Internet, including the World Wide Web, peer-to-peer file-sharing programs, and Internet Relay Chat."), http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4632 (last visited Dec. 11, 2012); World Congress against Commercial Sexual Exploitation of Children, *Theme Paper: Child Pornography [Report to the Second World Congress Against Commercial Sexual Exploitation of Children]* 5 (2001) ("[O]nce an image has been digitised and is in the public domain these days it will inevitably find its way on to the Internet where it could be picked up and used both in a commercial and a non-commercial setting. The distinction between commercial and non-commercial child pornography thus ceases to have any real significance in this context."), http://www.csecworldcongress.org/PDF/en/Yokohama/Background_reading/Theme_papers/Theme%20paper%20Child%20Pornography.pdf (last visited Dec. 11, 2012); *see also* Chapter 6 at 154 (noting that a majority of offenders today receive child pornography using non-commercial P2P file-sharing programs, while a minority received child pornography from commercial websites).

commercial distribution has eclipsed commercial distribution, the typical offender today receives images without providing financial support to the commercial child pornography industry. Therefore, the rationale for categorically punishing receipt in the same manner as distribution — and more harshly than possession — appears less compelling today than it did in the early 1990s.

Finally, after reviewing over 2,000 cases of offenders sentenced for receipt and possession offenses in fiscal years 1999, 2000, 2010, and 2012 in preparation for this report, the Commission reaffirms its prior conclusion that "there appears to be little difference in the offense seriousness between typical receipt cases and typical possession cases."[89]

For these reasons, and to reduce the unwarranted sentencing disparities resulting from inconsistent application of the mandatory minimum penalty for receipt offenses,[90] the Commission unanimously recommends that Congress align the statutory penalties for receipt and possession. There is a spectrum of views on the Commission, however, as to whether these offenses should be subject to a statutory mandatory minimum penalty and, if so, what any mandatory minimum penalty should be.[91] Nevertheless, the Commission unanimously believes that, if Congress chooses to align the penalties for possession with the penalties for receipt and maintain a statutory mandatory minimum penalty, that statutory minimum should be less than five years.

Finally, the Commission's analysis of current offenders' distribution behaviors revealed several different types of common distribution conduct, ranging from "personal" modes of distribution associated with "community" involvement (*e.g.*, emailing images to other offenders or trading images in "closed" P2P file-sharing programs) to "open" P2P file-sharing programs involving impersonal and indiscriminate distribution to strangers.[92] The most common mode of distribution today is "open" P2P file-sharing.[93] The different types of distribution reflect a significant evolution in the technologies used to distribute child pornography, particularly in the past decade.[94] Because the existing statutory provisions prohibiting distribution and the related act of transportation of child pornography[95] were enacted in earlier technological eras,[96] Congress may wish to revise the penalty structure governing those offenses to differentiate

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[89] U.S. SENT'G COMM'N, SEX OFFENSES AGAINST CHILDREN, *supra* note 77, at 41.

[90] *See* Chapter 8 at 215 (discussing sentencing disparities resulting from inconsistent application of statutory mandatory minimum penalty for receipt offenses).

[91] *Cf.* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, *supra* note 79, at xxxi (noting that "there is a spectrum of views among members of the Commission regarding mandatory minimum penalties" generally).

[92] *See* Chapter 6 at 149–51.

[93] *See id.* at 150, 54.

[94] *See id.* at 155 (noting that no non-production offenders sentenced in fiscal year 2002 appeared to have used a P2P file-sharing program).

[95] 18 U.S.C. §§ 2252(a)(1),(2) & 2252A(a)(1), (2). As noted in Chapter 7, the vast majority of offenders convicted of transportation of child pornography in fact knowingly distributed it to other offenders. *See* Chapter 7 at 189 n.72.

[96] Section 2252(a) originally was enacted in 1977, and § 2252A originally was enacted in 1996. *See* United States v. Polizzi, 549 F. Supp. 2d 308, 341 (E.D.N.Y. 2008), *vacated on other grounds*, 564 F.3d 142 (2d Cir. 2009). *See also* Chapter 1 at (discussing the evolution of technology in offense conduct during the past four decades).

among the wide array of newer and older technologies used by offenders to distribute child pornography.

2. Notice to and Restitution for Victims of Non-Production Offenses

Implementation of the current federal statutes governing notice to and restitution for victims of non-production child pornography offenses has been problematic. The notice provision has in some cases exacerbated victims' emotional harm, yet has been deemed necessary to protect the victims' rights (including their right to seek restitution). The restitution statute has generated confusion and disparate results in courts around the country.[97] Therefore, Congress should consider amending the notice and restitution statutes in order to minimize emotional trauma to victims and also provide specific guidance to sentencing courts to ensure appropriate restitution for victims.

E. FINDINGS AND RECOMMENDATIONS CONCERNING §2G2.1 (PRODUCTION) CASES

The Commission's special coding project of §2G2.1 cases revealed that production offenders engage in a wide variety of offense behavior. The typical offender, during the course of his production offense, had sexual contact with a prepubescent minor. A minority of offenders, however, did not engage in any physical contact with their victims, and a subset of those offenders were never physically present with their victims because they caused the production of child pornography remotely (*e.g.*, via a webcam or through email).[98]

The rate of sentences imposed within the applicable guideline ranges in §2G2.1 cases is substantially higher than the rate in §2G2.2 cases, but the within range rate in §2G2.1 cases has noticeably decreased during recent years. In fiscal year 2011, the within range rate in such cases was 50.4 percent, down from a rate of 84.0 percent in fiscal year 2004, while the below range rate (excluding departures for substantial assistance to the authorities) rose to 38.1 percent. As with average sentences in §2G2.2 cases, average sentences in §2G2.1 cases steadily increased in the years following the enactment of the PROTECT Act of 2003 but have declined slightly in recent years as the percentage of below range sentences have increased. The average sentence for production offenders in fiscal year 2011 was 274 months.[99]

The Commission will continue to monitor sentencing practices in production cases carefully. In addition, certain conforming amendments to §2G2.1 may be appropriate in conjunction with future amendments to §2G2.2.

F. CONCLUSION

This report by the Commission is intended to provide Congress and the various stakeholders in the federal criminal justice system with relevant and thorough information about child pornography offenses and offenders. As illustrated by this report, child pornography

[97] *See* Chapter 5 at 114–18.

[98] *See* Chapter 9 at 262–66.

[99] *See id.* at 252–57.

offenses result in substantial and indelible harm to the children who are victimized by both production and non-production offenses. However, there is a growing belief among many interested parties that the existing sentencing scheme in non-production cases fails to distinguish adequately among offenders based on their degrees of culpability and dangerousness. Numerous stakeholders — including the Department of Justice, the federal defender community, and the Criminal Law Committee of the Judicial Conference of the United States Courts — have urged the Commission and Congress to revise the non-production sentencing scheme to better reflect the growing body of knowledge about offense and offender characteristics and to better account for offenders' varying degrees of culpability and dangerousness.

The Commission believes that the current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to offenders' collecting behavior as well as its failure to account fully for some offenders' involvement in child pornography communities and sexually dangerous behavior. The current guideline produces overly severe sentencing ranges for some offenders, unduly lenient ranges for other offenders, and widespread inconsistent application. A revised guideline that more fully accounts for all three of the factors discussed in Part C — the full range of an offender's collecting behavior, the degree of his involvement in a child pornography community, and any history of sexually dangerous behavior — would better promote proportionate sentences and reflect the statutory purposes of sentencing. Such a revised guideline, together with a statutory structure that aligns the penalties for receipt and possession, would reduce much of the unwarranted sentencing disparity that currently exists. The Commission also suggests that Congress may wish to revise the penalty structure governing distribution offenses in order to differentiate among the wide array of newer and older technologies used by offenders to distribute child pornography. Finally, the Commission also recommends to Congress that it consider amending the notice and restitution statutes for victims of child pornography offenses. The Commission stands ready to work with Congress, the federal judiciary, the executive branch, and others in the federal criminal justice community to improve the sentencing scheme for these extremely serious offenses.

APPENDIX A
GLOSSARY OF RELEVANT TERMINOLOGY

Term	Definition
Abel Assessment	Developed by Gene Abel, M.D., the Abel Assessment is often part of a complete psychosexual evaluation. The Abel Assessment consists of both subjective self-report by an individual of his or her sexual interests and objective measures. Part of the objective test is the Visual Reaction Time (VRT) test which measures how long an individual views a variety of images of clothed adults, teens, and children. During the VRT, the individual is also asked to rate his or her degree of sexual arousal to the image.
Adam Walsh Act	Adam Walsh Child Protection and Safety Act, Pub. L. No. 109–248, 120 Stat. 587 (2006). Among other things, the Adam Walsh Act created a national system for sex offender registration and established a system for the duration of the registration requirement based on the seriousness of the sex offense giving rise to the requirement to register.
Anonymizer	Anonymizers are proxy servers that permit a user to surf the Internet anonymously. Users connect to the Internet through the anonymizing proxy server so the website records only that the proxy server visited the site. Different anonymizers rely on different methods and will provide greater or lesser protection. Anonymizers prevent users' IP addresses from being observed directly.
BitCoin (see Digital Currency)	BitCoin is a digital currency offering relative anonymity. Some child pornography offenders use BitCoins to purchase child pornography.
Bulletin Board System (BBS)	Bulletin Board System or BBS was an early iteration of networked computing. BBS enabled users to dial in using a computer modem and ordinary telephone line to connect to a host computer. Users could post messages, interact with other BBS users, or download stories and images for viewing on the user's own computer.
Chat/Chatting	Chatting or "web chatting" is a means of communicating with others online. Chatting may occur in dedicated "chat rooms" or software may permit chatting as part of video gaming, P2P filesharing, or other applications. *See* P2P.

Term	Definition
Child Erotica	Child erotica is a general term describing legal images or stories that are about children and of a sexual nature. Images may be overtly sexual and show children in inappropriate clothing or positions or it may only be use of the image that is inappropriate. For example, some pedophiles use catalog images of children in bathing suit advertisements for child erotica purposes.
Child Exploitation and Online Protection (CEOP) Centre	A United Kingdom multidisciplinary entity charged by the Home Secretary with preventing the exploitation of children. CEOP receives public and private funding. CEOP's role in the UK is somewhat analogous to that of the United States based National Center for Missing & Exploited Children (NCMEC). CEOP works with law enforcement, child protection agencies, and researchers to provide training, publications, and research. *See* NCMEC.
Civil Commitment	Pursuant to 18 U.S.C. § 4248(a), and similar state statutes, an offender who has been found to be a "sexually dangerous person," may be committed for an indefinite period of time beyond the conclusion of his/her criminal sentence.
Closed P2P	Some P2P file-sharing networks are "closed" in that an individual downloads the software and then must: (1) select other users with whom to share files; and (2) must be selected by other users to have access to that user's files. A new user who installs a closed P2P network will not have access to any existing user's files unless that person chooses to share with the new user. *See* P2P.
Cloud Computing	Cloud computing is remote digital storage accessed through Internet connectivity. Individuals use cloud computing to store photos, files, and other digital content remotely. Files that are saved in the "cloud" do not need to be stored on the user's Internet enabled device.
Cognitive Behavioral Therapy (CBT)	Cognitive Behavioral Therapy or CBT is a type of therapy that combines elements of behavioral therapy, which focuses on external offender behaviors, with cognitive therapy, which focuses on internal thought processes. CBT is a general type of therapy often used in sex offender treatment.
Cognitive Distortions	Cognitive distortions are false or irrational beliefs that can play a role in illegal or inappropriate behaviors. Some child pornography offenders espouse or develop cognitive distortions about children as appropriate sexual partners.

Term	Definition
Cohort	Cohort is a term used to refer to a group of individuals who have engaged in similar behavior or had a qualifying event occur during a particular time span. For example, this report uses cohort to refer to the group of child pornography offenders sentenced under the non-production child pornography sentencing guidelines in fiscal years 1999 and 2000. That group of offenders was studied by the Commission for several reasons, as discussed in Chapters 6, 7, and 11 of this report.
Compulsive Internet Use (CIU)/ Problematic Internet Use (PIU)	Compulsive Internet use (CIU) or problematic Internet (PIU) are generally thought of as an inability to stop using Internet technology without experiencing distress and where such use has resulted in a significant negative impact. Such behavior was clinically described by Kimberly Young, Ph.D. in 1996, and later refined by Nathan Shapira, MD, who suggested a three pronged definition that the behavior was: (a) uncontrollable; (b) caused significant distress or impairment; and (c) occurred in the absence of other pathology that might explain the behavior.
Contact Child Sex Offense	Contact child sex offense refers to a crime where a legally culpable individual has sexual contact with a child below the age of sexual consent. Contact child sex offenses are included within the definition of criminal sexually dangerous behavior as defined in this report. *See* Criminal Sexually Dangerous Behavior.
Containment Model/ Containment Approach	A multi-disciplinary approach to sex offender management currently used by many states and in the federal system. Developed primarily by Kim English, the approach relies on therapy to address the offender's internal controls, supervision to provide external criminal justice control measures, and uses polygraph to monitor internal controls and compliance with external controls.
CSDB or Criminal Sexually Dangerous Behavior	CSDB by offenders convicted of non-production child pornography offenses includes three different types of criminal sexual conduct: • "Contact" Sex Offenses: any illegal sexually abusive, exploitative, or predatory conduct involving actual or attempted physical contact between the offender and a victim occurring before or concomitantly with the offender's commission of a non-production child pornography offense; • "Non-Contact" Sex Offenses: any illegal sexually abusive, exploitative, or predatory conduct not involving physical contact between the offender and a victim occurring before or concomitantly with the offender's commission of a non-production child pornography offense; and • Prior Non-Production Child Pornography Offenses: a non-production child pornography offender's prior commission of a non-production child pornography offense if the prior and instant non-

Term	Definition
	production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender.
Deep Web	Deep Web (also called Darknet, Dark Net, and Dark Web) refers to a hidden Internet that can only be accessed through use of power anonymizing onion routers. Because there are many layers of protection and it is difficult to identify individuals in Deep Web, there may be child pornography offenders who are openly trading child pornography in Deep Web.
Digital Subscriber Line (DSL)	DSL is a means of providing high-speed Internet access through telephone lines. An individual can purchase DSL access through an ISP. *See* ISP.
Encryption	Encryption secures data (in the form of images, videos, documents, etc.) so that it cannot be easily understood without a password or decryption software.
F2F	F2F or friend-to-friend file-sharing is another term for a closed P2P system. *See* Closed P2P.
Freenet	A free and public multi-proxy router relying on an architecture similar to that used by TOR. Freenet also provides access to otherwise hidden parts of the Internet sometimes called Deep Web. *See* Deep Web, TOR, Onion Router.
Friend to Friend	*See* F2F.
General Recidivism	*See* Recidivism.
Gigatribe	Gigatribe is a closed P2P file-sharing network that permits one to share within a smaller network of individuals as opposed to anyone who is running the Gigatribe network. *See* Closed P2P.
Globally Unique Identifier (GUID)	A Globally Unique Identifier or GUID is the randomly assigned unique serial number assigned to each P2P user by the application software. The GUID may be used by law enforcement as one means of identifying users.

Term	Definition
Grooming	Grooming refers to a process by which child sex offenders prepare potential victims for abuse. It typically involves befriending a child over a period of time, establishing a trust relationship, and lowering the child's inhibitions so the child is both less able to object to the abuse and less likely to report it.
Hash Values	A hash value is created through a "hashing" process by which a digital file is summarized as a relatively short, single number of about 38 decimal digits. Hash values are easily managed by computers and investigators for verifying that two copies of a file are, in fact, the same, even if the filename or certain other attributes (such as the date it was last accessed) are changed. Hash values can be changed by altering even one small part of a file.
Hebephilia	Hebephilia refers to sexual interest in pubescent children who have begun to show signs of early puberty (as opposed to prepubescent children).
Impersonal Distribution	Impersonal Distribution refers to indiscriminate and anonymous distribution of child pornography made via open P2P file-sharing networks. It is deemed "impersonal" because the user has no, or limited, ability to select with whom to share files once the user has decided to share files. *See* Open P2P.
Internet Newsgroups	Internet Newsgroups allow non-real-time discussion within group forums. People post messages and read messages others have posted. In addition to text messages, pictures and other files can be posted directly on newsgroups.
Internet Relay Chat (IRC)	Internet Relay Chat or IRC permits real-time text chatting environments organized into channels – virtual "rooms" – based on specific interests. IRC permits group communication that is visible to everyone in a particular chat room and permits everyone to join in discussions or in smaller "private" chat rooms providing one on one communication.
Internet Service Providers (ISP)	Internet Service Providers or ISPs vary across the country but include cable and telephone service providers such as Verizon, Comcast, DirectTV, TimeWarner, and AT&T. ISPs permit a user to access the Internet.
IP Address	IP stands for "Internet Protocol." Every device accessing the Internet is assigned an IP address by the ISP through which it is connected to the Internet. It is relatively easy to cloak, hide, or change an IP address so that it is difficult to identify who is using that IP address at a particular moment in time. Law enforcement may use IP addresses to identify users who are distributed child pornography.
IRC	*See* Internet Relay Chat.
Lolita	A term commonly associated with child pornography.
National Center	NCMEC is a nonprofit organization created in 1984. The mission of the

Term	Definition
for Missing and Exploited Children (NCMEC)	organization 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. NCMEC serves as the nation's resource for missing and sexually exploited children. NCMEC provides information and resources to law enforcement, parents, and children including child victims as well as other professionals. NCMEC's exploited children division has several programs that work with law enforcement to track child pornography images and identify and rescue child pornography victims where abuse is ongoing.
National Juvenile Online Victimization Survey (NJOV)	The NJOV is a survey of a national sample of law-enforcement agencies about the characteristics of Internet sex crimes against minors and the numbers of arrests for these crimes during a one-year period. The NJOV was first utilized in 2000 and again in 2006. The NJOV is conducted by the Crimes against Children Research Center at the University of New Hampshire (http://www.unh.edu/ccrc/national_juvenile_online_victimization_publications.html).
Onion Router	An onion router is a powerful means of anonymizing users' identities. Unlike standard routers that attempt to direct Internet data on efficient routes, an onion router is a counter-surveillance tool that directs Internet activity along complex, circuitous routes in a network designed to obscure its origins. *See* TOR.
Open P2P	Many P2P file-sharing networks are wholly "open" in that an individual downloads the software and then automatically: (1) has access to any file shared by any other user; and (2) shares any file with any other user. Individuals using open P2P have no, or limited, ability to "block" other users or select other users with whom to share files. This differs from closed P2P. *See* closed P2P.

Term	Definition
P2P (Peer-to-Peer)	P2P (Peer-to-Peer) file-sharing lets two or more users transfer files directly to each another from their computers without having to go through a centralized server. The user downloads a software program called a P2P client in order to download files from a P2P network. Examples of P2P networks include, among others, BitTorrent, eMule, FastTrack, Gigatribe, and Gnutella. Examples of P2P software compatible with Gnutella include Limewire, Phex, Bearshare, Shareaza, and Frostwire. Software compatible with BitTorrent includes Vuze and µTorrent. Software compatible with eMule includes eDonkey and eDonkey2000 clients. Upon installation of the P2P software, the client typically creates two folders on the user's computer by default: an "Incomplete" folder, which contains pending downloads, and a "Shared" folder, which contains fully downloaded files. In an Open P2P network, any files downloaded or files placed in the Shared folder are immediately made available for sharing with all other users on the P2P network. Users may choose to share any or all files on their systems. In a Closed P2P network, users will typically choose with whom to share files.
Paraphilia	Paraphilia is a general clinical diagnosis of persistent sexually arousing fantasies, sexual urges, or sexual behaviors generally involving nonhuman objects, children or other nonconsenting persons, or the intentional suffering or humiliation of oneself or one's sexual partner. Pedophilia is one type of paraphilia.
Pedophilia	Pedophilia is a clinical psychological diagnosis of a persistent sexual interest in sexually immature children and can be manifested in thoughts, fantasies, urges, sexual arousal, or behavior.
Peer-to-Peer	Peer-to-peer file-sharing programs. *See* P2P.
Penile Phallometric Test	A test which measures physical arousal to sexual stimuli by measuring bloodflow to the penis. The test will typically expose the subject to different images and measure the change in bloodflow based on the type of image. The Penile Plethysmograph (PPG) is a Penile Phallometric Test.
Personal Distribution	Personal distribution refers to distribution of child pornography made via some means other than open P2P. Any form of distribution where the user exercises some control over with whom to share child pornography is included (*e.g.*, closed P2P, email, or hand-to-hand).
Postpubescent	Postpubescent refers to individuals who have completed puberty and have fully developed secondary sex characteristics. Children under the age of sexual consent may be postpubescent.

Term	Definition
Prepubescent	Prepubescent refers to children who have not begun puberty. These children show no sign of development of secondary sex characteristics.
Prevalence	The term prevalence permits researchers to discuss how frequently particular characteristics or events occur in a population. This report uses the term "prevalence" to discuss substance abuse, child sexual abuse victimization, and CSDB by offenders convicted for non-production child pornography offenses. "Lifetime prevalence rate" refers to the rate among the general population (or a specific part of the population) that a particular disorder or event occurred at least once during the lifetime of that population.
Proxy Server	Proxy servers are Internet intermediaries through which information can be passed. There are many legitimate uses for proxy servers. For example, some businesses utilize a single proxy server through which all of its electronic mail is sent and received for security purposes. Anonymizing proxy servers are sometimes used by child pornography offenders as a means of reducing likelihood of detection as they add an additional layer of complexity to identifying the ultimate receiver or distributor of child pornography images.
Psychosexual Evaluation	A psychosexual evaluation is an examination intended to identify an offender's risk for sexual and general recidivism; recommended types and intensity of treatment; and the offender's protective factors and risk factors.
PTHC	PTHC stands for "pre-teen hardcore," a term associated with child pornography.
Pubescent	Pubescent means children who have started puberty. These children show some development of secondary sex characteristics such as initial breast development or evidence of public hair or armpit hair.
RAP Sheets/Record of Arrest and Prosecution Database	The Record of Arrest and Prosecution Database, often called RAP Sheets, is an FBI-maintained national record of arrests and prosecutions, identifying offenders based on fingerprint submissions. A complete file includes offender information; the date, location and crimes associated with the arrest; the date, location, crimes, and sentencing information (if applicable) associated with the disposition of these arrests; and the date, location, and type of release following service of the sentence (if applicable). The accuracy of RAP sheets is reliant on proper reporting by each state and local law enforcement agency to the FBI.
Recidivism	Recidivism refers to the rate at which those individuals who have experienced a formal interaction with the criminal justice system (typically conviction) experience another formal interaction with the criminal justice system (violation of probation, rearrest, or reconviction). Different

Term	Definition
	recidivism studies choose to measure and report different types of recidivism. The Commission's recidivism study on child pornography offenders sentenced in fiscal years 1999-2000 included violations of offender's probation or supervised release that led to an arrest or revocation. Some studies will report a general recidivism rate or a rate of recidivism associated with a type of crime (e.g., sexual offenses). The definition of recidivism may depend greatly on a particular study.
Risk Assessments	A risk assessment is an actuarial judgment that attempts to quantify an offender's risk to the community or of reoffending generally. It relies on information about the offender's criminal history, offense types and other characteristics such as age and gender, in conjunction with the presence or absence of a limited number of pre-specified factors. The risk assessment assigns numerical values to these factors according to some preset formula to produce an estimate of risk.
R/T/D Offenses	R/T/D offenses are receipt, transportation, or distribution of child pornography offenses. While the elements of these offenses differ, they have identical statutory penalties under federal penal law. R/T/D offenses traditionally have carried more several penalties than possession of child pornography offenses.
Sex Offender Registration	*See* SORNA.
Sexual Recidivism	*See* Recidivism.
Social Network	Social networks exist both online and offline. Online social networks typically mean digital communities where people can communicate and interact with networks of friends or associates. LinkedIn and Facebook are two popular social networks.
SORNA	SORNA is short for the Sex Offender Registration and Notification Act and is Title I of the Adam Walsh Child Protection and Safety Act. SORNA provides a set of minimum standards for sex offender registration and notification in the United States. Under SORNA, a sex offender – including a child pornography offender – is required to register and maintain current information in each jurisdiction in which he is convicted, resides, is employed, or attends school, and also report on a periodic basis to the local authorities responsible for monitoring registered sex offenders. SORNA also created a new federal offense for failing to register as a sex offender. *See* Adam Walsh Act.
Steganography	Steganography is the process of hiding a file by transforming it into an innocuous file. One who views the transformed file would not know that its true contents were hidden. In order to reveal the contents, one must know

Term	Definition
	the steganography key. Digital steganography is sometimes used by child pornography offenders to hide child pornography images within legal images.
Technical Violation	Technical violations of the conditions of supervision (*e.g.*, parole, probation, supervised release) encompass a wide range of behavior, including absconding from supervision, refusal to participate in court-ordered mental health or substance abuse treatment, and failed drug tests. A technical violation typically does not involve criminal conduct and, instead, involves conduct that violated the conditions of an offender's supervision.
Time to Reoffending/Time to Failure	Time to reoffending or time to failure are terms used in recidivism studies to mean the time that the offender was at risk following the initial criminal justice event until the next arrest or conviction. This permits the reporting of an average time to reoffending as well as a shortest and longest.
TOR	A free and public onion router. TOR also provides access to otherwise hidden parts of the Internet sometimes called Darknet, Deep Web, or Dark Web. *See* Onion Router.
Videostreaming	Videostreaming or streaming media enables individuals to watch digital programming online via an Internet connection. Television channels sometimes permit their programming to be streamed online for free or for a fee. Other sites offer subscriptions to permit users to view programming such as television programs or movies to be streamed. Programs may be prerecorded or "live" streamed such as for sporting events.
Visual Reaction Time (VRT)	Part of the Abel Assessment, the Visual Reaction Time (VRT) is an objective test which measures how long an individual views a variety of images of clothed adults, teens, and children. During the VRT, the individual is also asked to rate his or her degree of sexual arousal to the image. *See Abel Assessment.*
Webcasting	Webcasting can be thought of as an internet "broadcast" and is a means of playing digital media streamed through the Internet. It enables individuals to watch live events such as meetings, webinars, or PowerPoint presentations that are occurring in remote locations. Some child pornography offenders watch webcasts featuring real-time sexual abuse of children.
WiFi	WiFi is a brand name of wireless Internet access and has come to refer to any wireless internet access. Individuals and business may purchase routers that provide WiFi in their homes and some cities provide citywide wireless access. WiFi permits an Internet enabled device to access the Internet without cables connecting the device directly.

APPENDIX B
CURRENT VERSIONS OF THE PRIMARY CHILD PORNOGRAPHY SENTENCING GUIDELINES, USSG §§ 2G2.1 AND 2G2.2, AND THE SENTENCING TABLE (USSG CHPT. 5, PT. A)

§2G2.1. **Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production**

(a) Base Offense Level: **32**

(b) Specific Offense Characteristics

(1) If the offense involved a minor who had (A) not attained the age of twelve years, increase by **4** levels; or (B) attained the age of twelve years but not attained the age of sixteen years, increase by **2** levels.

(2) (Apply the greater) If the offense involved—

(A) the commission of a sexual act or sexual contact, increase by **2** levels; or

(B) (i) the commission of a sexual act; and (ii) conduct described in 18 U.S.C. § 2241(a) or (b), increase by **4** levels.

(3) If the offense involved distribution, increase by **2** levels.

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

(5) If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by **2** levels.

(6) If, for the purpose of producing sexually explicit material or for the purpose of transmitting such material live, the offense involved (A) the knowing misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage sexually explicit conduct; or (B) the use of a computer or an interactive computer service to (i) persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct, or to otherwise solicit participation by a minor in such conduct; or (ii) solicit participation with a minor in sexually explicit conduct, increase by **2** levels.

(c) Cross Reference

(1) If the victim was killed in circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder), if the resulting offense level is greater than that determined above.

(d) Special Instruction

(1) If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1591, 2251(a)-(c), 2251(d)(1)(B), 2260(a).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Distribution" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Material" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

2. Application of Subsection (b)(2).—For purposes of subsection (b)(2):

"Conduct described in 18 U.S.C. § 2241(a) or (b)" is: (i) using force against the minor; (ii) threatening or placing the minor in fear that any person will be subject to death, serious bodily injury, or kidnapping; (iii) rendering the minor unconscious; or (iv) administering by force or threat of force, or without the knowledge or permission of the minor, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of the minor to appraise or control conduct. This provision would apply, for example, if any dangerous weapon was used or brandished, or in a case in which the ability of the minor to appraise or control conduct was substantially impaired by drugs or alcohol.

"Sexual act" has the meaning given that term in 18 U.S.C. § 2246(2).

"Sexual contact" has the meaning given that term in 18 U.S.C. § 2246(3).

3. Application of Subsection (b)(5).—

(A) In General.—Subsection (b)(5) is intended to have broad application and includes offenses involving a minor entrusted to the defendant, whether temporarily or permanently. For example, teachers, day care providers, baby-sitters, or other temporary caretakers are among those who would be subject to this enhancement. In determining whether to apply this adjustment, the court should look to the actual relationship that existed between the defendant and the minor and not simply to the legal status of the defendant-minor relationship.

(B) Inapplicability of Chapter Three Adjustment.—If the enhancement in subsection (b)(5) applies, do not apply §3B1.3 (Abuse of Position of Trust or Use of Special Skill).

4. Application of Subsection (b)(6).—

(A) Misrepresentation of Participant's Identity.—The enhancement in subsection (b)(6)(A) applies in cases involving the misrepresentation of a participant's identity to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Subsection (b)(6)(A) is intended to apply only to misrepresentations made directly to a minor or to a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement in subsection (b)(6)(A) would not apply to a misrepresentation made by a participant to an airline representative in the course of making travel arrangements for the minor.

The misrepresentation to which the enhancement in subsection (b)(6)(A) may apply includes misrepresentation of a participant's name, age, occupation, gender, or status, as long as the misrepresentation was made with the intent to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live. Accordingly, use of a computer screen name, without such intent, would not be a sufficient basis for application of the enhancement.

(B) Use of a Computer or an Interactive Computer Service.—Subsection (b)(6)(B) provides an enhancement if the offense involved the use of a computer or an interactive computer service to persuade, induce, entice, coerce, or facilitate the travel of, a minor to engage in sexually explicit conduct for the purpose of producing sexually explicit material or for the purpose of transmitting such material live or otherwise to solicit participation by a minor in such conduct for such purposes. Subsection (b)(6)(B) is intended to apply only to the use of a computer or an interactive computer service to communicate directly with a minor or with a person who exercises custody, care, or supervisory control of the minor. Accordingly, the enhancement would not apply to the use of a computer or an interactive computer service to obtain airline tickets for the minor from an airline's Internet site.

5. Application of Subsection (d)(1).—For the purposes of Chapter Three, Part D (Multiple Counts), each minor exploited is to be treated as a separate minor. Consequently, multiple counts involving the exploitation of different minors are not to be grouped together under §3D1.2 (Groups of Closely Related Counts). Subsection (d)(1) directs that if the relevant conduct of an offense of conviction includes more than one minor being exploited, whether specifically cited in the count of conviction or not, each such minor shall be treated as if contained in a separate count of conviction.

6. Upward Departure Provision.—An upward departure may be warranted if the offense involved more than 10 minors.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 161); November 1, 1990 (see Appendix C, amendment 324); November 1, 1991 (see Appendix C, amendment 400); November 1, 1996 (see Appendix C, amendment 537); November 1, 1997 (see Appendix C, amendment 575); November 1, 2000 (see Appendix C, amendment 592); May 1, 2001 (see Appendix C, amendment 612); November 1, 2001 (see Appendix C, amendment 627); November 1, 2003 (see Appendix C, amendment 661); November 1, 2004 (see Appendix C, amendment 664); November 1, 2009 (see Appendix C, amendments 733, 736, and 737).

§2G2.2. Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor

(a) Base Offense Level:

(1) **18**, if the defendant is convicted of 18 U.S.C. § 1466A(b), § 2252(a)(4), § 2252A(a)(5), or § 2252A(a)(7).

(2) **22**, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; (B) the defendant's conduct was limited to the receipt or solicitation of material involving the sexual exploitation of a minor; and (C) the defendant did not intend to traffic in, or distribute, such material, decrease by **2** levels.

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

(3) (Apply the greatest) If the offense involved:

(A) Distribution for pecuniary gain, increase by the number of levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than **5** levels.

(B) Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain, increase by **5** levels.

(C) Distribution to a minor, increase by **5** levels.

(D) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity, other than illegal activity covered under subdivision (E), increase by **6** levels.

(E) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by **7** levels.

(F) Distribution other than distribution described in subdivisions (A) through (E), increase by **2** levels.

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

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

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

(7) If the offense involved—

(A) at least 10 images, but fewer than 150, increase by **2** levels;

(B) at least 150 images, but fewer than 300, increase by **3** levels;

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

(D) 600 or more images, increase by **5** levels.

(c) Cross Reference

(1) If the offense involved causing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, apply §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 1466A, 2252, 2252A(a)-(b), 2260(b).

Application Notes:

1. Definitions.—For purposes of this guideline:

"Computer" has the meaning given that term in 18 U.S.C. § 1030(e)(1).

"Distribution" means any act, including possession with intent to distribute, production, transmission, advertisement, and transportation, related to the transfer of material involving the sexual exploitation of a minor. Accordingly, distribution includes posting material involving the sexual exploitation of a minor on a website for public viewing but does not include the mere solicitation of such material by a defendant.

"Distribution for pecuniary gain" means distribution for profit.

"Distribution for the receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain" means any transaction, including bartering or other in-kind transaction, that is conducted for a thing of value, but not for profit. "Thing of value" means anything of valuable consideration. For example, in a case involving the bartering of child pornographic material, the "thing of value" is the child pornographic material received in exchange for other child pornographic material bartered in consideration for the material received.

"Distribution to a minor" means the knowing distribution to an individual who is a minor at the time of the offense.

"Interactive computer service" has the meaning given that term in section 230(e)(2) of the Communications Act of 1934 (47 U.S.C. § 230(f)(2)).

"Material" includes a visual depiction, as defined in 18 U.S.C. § 2256.

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years, and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Pattern of activity involving the sexual abuse or exploitation of a minor" means any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.

"Prohibited sexual conduct" has the meaning given that term in Application Note 1 of the Commentary to §2A3.1 (Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse).

"Sexual abuse or exploitation" means any of the following: (A) conduct described in 18 U.S.C. § 2241, § 2242, § 2243, § 2251(a)-(c), § 2251(d)(1)(B), § 2251A, § 2260(b), § 2421, § 2422, or § 2423; (B) an offense under state law, that would have been an offense under any such section if the offense had occurred within the special maritime or territorial jurisdiction of the United States; or (C) an attempt or conspiracy to commit any of the offenses under subdivisions (A) or (B). "Sexual abuse or exploitation" does not include possession, accessing with intent to view, receipt, or trafficking in material relating to the sexual abuse or exploitation of a minor.

2. *Application of Subsection (b)(4).—Subsection (b)(4) applies if the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, regardless of whether the defendant specifically intended to possess, access with intent to view, receive, or distribute such materials.*

3. *Application of Subsection (b)(5).—A conviction taken into account under subsection (b)(5) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).*

4. *Application of Subsection (b)(7).—*

(A) *Definition of "Images".—"Images" means any visual depiction, as defined in 18 U.S.C. § 2256(5), that constitutes child pornography, as defined in 18 U.S.C. § 2256(8).*

(B) Determining the Number of Images.—For purposes of determining the number of images under subsection (b)(7):

(i) Each photograph, picture, computer or computer-generated image, or any similar visual depiction shall be considered to be one image. If the number of images substantially underrepresents the number of minors depicted, an upward departure may be warranted.

(ii) Each video, video-clip, movie, or similar visual depiction shall be considered to have 75 images. If the length of the visual depiction is substantially more than 5 minutes, an upward departure may be warranted.

5. Application of Subsection (c)(1).—

(A) In General.—The cross reference in subsection (c)(1) is to be construed broadly and includes all instances where the offense involved employing, using, persuading, inducing, enticing, coercing, transporting, permitting, or offering or seeking by notice or advertisement, a minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting live any visual depiction of such conduct.

(B) Definition.—"Sexually explicit conduct" has the meaning given that term in 18 U.S.C. § 2256(2).

6. Cases Involving Adapted or Modified Depictions.—If the offense involved material that is an adapted or modified depiction of an identifiable minor (e.g., a case in which the defendant is convicted under 18 U.S.C. § 2252A(a)(7)), the term "material involving the sexual exploitation of a minor" includes such material.

7. Upward Departure Provision.—If the defendant engaged in the sexual abuse or exploitation of a minor at any time (whether or not such abuse or exploitation occurred during the course of the offense or resulted in a conviction for such conduct) and subsection (b)(5) does not apply, an upward departure may be warranted. In addition, an upward departure may be warranted if the defendant received an enhancement under subsection (b)(5) but that enhancement does not adequately reflect the seriousness of the sexual abuse or exploitation involved.

Background: Section 401(i)(1)(C) of Public Law 108–21 directly amended subsection (b) to add subdivision (7), effective April 30, 2003.

Historical Note: Effective November 1, 1987. Amended effective June 15, 1988 (see Appendix C, amendment 31); November 1, 1990 (see Appendix C, amendment 325); November 1, 1991 (see Appendix C, amendment 372); November 27, 1991 (see Appendix C, amendment 435); November 1, 1996 (see Appendix C, amendment 537); November 1, 1997 (see Appendix C, amendment 575); November 1, 2000 (see Appendix C, amendment 592); November 1, 2001 (see Appendix C, amendment 615); April 30, 2003 (see Appendix C, amendment 649); November 1, 2003 (see Appendix C, amendment 661); November 1, 2004 (see Appendix C, amendment 664); November 1, 2009 (see Appendix C, amendments 733 and 736).

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	**5**	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B	**10**	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	**12**	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	**27**	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

APPENDIX C
SUMMARIES OF THE TESTIMONY OF THE WITNESSES
UNITED STATES SENTENCING COMMISSION
SENTENCING REFORM ACT 25TH ANNIVERSARY REGIONAL PUBLIC HEARINGS

PUBLIC HEARING – TUESDAY AND WEDNESDAY, FEBRUARY 10–11, 2009
9:00 a.m.–4:45 p.m.
ATLANTA, GA

I. DISTRICT COURT BENCH

Middle District of Florida
The Honorable Gregory A. Presnell, United States District Judge

Judge Presnell stated that "the Sentencing Commission . . . may become irrelevant, if it continues to promulgate and promote sentencing formulae which the judiciary disregard because of their perceived arbitrariness and lack of empirical foundation." (TR 133). He cited three guidelines, *viz.,* the crack, illegal re-entry and child pornography guidelines as examples of guidelines that may be afforded less deference than empirically-grounded guidelines.(TR 133).

Judge Presnell stated that the child pornography "guideline has been the subject of much recent criticism because it is not based on any empirical data or institutional analysis." (TR 134). In his experience with the guideline, "people on the lowest rung of culpability, that is, people who download and view child pornography in private, people who can truly be said to have an illness but who do not distribute or otherwise actively engage in this conduct, often under this guideline end up toward the statutory maximum." (TR 124).

II. PRACTITIONERS

Federal Public and Community Defenders

Alan Dubois, Senior Appellate Attorney, Eastern District of North Carolina
Nicole Kaplan, Staff Attorney, Northern District of Georgia

Mr. Dubois and Ms. Kaplan made the following specific recommendations as to how the Commission "can make sentencing [] work:"

1) Review "congressionally driven guidelines," including the child pornography guidelines. Citing the House Chair of the Subcommittee on Crime, Rep. Bobby Scott, Mr. Dubois and Ms. Kaplan suggested that the Commission should take a "long hard look" at whether "congressionally driven guidelines are appropriate." (TR 8). They attribute much of "the unwarranted severity, unwarranted disparity, and over-incarceration caused by the guidelines" to those guidelines that are congressionally driven. (TR 9).

2) Reduce unwarranted disparity by reducing unwarranted severity. Mr. Dubois and Ms. Kaplan maintain that the guidelines are too severe for relevant conduct, drugs, immigration, child pornography, fraud, firearms and career offender. They support their contention that some guidelines are unduly harsh by pointing to higher rates of government sponsored departure

motions and judicial variances associated with those guidelines. They state, however, that "the problem is that only some defendants, and not others, get relief from guideline sentences that are too harsh" because judges are reluctant to vary from the guidelines, resulting in unwarranted disparity. (TR 11).

Mr. Dubois and Ms. Kaplan stated that "as has been well-documented, §2G2.2 is dramatically flawed." It does "not exemplify the Commission's exercise of its characteristic institutional role. Many judges have found this guideline to be unsound and inhumane." (TR 28). They maintain that the "guideline invites draconian and manipulative charging practices by prosecutors." (TR 29).

Ms. Kaplan testified that, in her experience, the child pornography guidelines often produce ranges higher than the statutory maximums for those offenses. She stated "guideline ranges for child pornography are often higher than the penalties for many state crimes involving sexual assault of a child," and that "courts are providing detailed written reasons for why they continue to vary below the guidelines in pornography cases." (TR 69). She expressed a hope that the Commission would review this judicial feedback and adjust the guidelines accordingly.

PUBLIC HEARING – WEDNESDAY AND THURSDAY, MAY 27–28, 2009
8:45 a.m. – 5:00 p.m.
STANFORD, CA

I. DISTRICT COURT BENCH

District of Hawaii
The Honorable Susan Oki Mollway, United States District Judge

Judge Mollway contended that guideline sentences in child pornography cases under §2G2.2 are too high. (TR 99).

District of Idaho
The Honorable B. Lynn Winmill, United States Chief District Judge

Judge Winmill found troubling "the continued ability of the prosecutor to affect the application of the guidelines in ways . . . not envisioned by either Congress or the Commission," including through charging decisions in child pornography cases. (TR 449–51).

II. PRACTITIONERS

Federal Public and Community Defenders

Davina Chen, Assistant Federal Public Defender, Central District of California
Thomas Hillier, Federal Public Defender, Western District of Washington

Mr. Hillier and Ms. Chen stated the Commission should substantially reduce the unwarranted severity of the child pornography guidelines. By doing so, it would reduce true unwarranted disparity, as well as the rate of sentences below the guideline range. Sentencing data, sentencing decisions, and the Commission's own empirical research demonstrate that these guidelines recommend punishments that are greater than necessary to satisfy legitimate sentencing purposes and create unwarranted disparity.

Mr. Hillier further discussed the sentencing practices in Washington. (TR 279–83). He stated that, realizing that uniformly severe punishment for child pornography is not a good "one size . . . fit(s) all" approach, the parties in his district get together to try to determine an appropriate sentence through plea bargaining. (TR 280–82).

PUBLIC HEARING – THURSDAY AND FRIDAY, JULY 9–10, 2009
8:30 a.m.–5:15 p.m.
NEW YORK, NY

I. DISTRICT COURT BENCH

Western District of Pennsylvania
The Honorable Donetta W. Ambrose, Chief United States District Judge

Judge Ambrose urged the Commission to review the increasingly harsh child pornography guidelines. (TR 336–39).

Western District of New York
The Honorable Richard J. Arcara, Chief United States District Judge

Judge Arcara would like the guidelines to assist in determining, especially in child pornography cases where the guidelines use number of images to determine offense levels, which defendants pose a real danger to the community and a risk to children. (TR 113–14). Judge Arcara expressed concern that prosecutorial influence on sentencing, through the use of "fact bargaining" and substantial assistance departures, may result in disparity. Judge Arcara would like more alternatives to incarceration. Judge Arcara wondered whether Congress really intended for all child pornography sentences to be at or near the statutory maximum as dictated by so many guideline adjustments. (TR 141–42).

District of Maine
The Honorable John A. Woodcock, Jr., Chief United States District Judge

Judge Woodcock stated the Commission should 1) review variances in child pornography cases, and 2) advise the three branches of government "in the development of effective and efficient crime policy." (TR 124). Judge Woodcock believes the mandatory minimums are too high in child pornography cases and asked the Commission to work with Congress to review those penalties. (TR 139–41). Judge Woodcock discussed the factors he considers, both guideline and non-guideline, when imposing a sentence in a child pornography case. (TR 142-44).

II. PRACTITIONERS

Federal Public and Community Defenders

Alexander Bunin, Federal Public Defender, Northern District of New York

Mr. Bunin argues that the child pornography guidelines are "dramatically flawed" and overly harsh. (TR 16).

PUBLIC HEARING – TUESDAY AND WEDNESDAY, OCTOBER 20–21, 2009
8:30 a.m.–4:30 p.m.
DENVER, CO

I. DISTRICT COURT BENCH

District of Minnesota
The Honorable Joan Ericksen, United States District Judge

Judge Ericksen stated that guideline penalties for child pornography cases are more severe than state sentences for actually abusing a child. (TR 273).

District of Colorado
The Honorable John L. Kane, Senior United States District Judge

Judge Kane stated that some of the difficulties with child pornography cases are that "we do not see producers of these films. . . . the parents who sell their children or the step-fathers who captured them and attacked them in film and the actual perpetrators." (TR 74). He discussed two of his cases involving the possession of child pornography obtained on the Internet where the defendants were severely disabled, one on dialysis, the other a quadriplegic. He stated that the sentences for such individuals are the same as those for persons "actually profiting from these films, selling them and dealing with them." (TR 75).

II. PRACTITIONERS

Department of Justice

David M. Gaouette, United States Attorney, District of Colorado

Mr. Gaouette stated that some judges are "making it clear what they believe an appropriate sentence should be with little or no consideration of the advisory guideline range." (TR 3). He cited the child pornography guidelines as an example. (TR 3). Mr. Gaouette believes that the "current state of federal sentencing system increasingly favors judicial discretion over uniformity, consistency and certainty." (TR 3). He maintains that there is "little meaningful appellate review of sentences." (TR 3).

B. Todd Jones, United States Attorney, District of Minnesota

Mr. Jones discussed what he perceived to be cases of local disparity within his district, such as where significant below-guideline variances were granted in child pornography cases. (TR 7-8).

Federal Public and Community Defenders

Nick Drees, Federal Public Defender, Northern and Southern Districts of Iowa

Mr. Drees believed that the child pornography guidelines are in need of revision. (TR 25–27). He stated that "the guidelines for child pornography offenses, driven by congressional directives and also mandatory minimums, are simply too severe . . . most judges who have testified before the Commission share this view." (TR 25). He stated that judges have decided to apply only parts of the guideline because some enhancements, like use of a computer, apply in virtually every case. (TR 25). Mr. Drees stated that in the first three quarters of 2009, 53.7 percent of defendants sentenced under §2G2.2 received below guideline sentences, 10.9 percent of which were identified as government sponsored. (TR 25). He believes that prosecutors create unwarranted uniformity in child pornography cases by prosecuting primarily offenders who are not dangerous. (TR 25). Mr. Drees maintains that the vast majority of defendants in these cases have no prior criminal history and very few have a history of sexual abuse or exploitation. (TR 25). He stated that "recidivism research shows that child pornography offenders, without prior contact offenses, have a very low risk of recidivism of any kind, rarely commit a subsequent contact offense, and do very well in treatment and under supervision." (TR 26). Mr. Drees recommends that the Commission provide explanations for the pornography guidelines, "stating what purpose or purposes each guideline is meant to accomplish, and by providing the evidence upon which the Commission relied to conclude that the guideline would be effective in achieving the intended purposes." (TR 27).

Raymond P. Moore, Federal Public Defender, Districts of Colorado and Wyoming

Mr. Moore discussed appellate cases affirming district court sentencing decisions that reached different results with regard to the soundness of the child pornography guidelines. (TR 12). He stated:

> The problem is not the standard of review. The problem is that courts do not know the underlying bases of these guidelines or what purposes of sentencing a given guideline is trying to accomplish. In other words, the solution is better guidelines, ones that are empirically based, fully explained in a rational and transparent fashion, responsive to judicial feedback and informed public comment, and reflecting advancement in knowledge of human behavior as it relates to the criminal justice process.

Id.

III. COMMUNITY INTEREST GROUPS

Ernie Allen, President and Chief Executive Officer, National Center for Missing and Exploited Children, Washington, D.C.

Mr. Allen testified concerning the child pornography guidelines. (TR 207). He expressed a concern over the "increasing number of downward departures" in child pornography sentences which he believes results in "token sentences" that "trivialize and minimize . . . a very serious crime." (TR 207). Mr. Allen stated that child pornography is a serious crime that merits serious punishment. (TR 207). In addressing the criticism of the child pornography guideline, Mr. Allen opined that "the guidelines are not the problem . . . [t]he problem is the lack of understanding and awareness about the true nature and severity of this crime and the harm caused by these offenders to child victims." (TR 207).

Mr. Allen stated that the National Center for Missing and Exploited Children ("NCMEC") created the first child pornography tip line in 1985 and a cyber tip line in 1998, which has handled 744,000 tips from Internet providers and the general public regarding child pornography. (TR 208). Mr. Allen stated that since 2003, NCMEC has reviewed 28 million images and videos of child pornography and is currently receiving 250,000 images per week. (TR 208). Mr. Allen stated that in his view, the "fundamental problem is that child pornography is misnamed and misunderstood." (TR 208). He stated that it is not pornography, free speech or a victimless crime. (TR 208). Mr. Allen believes that "child pornography depicts crime scene photos, images of the sexual abuse of a child. They are contraband, direct evidence of the sexual victimization of a child." (TR 208). Mr. Allen stated that the circulation of these images "not only revictimizes the child" but also "drives the market for the production of new images." (TR 208-209).

Mr. Allen stated that from the millions of images that NCMEC has reviewed, "the vast majority of the victims are prepubescent and there's a growing number of infants and toddlers." (TR 109). He stated that many of these children are abused violently in images depicting bondage, sadism

and torture. (TR 209). He stated that most offenders do not innocently download an image or even a handful of images, but rather, build libraries of images which are "collected and viewed for the offender's personal sexual gratification and more commonly traded shared and/or sold online." (TR 209). Mr. Allen discussed the harm to the victims of child pornography and stated that "each viewing, each possession, each distribution of an image revictimizes that child anew." (TR 210). Mr. Allen stated that he was "deeply troubled" by the growing use of the term "mere possession" by the courts. (TR 210).

Mr. Allen stated that "like any other contraband, child pornography images are an illegal commodity that must be combated both at the point of production and at the point of distribution and possession." (TR 210). He discussed a Bureau of Prisons study finding that Internet offenders were "significantly more likely than not to have sexually abused a child via a hands-on act, and that these offenders tended to have multiple victims." (TR 212). Mr. Allen also stated that when a child has been abused, reporting of the abuse is far less likely when there is a video or photo that memorializes the abuse. (TR 213). He explained: "These children don't tell . . . because they're ashamed or embarrassed or they've been threatened or manipulated. They don't tell mom, they don't tell dad, they don't tell anybody." (TR 213). Mr. Allen indicated that "victims of online child pornography must deal with the permanency and circulation of the images of their sexual abuse. Once an image is on the Internet, it can never be removed and it becomes a permanent record of that abuse." (TR 213). He discussed the psychological problems experienced by child victims which continue well into adulthood. (TR 213).

Mr. Allen expressed a belief that the current base offense level for child pornography crimes is modest and that it is "only enhanced by what these offenders actually do, if they have large collections, if they are violent or sadistic images, if the children in those images are particularly young, if they're distributing them for profit or other purposes." (TR 214–15). He stated that in his view "weakening the guidelines and this continuing pattern of downward departures and token sentences is doing, and will continue to do, irreparable damage to the goal of stopping child pornography and will actually put countless real children at risk." (TR 215). He urged the Commission "to resist the clamor for change and to help us wake up the nation, including its judges, about the true nature and impact of this crime." (TR 215).

Diane Humetewa, Principal, Public Advocacy, Squire, Saunders & Dempsey L.L.P., Phoenix, Arizona

Ms. Humetewa believes that post-*Booker* judges and defense lawyers are "only just beginning to test the limits of discretion in sentencing." (TR 192). She indicated that currently federal prosecutors may be the only party to "depend on the strict calculation of the guidelines." (TR 193). She referenced child pornography cases where probationary sentences that represented dramatic departures from the guidelines were imposed and upheld on appeal. (TR 193). She stated that: "the question here is whether the appellate standard of review ultimately will eviscerate the uniformity in sentencing that was the original goal of the Sentencing Reform Act." (TR 193).

PUBLIC HEARING – THURSDAY AND FRIDAY, NOVEMBER 19–20, 2009
8:30 a.m.–3:00 p.m.
AUSTIN, TX

I. APPELLATE BENCH

Fifth Circuit Court of Appeals
The Honorable Edith Jones, Chief Circuit Judge

Chief Judge Jones believed the significant number of variances granted in child pornography cases indicates that there is something seriously wrong with that guideline. (TR 221–22).

Chief Judge Jones indicated that "in the child pornography [guideline] . . . it's not clear to me that we have enough background in those prosecutions, at this point in time, to really identify culpability in terms of, especially with these sophisticated cyber crimes in terms of the number of images and the events that the [] Commission has said we have to consider." (TR 221). She pointed to the "marked propensity of our district judges to deliver sentences not within the guidelines" and concluded that "whether that's good or ill... I think it's something like a 40 percent variance rate, and that suggests that there's something wrong with the guideline, something seriously wrong." (TR 221–22).

II. DISTRICT COURT BENCH

Southern District of Texas
The Honorable Micaela Alvarez, United States District Judge

Judge Alvarez expressed a disagreement with those who believe that the child pornography guidelines are too high. She believes that "it is important to remember that child pornography is not a victimless crime." (TR 271). She stated that "even simple possession of child pornography" could not have been engaged in "without some child having been somewhere abused by some adult." (TR 271). Judge Alvarez discussed the great harm suffered by children who are victimized by child pornography which continues as the images circulate. (TR 271–72). She described a letter from the mother of a child victimized by child pornography which detailed the effect that it had on the child victim (TR 272). Judge Alvarez believes that the guidelines appropriately reflect these concerns. (TR 272). She also urged the Commission to take into account the fact that if there was not a market for child pornography, the images would not be produced. (TR 273). She suggested that a greater understanding of the crime of child pornography itself is needed and that perhaps "the Commission could better lay out the rationale for the guidelines and what drove the guidelines in particular." (TR 273). She explained that the crime of child pornography itself is not understood. The "Commission could better lay out the rationale for the guidelines and what drove the guidelines in particular." (TR 273).

Western District of Texas
The Honorable Kathleen Cardone, United States District Judge

Judge Cardone expressed agreement with the statements of Judge Alvarez regarding the immigration and child pornography guidelines. (TR 276). She indicated that she handles a "lot

of pornography cases" and discussed what she described as the "horrific, horrific images." (TR 276).

Western District of Oklahoma
The Honorable Robin J. Cauthron, United States District Judge

Judge Cauthron stated that "the guideline sentences for child pornography cases are often too harsh where the defendant's crime is solely possession, unaccompanied by any indication of acting out behavior on the part of the defendant." (TR 14). She suggested that the child pornography guideline should be flexible, "recognizing that a broad range of conduct is encompassed within them, some of which is truly evil deserving of great punishment." (TR 14). She also questioned whether the enhancement for use of a computer "makes sense" and stated "widespread as computer use is now, enhancing for use of a computer is a little like penalizing for speeding, but increasing that if you're using a car." (TR 15).

Eastern District of Louisiana
The Honorable Jay C. Zainey, United States District Judge

Judge Zainey suggested that the Commission recommend the elimination of mandatory minimums to Congress, including in child pornography cases (TR 27, 31–34). Judge Zainey also stated that there is a difference between a "user, slash, viewer" of child pornography and "the person who actually exploits children." (TR 32). He discussed the argument that punishing viewers will reduce the market for child pornography and the exploitation of children. (TR 32). While he stated that it is a "very good argument" he noted it applies equally to the drug market and mandatory minimums generally do not apply to drug users. (TR 32.). He stated "there's no statutory minimum for . . . the [drug] user, then why should there be a statutory minimum for the user of pornography." (TR 32).

III. PRACTITIONERS

Federal Public and Community Defenders

Julia O'Connell, Federal Public Defender, Northern District of Oklahoma

Ms. O'Connell stated that "the child pornography guidelines are unreasonably harsh" and urged "the Commission to revise them to provide punishment proportional to the offense and the risk to public safety." (TR 16). She indicated that in her experience, "the vast majority of child pornography defendants have no criminal history whatsoever [and] it is not surprising that judges across the country question the need for severe sentences for first-time offenders, and in particular, offenders who are not likely to re-offend." (TR 16).

Jason Hawkins, Assistant Federal Public Defender, Northern District of Texas

Mr. Hawkins stated that "the child pornography guideline is not in step with current reality." (TR 15). He maintains that "very few" defendants convicted of possession of child pornography have a history of abuse or exploitation of children. (TR 15). He indicated that "the research shows that child pornography offenders, without prior contact offenses, have a very low risk of

recidivism of any kind, rarely commit a subsequent contact offense, and do very well in treatment and under supervision." (TR 15). Mr. Hawkins believes that the current enhancements in the child pornography guidelines are "no longer meaningful" and the guideline "does not advise judges about those important public safety considerations." (TR 16). He stated that the "best indicator that this guideline needs revision" is the number of below-guideline sentences imposed in cases under §2G2.2 and the fact that many district judges have expressed disagreement with the guideline in published opinions. (TR 16). Mr. Hawkins urged the "Commission to study and report on whether possession of child pornography actually correlates with child exploitation, and to revise the guideline to distinguish among differently situated offenders on a rational basis grounded in research." (TR 17).

PUBLIC HEARING – WEDNESDAY, JANUARY 20, 2010
8:30 a.m. – 3:00 p.m.
PHOENIX, AZ

PRACTITIONERS

Department of Justice

Dennis Burke, United States Attorney, District of Arizona

Mr. Burke discussed the standard of review of sentencing decisions set forth by the Supreme Court in *Gall*. (TR 8). He believes that this "very deferential standard of review gives wide latitude to a district court judge to impose a sentence based on that individual judge's determination of what is reasonable in light of all the facts and circumstances in a given case," which "has made it difficult, if not impossible, in the Ninth Circuit to appeal extreme variances from the guidelines in the relatively few cases in which they occur without agreement by both parties." (TR 8–9). Mr. Burke stated several sentences in his district were "unreasonably low" but an appeal "was not feasible" because of the deferential standard of review. (TR 9). He pointed to a child pornography case where a sentence of probation was imposed despite an advisory guideline range of six to seven years of imprisonment. (TR 9). He stated "simply put, government appeals challenging downward variances, even extreme ones, are practically impossible because of the discretion afforded to district courts after *Booker*, particularly in the Ninth Circuit." (TR 9).

Federal Public and Community Defenders

Heather Williams, Assistant Federal Public Defender, District of Arizona

Ms. Williams stated that "the Guideline governing child pornography distribution and possession convictions, has become increasingly harsher in its level computation, many times based upon Congressional mandate. . . . [and that] judges consistently state that sentences for child pornography convictions are too severe and they vary from the Guidelines." (TR 48). She maintains that "child pornography offenders are less likely to recidivate than other offenders in other categories, are not likely to commit nor likely have not committed contact sex crimes, and respond well to supervision." (TR 51). Ms. Williams' testimony contains a detailed discussion

of the Butner study as well as studies that she believes support her position. (TR 48–51). Ms. Williams also voiced concerns regarding the enhancements in the child pornography guideline. (TR 51–54). She stated that the use of a computer in the offense "is the rule rather than the exception and the vast majority of defendants do not use the computer in a way initially contemplated by Congress." (TR 52). She also maintains that §2G2.2 "over-punishes less culpable defendants by failing to distinguish between active and passive possession." (TR 52).

APPENDIX D
SUMMARIES OF THE TESTIMONY OF THE WITNESSES
UNITED STATES SENTENCING COMMISSION
PUBLIC HEARING ON FEDERAL CHILD PORNOGRAPHY CRIMES
WEDNESDAY, FEBRUARY 15, 2012
8:15 A.M.–5:30 P.M.
WASHINGTON, DC

I. Offender Use of Technology

United States Department of Justice
James Fottrell, Child Exploitation and Obscenity Section, Criminal Division

Mr. Fottrell observed that "[a]s new technologies emerge, offenders are often among the early adopters of those technologies to further their activities," and provided a brief background annotating the procedures and policies for examining and analyzing digital evidence. (TR 17–18). He stated that once exact-image copies are made of the digital media seized, its analysis "helps investigators and prosecutors answer some of the critical questions of the offense, including who did it, when did it happen, where did it come from, how did it get here, and what technologies were used to commit the offense," and that finding the answers to such questions "is like assembling the pieces of a puzzle in order to form a clear picture of the offense conduct." (TR 18).

Mr. Fottrell provided a number of examples of the kind of information that can be obtained during a computer forensics exam, and said that "[t]he analysis of [the obtained and copied] digital media can help provide evidence of the charged conduct, including providing critical evidence of the knowledge and intent to collect child pornography," as such information may be gleaned by examining the patterns of web browsing activity to determine who was using the computer at or around the time that illegal activity took place. (TR 19–20). Additionally, he described how a Thumbs.db file, Link Files, and the Windows Registry, provide specific date and time information about when a file was accessed or when images and/or videos were viewed by a computer user, all of which can help prosecutors "establish specific dates of knowingly possessing certain images and videos." (TR 20–22). Mr. Fottrell also explained how, in many investigations, offenders have large collections of images and videos, and stated that the folder names and the structure of the filing, "often contain useful insight into exactly the type of images that are most revered." (TR 22). Furthermore, he stated, that "[i]mages in particular folders sorted and organized [. . .] are not accidentally viewed; they are purposely sorted and organized in a particular manner." (TR 22–23).

In discussing the important question of being able to identify from where particular images and videos originated, Mr. Fottrell noted that while using computers and the Internet to access websites and e-mail are two technologies that may help to address the aforementioned question, "there are many other technologies used on the Internet every day," and many "different ways to classify and organize the types of different technologies used in online activity" such as by "identifying the different socialization aspects of the activity." (TR 23).

Mr. Fottrell explained how offenders may progress from an "individual experience" to an experience with much more group interaction. In the former, one acting alone receives, collects, and shares material online, he said, perhaps by registering for a child pornography website, receiving an e-mail with a user name and password, and possibly having limited communication abilities with the website administrator. (TR 23, 25–26). Next, an offender may increase his interactions with others by utilizing a "peer-to-peer" software program, often downloaded for free, and used to search for files using terms ranging from the very generic, such as "young," to the very specific, such as a particular series, victim name, website, or very narrow age range. (TR 26). One may then establish a unique online identity, used to communicate with other offenders via technologies such as "GigaTribe, instant messaging, newsgroups, and e-mail" in order to seek out more specific material. (TR 23–24). Such interactions, Mr. Fottrell claimed, helps offenders to "refine their desire for more specific material, while helping to validate their behavior among like-minded peers." (TR 24). Notably, Mr. Fottrell said that all of these technologies not only allow the exchange of images and video, but also provide a "conduit for direct communication [which] allows frank discussion of preference and specific types of material in helping individuals establish their unique identity." (TR 27). The next step in the progression, according to Mr. Fottrell, is to join an online community, which uses technologies such as "bulletin boards, social networking sites, and Internet-related chat." (TR 24, 27). Such groups often have specific rules and guidelines for membership, are sorted and organized into hierarchies to "distinguish the more experienced and senior members from the newer members," and work to "make sure that members employ sophisticated techniques to evade detection by law enforcement and deploy encryption to thwart the discovery of illegal material." (TR 24–25, 28). Such divisions, Mr. Fottrell said, "help law enforcement investigate and target and focus their investigations on the most serious offenders in the group." (TR 28–29).

Mr. Fottrell concluded by stating that "offenders use multiple Internet technologies to commit offenses online, and the type of evidence available to investigators and prosecutors varies depending on those technologies. [. . .] [I]n most cases, there is additional evidence located on computer servers on the Internet, separate from the offender's residence [and] [a]s investigators combine this evidence, they get a more complete picture of the offender's conduct." (TR 29–30).

Office of the Federal Public Defender
Gerald R. Grant, Digital Forensics Investigator

Mr. Grant believed that the advancements in technology are a very important area to be aware of while trying to understand how the child pornography guidelines and enhancements apply. (TR 30). Noting that while contraband material typically comes in two categories: still pictures and movies, he said that there is a transition taking place "from the original still picture, which was a physical copy of a picture you can hold, to what's now becoming digital — nothing more than ones and zeroes on a computer." (TR 30–31). Because of such increasing technology, according to Mr. Grant, an individual can instantly take pictures and videos and upload them to the Internet via social networking sites, and send them to others via e-mail. (TR 32). This is important, he said, because it means that "we can get more instantly," that uploading and/or downloading pictures is no longer "a slow, painful process," and that access and use of program such as AOL Instant Messaging, Yahoo, and MSN, became simpler. (TR 33–34).

Detailing the progression of access to child pornography, Mr. Grant described how individuals used to develop film on their own, or use polaroid type film, and then mail photos to others via the post office. (TR 33). With the advent of the Internet, he said, people could then e-mail each other small photos, or exchange them via private chat. (TR 34–36). Then, when search engines became available, individuals were able to quickly find anything they wanted on the Internet. (TR 36). "Internet Relay Chat," Mr. Grant said, was the beginning of what is now referred to as "peer-to-peer," which he sees as the "primary vehicle" in child pornography cases today. (TR 36). He explained how such systems have evolved over time, from there being a centralized area, to systems without centralized areas but where sharing files was required, to being able to share partial files, or "swarm." (TR 37–41). When files are shared on such a large basis, he said, the file names become longer and longer, and it becomes hard to know what the file actually contains. (TR 42–43). Plus, Mr. Grant said, an individual can create a search, glance at the resulting file list, tell the program to download, and then just walk away. As such, he claimed, one can start up a program, "type in the word 'sex,' grab all [their] files, go to lunch, come back, and [be] pretty certain [he is] going to hit every one of the sentencing enhancements within that short period of time based on high-speed technology, instant availability, and simple keyword searches that don't even indicate what [his] preference is." (TR 43).

In addition to discussing means of access to child pornography, Mr. Grant discussed the availability of identity protection tools that he said are often automatic and computer cleaning software as things that may affect an investigation. (TR 44–47). Finally, he noted that the Adam Walsh Act has made it "extremely difficult for the defense," in that while they may be able to get access to the forensic analysis of their client's computer, they do not have the ability to do a full forensics examination themselves. (TR 47).

Professor Brian Levine, Ph.D.
Department of Computer Science, University of Massachusetts Amherst

Dr. Levine addressed the question of how Congress, sentencing judges, and federal sentencing guidelines can "appropriately distinguish between less and more serious offenders" from his view of technology and hoped that the Commission would place his statements in the context of other witnesses speaking. (TR 48–49). Noting that offenders can be distinguished, in part, "by their online actions and the technology they use to access and share images of child exploitation on the Internet," Dr. Levine stated that he sees three critical modern aspects of this crime, its offenders, and the technology that supports it, which are not generally considered at this point in time. (TR 49).

First, Dr. Levine discussed "the value that offenders contribute to the online community that they leverage to acquire and share files containing images," construing the term "community" broadly to extend from users who never communicate and just trade data, to groups that trade and have detailed social relationships. (TR 49–50). He stated that the value of such communities can be determined by a few factors: (1) the number of peers involved; (2) the amount of content shared; (3) the amount of time devoted to the community; and (4) the resources, or bandwidth, contributed to meet the demands for the content, and that "[u]sers that have contributed a great deal of value to a community in these terms are more serious offenders, or can be viewed as more serious offenders." (TR 51–52). Further, Dr. Levine noted, while the quantity of images that an offender contributes to a community is a part of determining his value, it is not the only

thing to consider, nor sufficient to consider alone. Rather, value is added by "increasing the set of available files on the network," when sharing unique files, as well as making it "easier for others to get content," when sharing files over a long period of time. (TR 52–53).

Second, Dr. Levine explored "the nonpecuniary benefits that [offenders] receive [by participating in online communities.]" (TR 49). In some venues, he said, offenders will receive benefits and incentives for their participation and it is those offenders who take advantage of such benefits who are considered "more serious offenders." (TR 54). As examples, Dr. Levine said that benefits can range from improved network performance when offenders "friend" one another, to training and encouragement that may lead from file trading to contact offenses. (TR 54).

Third, Dr. Levine addressed "the masking mechanisms [offenders] may employ intentionally to evade investigation." (TR 49). He asserted that those who intentionally use various mechanisms to mask network addresses and other information as part of their crimes should be, or can be, viewed as "significantly more serious offenders," as they fully participate in communities, make content available, but then "stonewall[…] justice and thwart [. . .] investigators' abilities to put a stop to [the] communities and rescue exploited children in some cases." (TR 55). Stating that masking is different than encryption, Dr. Levine said that there are many ways to mask one's IP address, but also noted that just because one is masking his IP address, does not mean that he is doing anything illegal. Comparing a child pornography trafficker or trader who masked his IP address to a bank robber wearing a mask, Dr. Levine said that while the masking may not cause more harm directly, the robber can receive a sentencing enhancement. (TR 56).

II. Child Pornography Offending – Pathways, Community, Treatment

Gene G. Abel, M.D.
Medical Director, Behavioral Medicine Institute
Founder and President, Abel Screening, Inc.

Stating that it is important to understand why people want to look at child pornography, Dr. Abel said that he would focus on child pornography and its relationship to past sexual behavior, as well as talk about treating the abuser, screening those at risk for molesting children, and how abuse impacts boys and girls to "develop sexual interest in children." (TR 87–88).

In beginning to explore whether the use of child pornography is related to past child molestation, Dr. Abel presented information about four groups of individuals that he has studied: Group 1— looked at child pornography but did not go to meet a child; Group 2— did not look at child pornography but have gone to meet a child; Group 3 — both looked at child pornography and met a child; Group 4 — child molesters. (TR 95–96). The individuals were asked (1) if they were referred to the criminal justice system; and (2) if they were arrested for viewing child pornography. Of those referred for viewing child pornography or for soliciting children, Dr. Abel said, there was a smaller odds ratio for having actually molested a child — which he said "doesn't make sense." (TR 97). But he asserted, the odds ratio is explained by the fact that once an individual has been arrested for viewing child pornography or soliciting a child, he stops talking about the kind of behavior he has been involved in. When looking at Group 4 (those referred for having molested children), however, Dr. Abel asserted that it becomes clear that

"viewing child pornography increases the likelihood of an individual having molested a child in the past by 2.3" times — twice as likely, and having solicited a child increases the likelihood of molestation by 4.3 times. Those with the highest rates of molesting, he said, are those who both look at child pornography AND solicit children; there "the odds ratio is 9.9, or 10 times more likely to have molested children in the past." (TR 98–99).

In answering specific questions provided to him, Dr. Abel offered that "we assume" the majority of offenders view child pornography for sexual gratification. (TR 104). Additionally, because of the increase of the use and prevalence of technology, he asserted that "the landscape has changed" and that we are "forced to deal with younger and younger individuals who can manufacture, so to speak, child pornography." (TR 105). Finally, he opined that "early sexual experiences, masturbation fantasies, [and] being abused" are some of the factors causing people to seek sexual gratification from child pornography. (TR 105).

Concluding, Dr. Abel offered his view that "sentencing for child pornography when no child has been abused should be significantly less than for child sexual abuse, but probation should remain," but agrees with other witnesses that the individuals who make it easier for others to download material should be gone after. (TR 107). Finally, he asserted, "the criminal justice system ought to be prepared to deal with more 12- to 17-year-olds generating, obtaining, and viewing child pornography." (TR 108).

Jennifer A. McCarthy, Ph.D.
Assistant Director and Coordinator, Sex Offender Treatment Program, New York Center for Neuropsychology & Forensic Behavioral Science

Dr. McCarthy began by briefly discussing the assessment process she undertakes for child pornography offenders. (TR 109). Included in this assessment are: a clinical interview pertaining to the individual's full history, a personality or psychopathology assessment, offline and Internet sexual history assessments, and assessment of sexual interest, a review of the individual's social skills, and other specific assessment measures as needed, based on the individual at hand. (TR 109).

Dr. McCarthy stated that there are both sexual and nonsexual motivations for collecting child pornography material. Some of the nonsexual motivations, she said, range from pure curiosity, to fulfilling a collection compulsion, avoiding real-life problems, or as a purely commercial endeavor for financial gain. (TR 110–11). As for those with sexual motivations, Dr. McCarthy asserted that the individual motivations range from being purely fantasy, to having a sexual interest in minors and actually using the material to groom potential victims, to just having an indiscriminate interest in all types of pornography and needing "more and more and more serious and violent stuff to satisfy" sexual needs. (TR 111–13).

Leading to treatment, Dr. McCarthy stated that she usually follows a cognitive behavioral framework, but stressed that any such treatment must be individually based as "one-size-fits-all" treatment "never works." Furthermore, she opined that treatment providers must "consider the dynamic process of the Internet itself" and look at how an offender actually came to look at, obtain, trade, etc., the material, as well as the individual's motivation in collecting the material, and any emotional disconnect and/or cognitive distortions with regards to the material. (TR 113–

15). As an example, Dr. McCarthy said that with an individual with a primary sexual interest in minors, the treatment facilitators will look at high-risk factors, use behavior modification techniques, keep tabs on their sexual fantasies, masturbation habits, etc., as well as deal with relapse prevention and educate the offenders to help them manage their high-risk factors. (115–16). Psychopharmacology may also be employed, as well as life enhancing training where the providers design treatment around helping the offenders achieve their life goals in a healthy manner. (TR 116–17). Finally, Dr. McCarthy discussed the use of the polygraph in treatment and explained that there are three types of polygraphs — the sexual history polygraph, the specific issue polygraph, and the maintenance monitoring polygraph, which usually deals with treatment and probation issues. (TR 117–21). She also noted that her program uses the "Containment Model" where the treatment provider, polygraph examiner, referral agent, etc., all "work together in order to manage [the] offender." (TR 122). However, she said that when providing treatment it is rare for her to be able to see an offender's presentence report (TR 122–23) and that she has never seen a forensic analysis report in the assessment or treatment of an offender. (TR 124).

Dr. McCarthy also presented her opinion that "it [is] not necessarily the amount of child porn in an individual's collection; it [is] the ratio between adult porn and child porn that [is] a significant factor that distinguish[es] contact from noncontact offenders." (TR 125). Further, she cites the type of activity in the pornography material, the gender, and the age of those displayed in the images as being "crucial information" that helps to inform the treatment process. An additional distinguishing factor, she said, is whether an offender accesses material via a direct search or simply by clicking on pop-up ads. (TR 125–26).

In sum, Dr. McCarthy asserted that "digital evidence is extremely, extremely important with regard to informing the assessment, the treatment, and the management of [offenders] in the community," with the ultimate goal being to prevent reoffense and hold people responsible. (TR 127).

III. Possible Relationship Between Sexually Dangerous Behavior, Child Pornography

Michael C. Seto, Ph.D.
Dir. Of Forensic Rehab. Research, Integrated Forensic Program, Royal Ottawa Health Care Group

Dr. Seto opined that there are increasing pressures on the criminal justice and mental health and social service systems with regard to child pornography related crimes and offered as support a U.S. Department of Justice report showing that while the number of individuals entering the federal system for transportation offenses or contact sexual offenses has remained relatively stable for a period of years, the number of individuals entering the system for child pornography offenses has been steadily increasing. (TR 161). Additionally, while understanding that sentencing serves a variety of functions, Dr. Seto believed that it is also about "protecting the public, and protecting children in particular," and as such he hopes that "risk for future sexual offending is […] a central concern." (TR 162).

Beginning his discussion on known characteristics of child pornography offenders, Dr. Seto stated that "quite remarkably this is an extraordinarily male phenomenon," with typically 99

percent or more of United States and Canada study participants being male, as compared to the "perhaps 90 to 93 percent of […] incarcerated sex offenders." (TR 163). Further, he said that "child pornography offenders are disproportionately Caucasian," and while he does not have an explanation for why that is so, he opined that there may be "some cultural or ethnicity factors that might explain" the disproportionality. (TR 163).

Comparing child pornography and contact offenders, Dr. Seto asserted that both his research, and the research of others, suggests that offenders are, on average, likely to have pedophilia, as evidenced by one of his studies showing that about "61, 62 percent of child pornography offenders clearly showed a sexual preference for children." (TR 163–64). Next, Dr. Seto offered that some research shows that, on average, child pornography offenders have a higher IQ and are better educated than contact offenders — they are "just closer to the population average than contact offenders who tend to be below average on those two dimensions," and child pornography offenders have "less criminal history." (TR 164–65). Turning to psychological risk factors that have been identified in research, Dr. Seto stated that child pornography offenders, on average, score higher than contact offenders in terms of being "preoccupied by sexual thoughts and fantasies, having difficulty controlling their sexual urges and so forth," all of which are factors that have been shown, at least in the mainstream sex offender research field, "to be predictive of sexual offending in the future." (TR 166).

Dr. Seto explained the "counterintuitive" anomaly that one (the contact offenders) would have sexual contact with a child if they were not sexually interested in children, by stating that while sexual motivations are important, some offenders who sexually victimize children may be motivated by other factors such as opportunity, substance abuse, incest, etc. (TR 167–68). Further, he stated that the relationship between child pornography and being sexually interested in children is "robust enough" that the task force looking at psychiatric diagnostic criteria for pedophilia for the next version of the DSM is considering "persistent use of child pornography" as one of the factors to consider. (TR 169). Dr. Seto was careful to point out, however, that while there is an association between child pornography offending and pedophilia, it is not a "one-to-one" association. (TR 169–70).

Introducing the topic of child pornography offenders' history of contact offending, Dr. Seto presented his study that reviews a total of 21 studies done by different researchers, each focused on determining contact offending histories based on official criminal records or self-reporting information. (TR 170–71). The end result, he provided, is that about "one in eight of the online offenders had an official record, [while about] one in two [in the self-report studies] admitted having committed contact sexual offense in the past." (TR 171). Dr. Seto asserted that these findings highlight the "discrepancy between what has happened and what is officially known," as well as "belie the assumption that all child pornography offenders have necessarily sexually offended directly against children." (TR 171–72). His review also identified nine studies following child pornography offenders after they have been convicted and released, which showed a 2 percent rate of contact sexual offenses and a 3.4 percent rate for new child pornography offenses. (TR 176–77). While acknowledging that there are some inherent flaws with the research leading to those percentage rates, and saying that he is "sure that the observed recidivism rates will go up with time," Dr. Seto also said that he agrees with Dr. Abel in that new offenses will typically take place in the first five, six, seven years. (TR 177). Concluding, Dr. Seto asserted that an important takeaway from the studies is that they "contradict an assumption

that necessarily child pornography offenders are a high risk to sexually reoffend, either in terms of further child pornography offending, or in terms of contact sexual offending against children." (TR 178).

Dr. Seto also addressed the Butner Study, saying that in his analysis of the available research, that study "was a statistical outlier." (TR 172–73). Specifically, he asserted that the study's 85 percent value of child pornography offenders admitting to a history of contact offending upon treatment is "unusually high compared to the other research that is available." (TR 173). He also acknowledged a handful of the criticisms directed at the Butner Study, while simultaneously supporting the inclusion of that study in his larger review, stating that such a review has value in that "you are taking up studies that are quite diverse in terms of […] various issues, and you are trying to . . . see the signal despite the noise in them." (TR 174–76).

Finally, Dr. Seto briefly talked about the risk factors for sexual recidivism, as determined through a number of studies, stating that "a lot of these factors aren't going to be a surprise to any judge who has dealt with criminal cases." (TR 180). Because of this, he said, there is a solid base in terms of understanding the factors that predict who goes on to sexually reoffend. (TR 180–81). As for additional factors that should be considered, Dr. Seto said that the ratio of child pornography content depicting boys, relative to the content depicting girls, is "coming out as predictive of sexual recidivism." (TR 182–83).

Richard Wollert, Ph.D.

Dr. Wollert started his testimony by telling the Commissioners that he is "something of a skeptic," and that what they will hear from him is likely different from what others have said. (TR 184).

Stating that "many believe that pedophiles and undetected molesters are predisposed to watch child pornography on the Internet," and that "[i]t is also believed that this causes recurrent sexual misconduct," Dr. Wollert opined that such theories, or what he calls the Pornographic Attraction Theory (PAT), have "probably influenced the child pornography guidelines [] to some extent." (TR 184–85). Referring to a table showing that the average sentence length for a first time child pornography offender is three times what it was for both first time and recidivist offenders in 1994, Dr. Wollert asserted that "[t]he guidelines have become more punitive, in spite of their application to a current population that seems less dangerous than the population from the early '90s." (TR 188). His testimony focused on the relationship and interactions between PAT and child pornography offenders as a means to reconsider the child pornography guidelines.

Dr. Wollert began his review of the PAT by discussing Dr. Seto's study which concluded that "there is a distinct group of online offenders whose only sex crimes involve child pornography," and that "[o]nline offenders rarely go on to commit contact sex offenses." (TR 190). He argued that the averaging approach utilized in Dr. Seto's study has limitations in that it (1) focuses on online offenders as opposed to federal child pornography offenders; (2) misses studies disseminated recently; and (3) gives equal weight to studies that vary in quality of design, and therefore that the most relevant body of research for evaluating the PAT's applicability to federal child pornography offenders is studies on federal child pornography offenders themselves — a category containing three projects. (TR 190).

Dr. Wollert first discussed the Butner Study, which he and his colleagues "criticized stringently and trenchantly" due to its research design flaws, particularly stating that "almost any offender faced with the pressures built into the Butner program would generate many possible false disclosures." (TR 192–94). Additionally, Dr. Wollert asserted that the study's concentration on self-reported but unadjudicated sex crimes is not only peripheral, but also conflicts with the impression he developed from the group of 55 federal child pornography offenders that he treated over the course of 10 years. Those individuals, he said, struck him as "ashamed of their pornography offenses, motivated to succeed, well educated, responsive to treatment, compliant with supervision, and nonrecidivistic." (TR 194–95). Providing a vastly different view from that presented by the Butner Study, Dr. Wollert described the extensive data spreadsheet he created by compiling information from the file documents of all child pornography offenders who had been in his program, along with 17 additional offenders, and said that analysis of that information showed that "two out of 72 [child pornography offenders] were taken into custody for possessing child pornography over an average risk period of four years, [n]o one was arrested on charges of child molestation, [and] [n]inety-two percent succeeded in completing their supervision without being revoked." (TR 195–96). Furthermore, he said that 14 percent of the offenders had previously been convicted of contact sex offenses — a number similar to that reported by Dr. Seto. (TR 196). These results, Dr. Wollert said, parallel those obtained by Wakeling in another study, where it was found that 1 percent of a cohort of child pornography offenders had high scores on the Risk Matrix 2000 actuarial instrument, and that the sex recidivism rate for generalist sex offenders with low actuarial scores was four times higher than the rate for child pornography offenders. (TR 197).

The second project (of studies on federal child pornography offenders) that Dr. Wollert referred to was Probation Officer Lawrence Andres' memo to Judge Jack Weinstein, reporting on the treatment and supervision of child pornography offenders under the Eastern District of New York's supervision. (TR 197). Of the 108 child pornography offenders supervised since 1999, the memo stated that "approximately 20 percent disclosed a prior victim either via clinical polygraph examination or self-report during the term of supervision," with a "prior victim" being defined as a person under 18 years of age. (TR 197–98). Further, according to the memo, only one offender committed a new contact offense while under supervision, and 87 percent of the offenders succeeded in not violating the terms of their supervision. (TR 198). Combining that data with his own, Dr. Wollert asserted that "the overall base rate of contact offense recidivism is six-tenths of 1 percent." (TR 198–99). Additionally, Dr. Wollert said, while Andres's memo contained data obtained via self-reporting measures, similar to those used in the Butner Study, only 20 percent of the supervised offenders in New York made new disclosures, as compared to the 59 percent reported in the Butner Study — a "highly significant" difference according to statistical testing. (TR 199).

In considering all of the research discussed, Dr. Wollert presented five conclusions about federal child pornography offenders: (1) the "average estimated risk per existing actuarials was low;" (2) "[t]he recorded contact sex offense recidivism rate was very low;" (3) "about 15 percent had been convicted of contact sex offenses prior to their index pornography conviction;" (4) "[90] percent successfully completed probation;" and (5) "using self-report to count prior offenses produces unreliable results — at least the way it has been done so far." (TR 199–200). Dr. Wollert contended that such findings are consistent with the results of four other studies of

Internet child pornography offenders, and that they hold "diagnostic and prognostic implication at odds with the PAT." (TR 200–01). Stating that the "base rate occurrence of these problems is low," that the level of accuracy attainable by actuarial instruments is "moderate, or modest," and that there are legal constraints to consider, Dr. Wollert asserted that "the PAT is a highly contagious theory [and a] refractory to strong doses of evidence to the contrary." (TR 201–02). As such, he made three recommendations: (1) "increase efforts to support the reintegration of [child pornography offenders] into the community sooner rather than later;" (2) work towards having comparative research "study the value of these alternative theories [such as a learning theory] and not just focus in on a mental disorder theory;" and (3) "look at child pornography offending from a public health perspective as well as a criminological one," such as by providing "warnings on the Internet or TV stating that viewing, possessing, and distributing child pornography is a very serious crime that will result in a ten-year federal prison sentence." (TR 202–04).

IV. Law Enforcement Perspective

Janis Wolak
Senior Researcher, Crimes Against Children Research Center

Ms. Wolak began by clarifying that she was not speaking from the law enforcement perspective, but rather as a researcher who has done a lot of research with the assistance of law enforcement agencies. (TR 224–25). She introduced the background of her research, stating that "the goal of our research was to look at the numbers of technology-facilitated child sexual exploitation crimes." (TR 226). Excluding everyone except child pornography possession, and sometimes distribution offenders, Ms. Wolak stated that in 2000, she found that there were about 1,000 arrests for child pornography possession, with roughly one-quarter resulting in federal charges and the remaining three-quarters being handled in state courts, with "fairly similar" sentencing among both groups. (TR 228). In 2009, she said, there were about 3,800 arrests involving only child pornography possession, with roughly one-third handled at the federal level and the remaining two-thirds handled at the state level. Of those sentenced at the federal level, 65 percent received sentences of more than five years in prison, as compared to roughly 20 percent of offenders in state cases being sentenced to more than five years in prison. (TR 229). Acknowledging that the federal cases were more serious in some ways, Ms. Wolak asserted that she can control statistically for those elements of seriousness through a "logistic regression" analysis and, even after doing as much, that the federal offenders were twice as likely to be sentenced to five or more years in prison. (TR 230). In sum, Ms. Wolak stated that "the sentences in federal courts have increased substantially at least in terms of the number, the percentage of offenders who get more than five years, while the sentences in state courts have increased a little bit but not really substantially," (TR 229) and that "simply being charged in federal rather than in state court increases the likelihood that someone is going to get five or more years." (TR 230).

Recognizing the limitations to her data, Ms. Wolak believed that the disparities addressed may be a result of judges and prosecutors in state courts having a different orientation than the ones in federal courts, possibly based on differences in the number of child molestation or sexual abuse cases seen, varying levels of training about the seriousness of child pornography possession crimes, as well as different levels of advocacy among law enforcement investigators. (TR 231–

32). Finally, Ms. Wolak stressed "that the discrepancy between state and federal sentencing that we've identified doesn't address the question of what is an appropriate sentence. [. . . But rather,] we are simply documenting that there does appear to be a considerable difference in cases of equal seriousness based on whether or not federal charges are brought." (TR 233).

United States Department of Justice

Steven DeBrota, Assistant United States Attorney

Mr. DeBrota came to believe from a fairly early perspective that a prosecutor or investigator in the child pornography area "had a responsibility to visually examine the images, principally to see if we could locate the child victim who might be in the images." (TR 234). During the course of investigations, Mr. DeBrota and investigators would carefully examine images and sort the collections "because it became very easy to identify [the defendant's] paraphilias by looking at what he collected and valued." (TR 235–36).

Mr. DeBrota stated "in 1996 there were no readily traded series on the Internet involving infants and toddlers in any numbers." (TR 236). Additionally, Mr. DeBrota noted that "readily traded child pornography in 1998 did not include [to his knowledge] infants and toddlers." (TR 237). However by 2010, Mr. DeBrota prosecuted groups of nepiphiles, those who are not interested in anyone after they clear about age five. (TR 237–38). He indicated that "the amount of material [groups] trafficked pointing at [nepiphilia] was vast. And they also, within the group, encouraged each other to produce the material because it was hard to find, and that occurred. And then they trafficked that newly created material." (TR 238). Mr. DeBrota believed that "it is an absolute fact" that the nature of child pornography from when he started in 1991 to the present "has gotten much worse," and he does not "see how anyone looking at that same data set could reach any other conclusion." (TR 238).

Mr. DeBrota thought "it is critical to know what someone collects and values as a measure of their true interest and activities, immune from the bias of what they may say, or what their history is, or the uncertainty of anything else." (TR 239). Mr. DeBrota believed that "there is utility, for example, in the sentencing guidelines saying someone has sadistic images, because that tells us a bit about them, or the number of images because it tells us maybe how long they were doing it, which was one of [the Commission's] concerns, and a valid one." (TR 239–40). Mr. DeBrota noted that "it could also tell you the degree of harm, because how many children were affected and those things." (TR 240).

Mr. DeBrota stated that "right now, there is no obvious way to differentiate between nepiphiles and someone older," and he thought that is a flaw because he does think "it matters that the target group they're attracted to is incapable of speech." (TR 240). Mr. DeBrota noted that it would be complicated to prove a case involving the molestation of an infant or a toddler. (TR 240).

Mr. DeBrota believed there is no need to worry about the question of duplicates because in the 20 years that he has directly prosecuted about 200 cases, he has never charged a duplicate or used it as a sentencing consideration because he's never had to. (TR 240–41). He explained that "I don't count duplicates even though the law might say I could because it's never come up. It's

not been a problem." (TR 241). Mr. DeBrota noted that "there are technological ways of dealing with the duplicates such as hashing." (TR 241).

Mr. DeBrota suggested that "to know what percentage of child pornography there is in an offender's computer, you would have to know how much adult material they have." (TR 241). For example, Mr. DeBrota stated that "we don't have a data set of all the Internet adult material . . . We would have to accumulate that to have an automated mechanism. And we would have to run that against a computer and get a number. Then we've got to run the child pornography and get a number and do the math." (TR 241–42). Mr. DeBrota thought that "we shouldn't set sentencing questions, unless they're of paramount value to [the Commission], on that basis because the overhead to the judicial system will be vast." (TR 242).

Mr. DeBrota noted that "telling how sorted someone's collection is, or how long they've been doing something, is much, much easier to do" than determine the percentage of certain material against a total collection. (TR 242). First, Mr. DeBrota stated that prosecutors and law enforcement interview child pornography offenders, and "most of the time, if they think we'll get the answer anyway forensically," they admit how long they have been collecting child pornography. (TR 242–43). Mr. DeBrota believed they could answer that question by looking at some forensic information in the offender's computer in a relatively straightforward manner. (TR 243).

Mr. DeBrota worked with people from Homeland Security, the FBI, the Postal Service, the State Police, all the IGs, and many state and local agencies, and he stated that he needs them. (TR 243–44). Mr. DeBrota explained that he needs these people not to look through a collection principally to drive a sentencing computation, but he needs them to look through the collection to find the kids. (TR 244). Mr. DeBrota wanted to have sentencing calculations "as efficient as possible" to getting the Commission what it needs. (TR 244). Mr. DeBrota stated that when the Commission talks about the information he provides courts, it is the last step in the process. (TR 244). When Mr. DeBrota prepares information for a presentence report, he is "not doing an elaborate description of everything in the investigation," he is "not giving them a forensic exam report," he is "trying to lay out why the specific offense characteristics apply as they do." (TR 244). Mr. DeBrota stated that "you cannot get an accurate measure of someone's true interests and activities exhaustively by reading just a PSR. You'd have to do more than that." (TR 244). Mr. DeBrota suggested that if the Commission needs more information, or if the sentencing criteria ought to be greater to call prosecutors to do more, they certainly could, but he suggested "we should constantly balance the drain on the judicial resources and the litigant's resources versus [does the Commission] really need that piece of information." (TR 245). Mr. DeBrota stated that "forensic rules, forensic demands, judicial demands, play into sentencing policy. It has to be worth it . . . to really advance" what the Commission wants to try to do with sentencing enhancements. (TR 245).

Mr. DeBrota stated that the people who work these cases are volunteers. (TR 246). He explained that the prosecutors give the volunteers requests for information and then the volunteers get information to do a search warrant, and the prosecutors will do a "danger assessment." (TR 246). Mr. DeBrota noted that it does not matter what the opening allegation is, they will do a "danger assessment first based on the interview of the target" and then do an "on-scene triage of their

computer." (TR 246). Mr. DeBrota stated that in his district, they look at "the stuff" and interview the offenders about it, but other districts use polygraphs. (TR 246).

Mr. DeBrota explained that if they think they have an offender working in isolation, they will do a confirmation exam, a level one forensic exam. (TR 246). Mr. DeBrota indicated that the purpose of this exam is to "confirm why we were there and get some ideas about them, and so forth." (TR 246–47). Mr. DeBrota explained that a level two exam is "much more robust, much more time consuming and so forth" and is used when they think the offender is networking with other people where the investigators could trace communication links to victims or other offenders. (TR 247). Mr. DeBrota stated that a "level three exam is one where there is some forensic issue like someone claiming that they didn't understand something, or that the computer did it automatically." (TR 247). Mr. DeBrota claimed that about 90 percent of his cases are resolved in level one and two because the offender "will confess on-scene more than 90 percent of the time. The child pornography we already knew they had, they will identify and confirm. And we can go on to then work on finding kids and doing those things." (TR 247). Mr. DeBrota stated that "one in ten cases goes to trial either because there's a fact issue, or because the person is in so much trouble there's no incentive to plead." (TR 247–48).

Mr. DeBrota stated that "almost all of the offenders we've prosecuted the last three or four years were not just generic passive recipient peer-to-peer people. They were the other kind." (TR 248). Mr. DeBrota believed that it is impossible to be a member of a collective group and still be a neophyte. (TR 248). In his experience, to get in a group "you had to already demonstrate you were willing to distribute child pornography within the group. You had to do that, so they knew you weren't a copy. And you had to be vouched for by another member." (TR 248–49).

Captain Kirk Marlowe
Virginia State Police Bureau of Criminal Investigation, High Tech Crimes Division
NOVA-DC Internet Crimes Against Children Task Force

One of the major issues that Captain Marlowe's task force faces is "the misinformation that continues to grow that the folks we're dealing with are merely looking at nude pictures of youth, when in fact there are gruesome acts of violence against the most innocent citizens that we have. So we are in a constant battle there to bring it back to the real issue at hand." (TR 250). Captain Marlowe explained that another issue for his task force is "when we do the forensic work we are only able to recover a small amount of the images from the actual media that we have in front of us." (TR 250). Captain Marlowe stated that this causes a problem because "the images, once they're out into the virtual world, they continue to circulate. The victims are revictimized over and over again from that situation." (TR 250).

Captain Marlowe stated that there is a direct correlation between those who possess child pornography and being hands-on offenders. (TR 250). He noted that "[q]uite often the child pornography is a way into the door, and then we find out there's a whole other sinister world there that we otherwise would not have known about had we not initiated this type of information." (TR 250–51).

One challenge that Captain Marlowe and his task force faced is that many of the predators they encounter are professionals (*i.e.*, law enforcement officers, teachers, doctors, lawyers, etc.) who

do not have criminal histories, so they are often viewed differently. (TR 251). Another challenge that Captain Marlowe described is that the investigators and examiners are forced to view thousands of images and discuss them with the prosecutors, but "just like in all lines of work, some are better at that than others, and so often the true nature of the gruesome act is not conveyed to the court." (TR 251–52).

Captain Marlowe stated that forensics are done differently all around the country, but his task force does on-scene triage to get information. (TR 252). However, Captain Marlowe noted that "quite often those cases still need a full-blown forensics before they go to trial," which "backlogs the system for three to six months on any given case." (TR 252).

Another point that Captain Marlowe emphasized is that "as technology is improving the electronic service providers are better at reporting to the National Center [of Missing and Exploited Children]." (TR 252). He stated that the volume at the National Center continues to grow and the National Center is "vetting that and pushing that out to the" Internet Crimes Against Children tasked forces. (TR 252). Captain Marlowe explained that as the number of cyber tips continues to grow, it forces the task forces "into more of a reactive strategy" because they are "responding to tips from the public, from the service providers, instead of being proactive and going out and combating this problem." (TR 252–53). Captain Marlowe concluded by stating that "[t]here are certainly many variables that affect the system, so no one person or one discipline is to blame. It's a team effort to try to move forward and make it better for everyone." (TR 253).

V. Victim Perspective

Michelle Collins
Director, Exploited Child Unit, National Center for Missing and Exploited Children

Ms. Collins stated that to date, the National Center for Missing and Exploited Children (NCMEC) has received over 1.3 million Cyber Tipline reports since 1998. (TR 289). Of those reports, 92 percent were related to child pornography. (TR 289).

Ms. Collins stated that NCMEC operates the Child Victim Identification Program (CVIP) which assists federal, state, and local law enforcement agencies as well as prosecutors with determining which seized images contain children who have already been identified by law enforcement and assists law enforcement in identifying and locating those children who still may be in an abusive situation. (TR 289–90).

Ms. Collins indicated that the "majority of the children that we know who have been identified are here in the United Stated, but that can very much be pointed to the fact that law enforcement here in the U.S. is aware of CVIP and provides us with that information." (TR 293). Ms. Collins stated that in 2010, law enforcement agencies submitted nearly 14.2 million images and videos to CVIP for review, and in 2011, they submitted more than 22 million images and videos. (TR 294). Ms. Collins attributed this increase, in part, to the increased awareness of this resource to law enforcement agencies. (TR 294). She acknowledged that "the increase may also be due to high-speed Internet access and digital storage capacity, which has made it easier for child pornography possessors to collect a large volume of illegal material." (TR 294).