

Notes

Inequitable Sentencing for Possession of Child Pornography: A Failure To Distinguish Voyeurs from Pederasts

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This Note identifies several infirmities of United States Sentencing Guideline section 2G2.2, the sentencing scheme for possession of child pornography. The production and web-based dissemination of child pornography images has increased substantially over the past decade. The Department of Justice has aggressively prosecuted these crimes under the rationale that (1) possession of child pornography leads to contact offenses, (2) demand drives supply, and (3) the mere availability of an image or video constitutes continued and indirect abuse of the child depicted. In light of these and other concerns, Congress has enacted dramatic increases in the potential sentences for possessors of child pornography. In this Note, I argue that the Sentencing Commission should amend the guidelines for possession of child pornography because empirical evidence calls into question the asserted link between possession of child pornography and future sexual assaults of children. Moreover, the guidelines fail to consider the nature of internet downloading, and thus most of the “enhancements” are actually a core facet of basic possession. Numerous federal district courts have taken note of these deficiencies and have sentenced defendants below the applicable guideline ranges. Though the Supreme Court’s recent decisions in Rita and Kimbrough permit trial courts to disregard sentencing guidelines that lack empirical support, most courts still rely heavily on the guidelines to impose lengthy sentences. Accordingly, I propose that the Sentencing Commission amend section 2G2.2 in a manner that reflects the tenuous connection between possession and contact offenses, as well as the realities of internet use.

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INTRODUCTION

On January 25, 2010, Thomas Cunningham was sentenced to just over ten years in prison for possession of child pornography.¹ Cunningham, who was fifty-four years old at the time, had no criminal history.² He pled guilty to possessing 144 images and one video.³ The mandatory minimum sentence for Cunningham’s crime was five years in prison. But he was sentenced to over ten years as a result of numerous sentencing enhancements that significantly increased his recommended sentence. He received enhancements because some of the images depicted prepubescent minors and because others depicted sadistic behavior.⁴ He received additional enhancements for using a computer to obtain the material,⁵ and for possessing a significant number of images and videos.⁶ He also received an enhancement for distributing some of

1. United States v. Cunningham, No. 1:09CR154, 2010 U.S. Dist. LEXIS 6097, at *1–2 (N.D. Ohio Jan. 26, 2010).

2. *Id.* at *30, 33.

3. *Id.* at *26.

4. *Id.* at *3–4.

5. *Id.* at *4.

6. *Id.*

the material.⁷ These enhancements more than doubled Cunningham's sentence.⁸

There is no question that Cunningham's conduct was reprehensible and deserving of severe punishment.⁹ The question posed in this Note is, *how* severe? This Note argues that the sentencing guidelines for possession of child pornography, and specifically certain enhancements like those applied to Cunningham's case, should be amended. A comparison between sentencing for possession of child pornography and sentencing for actual child molestation underscores the need for reform. A hypothetical adult defendant who uses the internet to lure a twelve-year-old girl into having repeated sex with him would face a lower recommended sentence than did Mr. Cunningham.¹⁰

The statutory provision that underlies this inequity is United States Sentencing Guideline section 2G2.2, which applies to receipt and possession of child pornography.¹¹ This provision has received little attention in the legal academy. A small number of commentators have attacked these guidelines as being driven by politics rather than empirical evidence,¹² but few have actually explored the empirical evidence itself.¹³

Part I of this Note describes the historical development and primary rationales for laws proscribing possession of child pornography. Part II provides a brief description of the United States Sentencing Commission's role in promulgating advisory sentencing guidelines, and then discusses the procedural defects and political distortions that led to the creation of section 2G2.2. Part III surveys existing empirical studies that undermine one of the primary rationales behind strict sentencing in this area—that possession offenses lead to future contact offenses. Part III also examines specific internet-related enhancements under section 2G2.2, and it argues that several of them are based on a fundamental misunderstanding of the nature of internet use. Lastly, Part IV discusses the growing number of sentencing decisions that have

7. *Id.* at *3.

8. Cunningham was sentenced at the low end of the recommended sentencing range for his offense. The high end was 151 months (over twelve-and-a-half years). *Id.* at *4.

9. There are several extremely disturbing facets of Cunningham's case. For example, the sentencing court was particularly troubled by the fact that Cunningham videotaped himself masturbating onto the photograph of a toddler. *Id.* at *39–40. The videotape shows Cunningham talking to the photo and telling the girl how her father wants Cunningham to rape her. *Id.*

10. See *infra* notes 88–90 and accompanying text.

11. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2009).

12. See *infra* notes 91–100 and accompanying text.

13. As this Note reached its final stages of publication, Professor Carissa Hessick posted an excellent article that includes a critique of various rationales behind strict sentencing for child pornography offenses. See Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577961. In addition to reviewing relevant empirical studies, Hessick has also proposed several sensible areas for reform. *Id.*

disregarded the guideline recommendations based on a finding that the guidelines were unreasonable. Part IV also reviews recent signs that the Sentencing Commission may be considering amendments to section 2G2.2.

This Note concludes by arguing that the Sentencing Commission should make substantial amendments to the guidelines. Sentencing for child pornography should be recalibrated to reflect the actual risk of cross over from online to offline offending. The new scheme should also incorporate a realistic understanding of how file-sharing works, and it should take account of evolving technology that permits defendants to download massive numbers of images with little effort or even intent.

I. CONSTITUTIONAL AND NORMATIVE BASES OF CHILD PORNOGRAPHY LAW

This Part surveys the development of child pornography proscriptions in the context of free speech challenges under the First Amendment. The discussion illuminates the primary rationales used by legislators and other advocates of lengthy sentences for possessors of child pornography.

Child pornography is not protected under the First Amendment. In *New York v. Ferber*, the Supreme Court found that prohibitions against the distribution of child pornography, unlike similar prohibitions against adult pornography, do not impinge on the right to free expression.¹⁴ The defendant in *Ferber* was convicted under a New York statute for selling films depicting young boys masturbating.¹⁵ The defendant challenged the statute on the grounds that it infringed his free speech rights.¹⁶ But the Court disagreed, articulating five primary reasons why states could proscribe the distribution of child pornography without running afoul of the First Amendment: (1) states have a compelling interest in “safeguarding the physical and psychological well-being of a minor”;¹⁷ (2) states can criminalize distribution of child pornography because it is an effective means of eliminating the market for such material;¹⁸ (3) the distribution of child pornography is an integral part of its actual production, which itself is proscribed because it involves the sexual abuse of minors;¹⁹ (4) the societal value of child pornography is “exceedingly modest, if not *de minimis*”;²⁰ and (5) child pornography, as an entire category of speech, can be deemed outside the protection of the First

14. 458 U.S. 747, 774 (1982).

15. *Id.* at 752.

16. *Id.*

17. *Id.* at 756–57.

18. *Id.* at 759–61.

19. *Id.* at 761–62.

20. *Id.* at 762.

Amendment because “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”²¹

Having upheld the constitutionality of prohibitions on distribution of child pornography, the Court then confronted the question of whether mere *possession* of child pornography could also be proscribed. In *Osborne v. Ohio*, the Court relied on the rationales enunciated in *Ferber* and held that an Ohio statute criminalizing the possession of child pornography did not violate the First Amendment.²² The *Osborne* Court noted that child pornography constitutes a permanent record of the victim’s abuse, and it found persuasive certain evidence indicating that “pedophiles use child pornography to seduce other children into sexual activity.”²³ The *Osborne* Court used these and other rationales to distinguish possession of child pornography from possession of obscenity involving adult actors, which it had earlier held could not be proscribed.²⁴

The Supreme Court next considered whether laws criminalizing the distribution of *virtual* child pornography violated the First Amendment. Virtual child pornography includes either pictures of youthful-looking adults or computer-generated images of children.²⁵ In *Ashcroft v. Free Speech Coalition*, the Court found such laws unconstitutional, in part because the *Ferber* rationales did not apply.²⁶ Since no actual abuse of minors was involved, the prohibition would not help dry up a market that depended on unlawful conduct.²⁷ Similarly, there was no parallel concern regarding a “permanent record” of a victim’s abuse.²⁸ Moreover, the Government attempted, but ultimately failed, to convince the Court that “pedophiles may use virtual child pornography to seduce children.”²⁹ Having found that adults had a First Amendment right to possess virtual child pornography, the Court found that the government could not proscribe such possession merely because of the risk that it might be misused.³⁰

The *Ashcroft* Court also rejected the contention that virtual child pornography could be criminalized because it “whets the appetites of pedophiles and encourages them to engage in illegal conduct.”³¹ The

21. *Id.* at 763–64.

22. 495 U.S. 103, 110–11 (1989).

23. *Id.* at 111.

24. *Id.* at 108 (distinguishing *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (“[T]he mere private possession of obscene matter cannot constitutionally be made a crime.”)).

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

26. *Id.* at 240, 256.

27. *See id.* at 249–50.

28. *Id.*

29. *Id.* at 251–52.

30. *Id.* at 252–53.

31. *Id.* at 253.

Court characterized this rationale as a forbidden attempt to “constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”³² Unless the Government could show a stronger connection between the speech at issue and actual child abuse, the Court held that the Government could “not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.”³³

The preceding description of the Supreme Court’s treatment of child pornography illuminates several rationales for proscribing the possession of such material. Many of these same arguments are made by those who advocate for lengthy sentences for possessors of child pornography. First, advocates frequently argue that restricting possession of child pornography reduces the demand for such material, which in turn would reduce the amount of sexual abuse of children.³⁴ Second, many believe that possession of child pornography leads to actual physical abuse of children.³⁵ This rationale is based in part on the belief that child pornography “whets the appetites” of pedophiles, and in part on the contention that pedophiles use illicit images to entice children into participating in illicit acts.³⁶ This “cross-over” theory is sometimes based on the premise that possession of child pornography encourages pedophiles to commit contact offenses because the images “normalize” such abuse.³⁷ Third, proponents of strict sentences sometimes argue that possession is not a “victimless” crime, since the existence of the image constitutes a permanent record of the child’s abuse, and each viewing of the image is akin to another episode of abuse.³⁸

II. HISTORY AND APPLICATION OF UNITED STATES SENTENCING GUIDELINE SECTION 2G2.2

The preceding Part discussed the history and rationales behind child pornography law. Many of those rationales are also invoked by those

32. *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)).

33. *Id.* at 253–54. In response to the *Ashcroft* decision, Congress amended the virtual child pornography statute to specifically prohibit “pandering or solicitation” of virtual child pornography. See *United States v. Williams*, 128 S. Ct. 1830, 1835 (2008). The Supreme Court found this facet of the statute constitutional, because the provision at issue did not target the underlying material, but only “the collateral speech that introduces such material into the child-pornography distribution network.” *Id.* at 1838–39. Since the provision was designed to apply only when the alleged panderer or solicitor actually believed that the material would depict real children, *Ferber* did not render the provision unconstitutional. *Id.* at 1840.

34. See, e.g., Alexandra Gelber, Assistant Deputy Chief, Child Exploitation & Obscenity Section, U.S. Dep’t of Justice, Response to “A Reluctant Rebellion” 4 (July 1, 2009), <http://www.justice.gov/criminal/ceos/ReluctantRebellionResponse.pdf>.

35. See, e.g., sources cited *infra* note 104.

36. See, e.g., *Ashcroft*, 535 U.S. at 253.

37. See, e.g., Anthony R. Beech et al., *The Internet and Child Sexual Offending: A Criminological Review*, 13 *AGGRESSION & VIOLENT BEHAV.* 216, 222 (2008).

38. Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 *PACE L. REV.* 847, 852–54 (2008).

who support strict sentencing for possession of child pornography. This Part discusses the evolution of the child pornography sentencing guidelines, and describes how the legislators who crafted those guidelines were motivated by moral indignation rather than empirical evidence.

A. THE UNITED STATES SENTENCING GUIDELINES

The United States Sentencing Guidelines are promulgated pursuant to the Sentencing Reform Act of 1984 (SRA).³⁹ The purpose of the SRA was to limit disparities in sentencing that arose from the unchecked powers given to sentencing judges.⁴⁰ The pre-SRA system, known as “indeterminate sentencing,” was problematic because similarly situated defendants were receiving vastly different sentences.⁴¹ The SRA sought to remedy this problem by establishing the United States Sentencing Commission, which promulgates guidelines meant to restrict the latitude exercised by sentencing judges.⁴² The ranges are derived from a complex two-dimensional grid that includes forty-three “offense levels” and six “criminal history” categories.⁴³ The offense level—a measurement of the seriousness of the crime—is determined by various factors including, for example, how the crime was committed, the status of the victim, and the defendant’s acceptance of responsibility.⁴⁴ The guidelines then specify a sentencing range for any given offense level and criminal history combination.⁴⁵ The SRA made the guidelines binding on sentencing judges, although judges could depart from the guidelines on a finding of certain aggravating or mitigating circumstances.⁴⁶

For more than twenty years, federal sentencing was conducted under the SRA’s mandatory guideline regime. But in *United States v. Booker*, the Supreme Court struck down the portion of the SRA that made the guidelines binding, finding that it violated defendants’ Sixth Amendment right to a jury trial.⁴⁷ The *Booker* Court found that mandatory sentencing guidelines were unconstitutional because they permitted judges to sentence above the statutory maximum if they found certain facts to be true by a preponderance of the evidence.⁴⁸ Relying on its earlier decision in *Apprendi v. New Jersey*, the Court reaffirmed that

39. See *Mistretta v. United States*, 488 U.S. 361, 362 (1988).

40. See *id.* at 364–66; see also STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 1471–79 (7th ed. 2004).

41. *Mistretta*, 488 U.S. at 363–66.

42. 28 U.S.C. §§ 991, 994, 995(a)(1) (2006); see also *Mistretta*, 488 U.S. at 367.

43. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1324–25 (2005).

44. *Id.* at 1325.

45. *Id.* at 1326.

46. See *Mistretta*, 488 U.S. at 367–68 (citing 18 U.S.C. § 3553(a)–(c)).

47. 543 U.S. 220, 245 (2005).

48. *Id.* at 232.

the Sixth Amendment requires that any fact that increases the defendant's punishment above the statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.⁴⁹ But rather than striking down the entire SRA, the Court simply made the guidelines advisory rather than mandatory.⁵⁰

The Supreme Court recently explained that the guidelines, in their newly advisory role, "should be the starting point and the initial benchmark" for any sentencing determination.⁵¹ But the Court has also made clear that the guidelines are one of several factors a sentencing judge should consider.⁵² The other sentencing factors are outlined in 18 U.S.C. § 3553, which commands a sentencing judge to "impose a sentence sufficient, but not greater than necessary," to comply with four primary needs: (1) that the sentence reflect the "seriousness of the offense," "promote respect for the law," and "provide just punishment"; (2) that the sentence "afford adequate deterrence" against the type of conduct in question; (3) that the sentence "protect the public from further crimes of the defendant"; and (4) that the sentence "provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."⁵³

The Court has also clarified important issues related to the appellate standard of review for sentencing cases. In *Rita v. United States*, the Court found that an appellate court may apply a presumption of reasonableness when reviewing a sentence that falls within the guidelines.⁵⁴ The Court then clarified, in *Gall v. United States*, the appellate standard of review when the district court has sentenced a defendant below the guideline range.⁵⁵ The Court found that a sentencing judge need not specify "extraordinary" circumstances when sentencing below the recommended guideline range.⁵⁶ Instead, appellate courts should apply an "abuse-of-discretion standard" when reviewing sentences that fall above or below the guideline range.⁵⁷

The most significant recent sentencing case involved the guidelines for possession of crack cocaine. In *Kimbrough v. United States*, the sentencing judge declined to follow the recommendation of between 228 and 270 months, and instead sentenced the defendant to 180 months in prison.⁵⁸ The judge based this variance in part on the fact that the

49. *Id.* at 230–32 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

50. *Id.* at 245.

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

52. *Rita v. United States*, 551 U.S. 338, 347–48 (2007).

53. 18 U.S.C. § 3553(a)(2)(A)–(D) (2006).

54. *See* 551 U.S. at 347, 351.

55. 552 U.S. 38.

56. *Id.* at 47.

57. *Id.* at 51.

58. 552 U.S. 85, 93 (2007).

applicable guidelines treated every gram of crack cocaine as equivalent to one hundred grams of powder cocaine.⁵⁹ The Supreme Court upheld the sentence, finding that the crack cocaine guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role”⁶⁰ because they were not based on “empirical data and national experience.”⁶¹ It was therefore not an abuse of discretion for the district court to sentence the defendant below the guidelines.⁶² As discussed in Part IV below, an increasing number of district courts have recently relied on *Kimbrough* when sentencing child pornography defendants below the range recommended by the guidelines.⁶³

In sum, *Booker* and its progeny have given district courts some latitude to depart from guidelines such as those for child pornography possession, which they determine to be unreasonable and not based on empirical evidence. But the Court’s sentencing jurisprudence has also made clear that the guidelines should be the starting point for any sentencing determination. There is also considerable incentive for courts to impose within-range sentences, since such sentences are generally entitled to a “presumption of reasonableness” on appellate review.

B. EVOLUTION OF UNITED STATES SENTENCING GUIDELINE SECTION 2G2.2

The guideline governing possession and distribution of child pornography, United States Sentencing Guidelines section 2G2.2, was first promulgated by the Sentencing Commission in 1987.⁶⁴ In the past several years, the section has been amended several times, resulting in increasingly lengthy sentences.⁶⁵ These strict penalties result from amendments that have increased the number and severity of various sentencing enhancements.⁶⁶ The current guideline includes enhancements if any of the following circumstances are established: the material includes prepubescent children or minors under twelve;⁶⁷ the material depicts sadistic or masochistic conduct;⁶⁸ the defendant has exhibited a “pattern of activity” involving sexual abuse of a minor;⁶⁹ or the offense

59. *Id.* at 96.

60. *Id.* at 109.

61. *Id.* (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

62. *Id.* at 110.

63. See *infra* notes 174–82 and accompanying text.

64. U.S. SENTENCING COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES I (2009), available at <http://www.ussc.gov/research.htm>.

65. See TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES 2–3 (2009), http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

66. *Id.* at 3–12.

67. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2) (2009).

68. *Id.* § 2G2.2(b)(4).

69. *Id.* § 2G2.2(b)(5).

involved the use of a computer.⁷⁰ Additional enhancements apply if the defendant distributed the material rather than merely possessing it.⁷¹ Finally, section 2G2.2 allows for escalating enhancements depending on the number of images possessed.⁷² Without any enhancement, the mandatory minimum for receipt of child pornography is five years.⁷³

In a comprehensive analysis of the history of section 2G2.2, Assistant Federal Public Defender Troy Stabenow examined the guideline's amendment history and determined that the changes resulted from "numerous morality earmarks, slipped into larger bills over the last fifteen years, often without notice, debate, or empirical study of any kind."⁷⁴ Stabenow describes how then-Senator Jesse Helms of North Carolina introduced a "morality earmark" into House Resolution 2622, the Treasury-Postal Service Appropriations Bill of 1991.⁷⁵ Two religious organizations, Morality in the Media and the Religious Alliance Against Pornography, had sent letters to Senator Helms urging him to propose upward adjustments to the guidelines for child pornography crimes.⁷⁶ Accordingly, the proposed amendment instructed the Sentencing Commission to increase the penalties for child pornography offenders.⁷⁷

The Sentencing Commission lobbied against the upward adjustments. The chair of the Commission wrote a letter to the House of Representatives opposing the proposed amendment and noting that it "would negate the Commission's carefully structured efforts to treat similar conduct similarly and to provide proportionality among different grades of seriousness of these offenses."⁷⁸ The amendment was nevertheless added to the House bill and was eventually signed into law.⁷⁹ Stabenow notes that this amendment marked the beginning of a series of changes to child pornography guidelines that "would come from Congress [rather than the Sentencing Commission], and would be dictated not by experience and study, but instead by a general moral sense that the penalties for 'smut peddlers' should always, and regularly, be made stricter, not weaker."⁸⁰ Stabenow then details several more congressionally mandated increases in the child pornography sentencing

70. *Id.* § 2G2.2(b)(6).

71. *Id.* § 2G2.2(b)(3)(A)–(F).

72. *Id.* § 2G2.2(b)(7)(A)–(D).

73. 18 U.S.C. § 2252(b)(1) (2006).

74. STABENOW, *supra* note 65, at 3.

75. *Id.* at 6–7.

76. *Id.* at 6.

77. *Id.* at 6–7.

78. See Pub. L. No. 102-141, § 632, 105 Stat. 834, 876 (1991); STABENOW, *supra* note 65, at 7–8.

79. STABENOW, *supra* note 65, at 8.

80. *Id.* at 8–9.

guidelines that were based on moral sensibilities rather than on scientific studies and empirical research.⁸¹

The most far-reaching of these amendments arose in 2003 when two officials from the Department of Justice convinced freshman Congressman Tom Feeney to insert changes to the child pornography guidelines into an unrelated bill.⁸² Representative Feeney's amendment adjusted the sentencing guidelines for child pornography in various ways, including creating a five-year mandatory minimum and a potential five-level increase depending on the number of images possessed.⁸³ Debate on the amendment was limited to twenty minutes, and it was eventually inserted into the Child Abduction Prevention Act.⁸⁴ The Feeney Amendment was widely criticized for its failure to consult with the Sentencing Commission and for its lack of empirical support.⁸⁵ It was opposed not only by the Sentencing Commission itself, but also by the Chairman of the House Committee on the Judiciary, the Judicial Conference of the United States, and the American Bar Association.⁸⁶ Professor Steven Chanenson has summarized some of the concerns as follows:

Congress [for the first time] directly amended the Federal Sentencing Guidelines by drafting Guidelines text. In the past, Congress often had been content to issue directions to and requests for study from the Commission, but left it to the Commission to craft specific Guidelines text. This time, Congress completely ignored the *expert* role the Sentencing Commission was designed to play, cut the Commission out of the process entirely, and directly wrote Guidelines text to its own specifications.⁸⁷

The politicization of child pornography sentencing guidelines has resulted in a flawed and irrational sentencing scheme. For example, Stabenow describes a typical defendant with no criminal history who is convicted of possessing four short video clips and ten pictures. Since most of the enhancements are triggered in the average case, the recommended range for this hypothetical defendant would be 188 to 235

81. *Id.* at 9–12, 17–26.

82. See Skye Phillips, *Protect Downward Departures: Congress and the Executive's Intrusion into Judicial Independence*, 12 J.L. & POL'Y 947, 983–84 (2004); see also *id.* at 983 n.185 (noting that Feeney later admitted he was only the “messenger” for the Department of Justice).

83. STABENOW, *supra* note 65, at 21, 24–25. Representative Feeney's amendment, commonly known as the “Feeney Amendment,” effected numerous other controversial changes in the federal sentencing scheme. Most notably, it reduced the ability of judges to invoke downward departures from the guidelines. See *id.* at 983; see also Steven L. Chanenson, *Hoist with Their Own Petard?*, 17 FED. SENT'G REP. 20, 23 (2004).

84. See Pub. L. No. 108-21, 117 Stat. 650, 667 (2003); Phillips, *supra* note 82, at 983, 994.

85. See, e.g., STABENOW, *supra* note 65, at 21–23.

86. *Id.* at 20.

87. Chanenson, *supra* note 83, at 23 (footnotes omitted).

months (roughly fifteen-and-a-half to nineteen-and-a-half years).⁸⁸ Stabenow compares this sentence to that of a fifty-year-old man who contacts a twelve-year-old girl over the internet and eventually arranges a meeting with her during which they have repeated sex. The conduct would be a violation of 18 U.S.C. § 2422(b), and the defendant would be sentenced under section 2G1.3.⁸⁹ His recommended range would be 108 to 135 months (nine to just over eleven years).⁹⁰ Stabenow concludes that this sentencing disparity, between a typical possessor of child pornography and a man who entices a child to have repeated sex with him, underscores the disproportionality of section 2G2.2.⁹¹

III. THE MORAL PANIC VERSUS THE EMPIRICAL EVIDENCE

The previous Part discussed the problematic evolution of section 2G2.2. The next Part takes these criticisms a step further. It will first explain how the guidelines are symptomatic of a nationwide “moral panic.” This panic has prevented the public, and its political representatives, from carefully considering the empirical evidence that should inform sentencing decisions. The Part then takes the appropriate next step by actually investigating the kinds of empirical evidence upon which the possession guidelines should be based. This empirical review concludes that studies of pedophiles and child pornography consumers, as well as data regarding internet use more generally, expose several deficiencies of section 2G2.2, especially as it applies to defendants with no prior history of sexual abuse.

A. THE MORAL PANIC OVER CHILD PORNOGRAPHY

As discussed above, the sentencing guidelines for possession of child pornography have been shaped in recent years by politics and moral outrage rather than empirical studies. Some commentators have attributed this pattern to a “moral panic” generated by the media, special interest groups, law enforcement agencies, and politicians.⁹² A moral panic is characterized not only by widespread public fear, but also “fear

88. See STABENOW, *supra* note 65, at 27–28.

89. *Id.* at 29.

90. *Id.*

91. *See id.*

92. See, e.g., Neil Malamuth & Mark Huppert, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 789 (2007) (“Regrettably, legislative and judicial judgments appear to be regularly based on feeling as much as fact, and notably without consideration of individual difference factors among pedophiles, which may serve to better tailor existing laws to external realities.”); Michael M. O’Hear, Editor’s Observations, *Perpetual Panic*, 21 FED. SENT’G REP. 69, 69 (2008); Suzanne Ost, *Children at Risk: Legal and Societal Perceptions of the Potential Threat That the Possession of Child Pornography Poses to Society*, 29 J.L. & SOC’Y 436, 443–47 (2002).

that is wildly exaggerated and wrongly directed.”⁹³ Such fear-mongering can in turn produce “excessive and ill-considered legislative responses, with lawmakers adopting new policies that ‘may cause harm in areas having nothing to do with the original problem and that divert resources away from measures which might genuinely assist in protecting children.’”⁹⁴ In the sex offender context, the moral panic can create a “ratchet effect” in which subsequent waves of politicians will vote to increase punishment for offenders.⁹⁵ Strict curbs on pedophiles invariably win votes, and politicians tend to vote for stronger penalties in order to appear “tough” on sex offenders.⁹⁶

Several scholars have argued that there is a moral panic specifically associated with child pornography. For example, Professor Suzanne Ost examined British media coverage of child pornography and concluded that sensationalist headlines and stories on the issue provoke and reinforce strong public reaction to child pornography crimes.⁹⁷ She contends that the root causes of the moral panic over child pornography are the “moral values which affirm the sacred status of the child and the rights that our society has ascribed to children.”⁹⁸ With regard to American child pornography laws, Professor Anne Higonnet has suggested that “[i]t is frightening to question any provisions of child pornography law because they are so closely bound to the emotionally explosive issue of actual child abuse.”⁹⁹ Ironically, the strong societal and legislative responses to this moral panic may actually perpetuate the fetishizing of children and thus exacerbate the problem of child molestation.¹⁰⁰ Moreover, public opposition to pedophilia may encourage cohesiveness and support within the targeted group, which could ultimately encourage pedophilic activity rather than prevent it.¹⁰¹

93. O’Hear, *supra* note 92, at 69 (quoting PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 6–7 (1998)).

94. *Id.* (quoting JENKINS, *supra* note 93, at 7).

95. Anonymous, *America’s Unjust Sex Laws; Illiberal Politics*, *ECONOMIST*, Aug. 8, 2009, at 9.

96. *Id.*

97. Ost, *supra* note 92, at 444.

98. *Id.* at 443.

99. ANNE HIGONNET, *PICTURES OF INNOCENCE: THE HISTORY AND CRISIS OF IDEAL CHILDHOOD* 160 (1998).

100. Ost, *supra* note 92, at 456–58.

101. Beech et al., *supra* note 37. There are certainly scholars and practitioners who believe that the panic over child pornography is entirely justified. Alexandra Gelber, of the U.S. Department of Justice, has written that “[t]he heart of a child pornography case is not Victorian-era discomfort with sex, but the sexual exploitation of children through the ongoing mass circulation of images of their abuse.” Gelber, *supra* note 34, at 1 (responding to Mark Hansen, *A Reluctant Rebellion*, *A.B.A. J.*, June 2009, at 54 (Magazine), available at http://www.abajournal.com/magazine/article/a_reluctant_rebellion/). Similarly, Audrey Rogers has suggested that there is insufficient outrage over the problem of child pornography possession. See Rogers, *supra* note 38, at 854.

Given the moral panic's potential to distort society's understanding of the harms caused by child pornography, it is important to step back and "coolly" assess empirical evidence to determine the real dangers posed by child pornography.¹⁰² Several scholars have surveyed empirical studies of child pornography use and have drawn general conclusions about the appropriateness of child pornography laws, though few have directly assessed the validity of section 2G2.2.¹⁰³ In the next section, I will conduct a similar, but much narrower, analysis. The following survey of recent empirical studies aims to assess the validity of section 2G2.2 for possession defendants with no prior sexual offense history.

B. ONLINE TO OFFLINE "CROSS OVER"

A primary justification for strict sentencing in this area is the assertion, or at least the insinuation, that possession of child pornography will lead to actual child molestation.¹⁰⁴ One critical question, therefore, is to what extent the possession and viewing of child pornography, by a defendant with no prior history of sexual offense, has a causal connection to the likelihood of future contact offenses against children. In other words, how likely is it that a possessor of child pornography will "cross over" to contact offenses?¹⁰⁵ Numerous recent studies have assessed the question and most have found that "there is no empirical support for a

102. Ost, *supra* note 92, at 447.

103. See Hessick, *supra* note 13.

104. See, e.g., *United States v. Cunningham*, No. 1:09CR154, 2010 U.S. Dist. LEXIS 6097, at *43 (N.D. Ohio Jan. 26, 2010) ("[E]ven a remote possibility of a correlation between viewing child pornography and committing a hands-on offense is deeply troubling to the Court."); Michael L. Bourke & Andres E. Hernandez, *The "Butner Study" Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 189 (2009) ("[W]e believe that there exists a complex and reciprocal interaction [between viewing child pornography and contact sexual crimes]."). *But cf.* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (rejecting the contention that virtual child pornography could be criminalized because it "whets the appetites of pedophiles and encourages them to engage in illegal conduct"). Andres Hernandez, whose studies have frequently been invoked by those who contend there is a causal connection between child pornography and child sex abuse, recently issued a position paper that noted the "misuse" of his studies:

Although child pornography crimes are clearly abhorrent and show visual evidence of child abuse and exploitation, the strong emotional reactions experienced by individuals enforcing child pornography laws frequently fuel the extreme argument that all of these offenders are dangerous monsters. Some individuals have misused the results of [Hernandez's prior studies] to fuel the argument that the majority of [child pornography] offenders *are* indeed contact sexual offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence.

Andres E. Hernandez, *Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment 4* (Apr. 2009) (unpublished manuscript, on file with the Hastings Law Journal), available at http://www.iprc.unc.edu/G8/Hernandez_position_paper_Global_Symposium.pdf.

105. See Beech et al., *supra* note 37, at 222-25.

direct causal link between internet sex offending and the commission of contact offenses.”¹⁰⁶ The following is a discussion of several key studies.

The most effective means of assessing cross-over risk is via follow-up studies, which monitor recidivism rates for those convicted of child pornography offenses.¹⁰⁷ One of the most recent follow-up studies monitored 231 internet offenders from 2002 to 2008.¹⁰⁸ Under a strict definition of recidivism (which included only actual reconvictions), none of the subjects were convicted of a hands-on sex offense.¹⁰⁹ Even under the broader definition (which included reconvictions, ongoing investigations, and charges), only two subjects (0.8%) were being investigated, charged, or were convicted of a hands-on sex offense (i.e., child sex abuse).¹¹⁰ One of those two subjects had been convicted of a hands-on offense prior to the follow-up study period.¹¹¹ Given the lengthy follow-up period (six years), the authors concluded that “[t]he consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses in the present sample—at least not in those subjects without prior convictions for hands-on sex offenses.”¹¹² The study also assessed the criminal histories of the internet offenders, and found that “the majority of child pornography consumers do not have a criminal record for a violent and/or sex offense.”¹¹³

Another follow-up study monitored one group of internet offenders and one group of child molesters over the course of eighteen months.¹¹⁴ Out of seventy-three internet offenders, none were charged with or convicted of a contact offense, though one (constituting 1%) was convicted for a nonsexual offense and two (3%) were convicted of further internet sexual offenses.¹¹⁵ Out of 117 convicted child molesters, 2% were convicted of contact sexual offenses, and 17% breached the conditions of their probation and “were taken back to court or into custody as a result of inappropriate behavior.”¹¹⁶ None of the internet offenders were convicted of a contact sexual offense, nor did any of them

106. L. Webb et al., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 *SEXUAL ABUSE: J. RES. & TREATMENT* 449, 451 (2007).

107. See Jérôme Endrass et al., *The Consumption of Internet Child Pornography and Violent and Sex Offending*, 9 *BMC PSYCHIATRY*, July 14, 2009, <http://www.biomedcentral.com/content/pdf/1471-244X-9-43.pdf>.

108. *Id.* Just over half of the subjects had been convicted, but the unconvicted remainder had confessed during court proceedings and had registered (with personal credit cards) at an illegal website. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 49.

113. *Id.* at 48.

114. Webb et al., *supra* note 106, at 452, 455 (describing results of a study of British subjects).

115. *Id.* at 459.

116. *Id.* at 454–55, 459.

breach the probation conditions.¹¹⁷ Finally, the researchers found that 26% of child molesters demonstrated “sexually risky behavior” as compared to 14% of internet offenders.¹¹⁸ The researchers concluded that “child molesters were more likely to fail in all areas compared to the internet sex offenders” and that “internet offenders appear to be extremely compliant with community treatment and supervision sessions.”¹¹⁹ Integrating the results from the follow-up studies with results from an array of standardized tests designed to assess the risk of recidivism, the researchers asserted that “by far the largest subgroup of internet offenders would appear to pose a very low risk of sexual recidivism.”¹²⁰

In a 2005 study that monitored 201 child pornography offenders, the researchers determined the extent and type of recidivism over a two-and-a-half year period.¹²¹ The researchers found that, of seventy-six men with a history of child pornography offenses but no contact offenses, only one person committed a contact sexual offense during the follow-up period.¹²² The researchers concluded that their findings “contradict the assumption that all child pornography offenders are at very high risk to commit contact sexual offenses involving children.”¹²³

Though these follow-up studies are a rebuke to stringent sentencing for internet offenders, such studies do have limitations. Most problematic is the “well known fact that the use of criminal records frequently leads to an underestimation” of actual sex crimes.¹²⁴ Many sex offenses that are investigated or charged do not result in conviction, and some argue that a high proportion of sex crimes are unreported.¹²⁵ At least one of the papers discussed above, by Professor Endrass and his coauthors, sought to address this problem by using a broader definition of recidivism.¹²⁶ Other studies supplemented their follow-up analyses with psychological testing to assess the risk of recidivism.¹²⁷ Another significant limitation is the relatively small sample sizes and short follow-up periods of some of

117. *Id.* at 459.

118. *Id.* at 460. “Sexually risky behaviors,” as defined by the researchers, included (1) sexual convictions, arrests, or charges; (2) “observation of high-risk behaviors” (such as increased internet use or heavy drinking); and (3) “child protection investigations.” *Id.* at 455.

119. *Id.* at 462.

120. *Id.* at 463.

121. Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 *SEXUAL ABUSE: J. RES. & TREATMENT* 201, 208 (2005) (describing results of a study of Canadian subjects).

122. *Id.* at 207.

123. *Id.* at 208.

124. Endrass et al., *supra* note 107.

125. *See, e.g.*, CTR. FOR SEX OFFENSE MGMT., FACT SHEET: WHAT YOU NEED TO KNOW ABOUT SEX OFFENDERS I (2008), available at http://www.csom.org/pubs/needtoknow_fs.pdf.

126. Endrass et al., *supra* note 107.

127. *See, e.g.*, Webb et al., *supra* note 106.

the studies.¹²⁸ Nevertheless, the findings discussed above were all statistically significant.

In addition to empirical studies of recidivism, other studies have focused exclusively on psychological testing, and their findings similarly undercut the cross-over theory. Professor Ian Elliott and his coauthors compared the results of extensive psychological testing of a group of internet offenders and a group of contact offenders.¹²⁹ The researchers found that internet offenders had much lower levels of cognitive and victim empathy distortions than did contact offenders.¹³⁰ These distortions indicate a “greater difficulty identifying the harmful impact of sexual contact on a child and . . . maladaptive beliefs relating to the sexual sophistication of children that diminish their ability to display empathy.”¹³¹ The authors therefore concluded that the lower frequency of these “pro-offending attitudes and beliefs . . . displayed by Internet offenders” indicates that “they may be unlikely to represent persistent offenders or potentially progress to commit future contact sexual offenses.”¹³²

Another psychological meta-study focused on the prevalence of pedophilia in the male population. Professors Malamuth and Huppin surveyed studies of male arousal to child pornography, and found that “sexual interest or arousal in children is not confined to a ‘sick few.’”¹³³ In one such study, 21% of college-aged males “reported some sexual attraction to small children.”¹³⁴ The authors integrated data from several such studies and concluded that a significant portion of the male population demonstrates some pedophilic interests.¹³⁵ While it is disturbing that such a high percentage of men have pedophilic interests, the finding may be somewhat less alarming given that attraction to children is not necessarily linked to a desire to commit a contact offense. Indeed, only 40% to 50% of convicted child molesters meet the diagnostic classification of pedophilia.¹³⁶ These studies therefore suggest that a considerable percentage of the men who are aroused by children, and who thus may consume child pornography, are unlikely to cross over to contact offenses. Possession of child pornography may instead reflect

128. See, e.g., Seto & Eke, *supra* note 121, at 209.

129. Ian Alexander Elliott et al., *Psychological Profiles of Internet Sexual Offenders: Comparisons with Contact Sexual Offenders*, 21 *SEXUAL ABUSE: J. RES. & TREATMENT* 76, 76 (2009).

130. *Id.* at 87.

131. *Id.*

132. *Id.*

133. Malamuth & Huppin, *supra* note 92, at 792 (summarizing self-reporting studies as well as studies measuring physiological indices of penile arousal, by use of a plethysmograph).

134. *Id.*; see John Briere & Marsha Runtz, *University Males' Sexual Interest in Children: Predicting Potential Indices of "Pedophilia" in a Nonforensic Sample*, 13 *CHILD ABUSE & NEGLECT* 65, 71 (1989).

135. Malamuth & Huppin, *supra* note 92, at 792.

136. *Id.* at 793.

a more “general interest in sexual variety”¹³⁷ rather than a proclivity toward child molestation. Professor Ost came to a similar conclusion in a separate meta-analysis.¹³⁸ She argued that “it is possible that individuals use child pornography for sexual stimulation, yet have no inclination to actually go out and commit child abuse.”¹³⁹

These studies expose a serious flaw in the rationale behind strict sentencing for child pornography. The length of sentences under section 2G2.2 has risen dramatically in the last several years, in part under the rationale that pornography offenses lead to contact offenses.¹⁴⁰ But many of those who pushed for these increases provided no scientific basis for this rationale.¹⁴¹ The foregoing discussion of cross-over studies indicates that possession of child pornography, especially among defendants with no history of contact offenses, is not an accurate predictor of future incidents of child molestation.

C. INTERNET USE

As discussed above, the legislators who crafted the current version of section 2G2.2 failed to consult the growing body of research concerning the cross-over phenomenon. That failure has resulted in unduly long sentences that are based on unsubstantiated assumptions about recidivism potential. This section explores a separate set of questionable assumptions made by the designers of section 2G2.2 about the basic characteristics of internet use. The child pornography guidelines provide for sentencing enhancements where the defendant used a computer, where the defendant “distributed” images, and where the defendant has possessed a large number of images.¹⁴² Some scholars have already attacked the computer use enhancement as applying too frequently and too broadly.¹⁴³ I will therefore focus on the infirmities of the distribution enhancement and the number-of-images enhancements.

I. *The Distribution Enhancement*

The primary deficiency of the distribution enhancement is that it is broad enough to encompass defendants who obtain images via file-sharing services. The problematic provision is section 2G2.2(b)(3)(B), which applies a five-level increase if the offense involved “[d]istribution for the receipt, or expectation of receipt, of a thing of value, but not for

137. *Id.*

138. Ost, *supra* note 92, at 449.

139. *Id.*

140. *See supra* Part I.

141. *See, e.g., supra* note 85 and accompanying text.

142. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2009).

143. *See, e.g.,* STABENOW, *supra* note 65, at 14–15 (noting that in 1996, 97% of child pornography defendants had used a computer, and that the rationales put forth in support of the enhancement no longer apply).

pecuniary gain.”¹⁴⁴ Several circuit courts have found that this enhancement applies to defendants using peer-to-peer networks such as Kazaa and Limewire.¹⁴⁵

For example, in *United States v. Griffin*, the Eighth Circuit found that the distribution enhancement applied to a defendant who downloaded approximately sixty-seven illegal video clips from Kazaa.¹⁴⁶ The “distribution” prong of the enhancement was satisfied because the defendant failed to disable the feature that automatically makes the user’s images available to other Kazaa users.¹⁴⁷ The court then found that the defendant expected to receive a “thing of value” because it considered the defendant’s file-sharing to be a form of “bartering.” The court thus presumed that the defendant had engaged in “distribution” with the expectation that he would receive additional illegal images in return.¹⁴⁸ The court accordingly affirmed the district court’s finding that the distribution enhancement applied, and it affirmed the seventy-eight month (six-and-a-half year) sentence of imprisonment.¹⁴⁹

As the *Griffin* case demonstrates, the distribution provision is stated broadly enough to trigger the five-level enhancement any time a defendant has made illegal images available on a file-sharing network. But similar to the blunt computer use enhancement, the file-sharing enhancement does not account for the fact that file sharing is now one of the most common means of accessing files from the internet.¹⁵⁰ Though file-sharing technology is most commonly associated with the sharing of copyrightable material,¹⁵¹ recent studies show that “peer-to-peer technology is increasingly popular for the dissemination of child pornography.”¹⁵² Law enforcement has clearly taken notice of this trend,

144. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3)(B).

145. *See, e.g.*, *United States v. Carani*, 492 F.3d 867, 873–74 (7th Cir. 2007); *United States v. Shaffer*, 472 F.3d 1219, 1223–25 (10th Cir. 2007); *United States v. Todd*, 100 F. App’x 248, 250 (5th Cir. 2004), *vacated*, 543 U.S. 1108 (2005).

146. 482 F.3d 1008, 1010, 1013 (2007). *But see* *United States v. Geiner*, 498 F.3d 1104, 1111 (10th Cir. 2007) (“[A] defendant who distributes child-pornography files by sharing them on a file-sharing network does not necessarily do so in exchange for similar files, particularly when the defendant understands that these files are available even if he chooses not to share his own.”).

147. *Griffin*, 482 F.3d at 1012–13.

148. *Id.*

149. *Id.* at 1009.

150. *See* Michael P. Murtagh, Note, *The FCC, the DMCA, and Why Takedown Notices Are Not Enough*, 61 HASTINGS L.J. 233, 235–36 & n.6, 245 (2009) (compiling and discussing statistics on the popularity of file-sharing).

151. *See id.*; *see also* *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–20 (2005).

152. U.S. GEN. ACCOUNTING OFFICE, FILE-SHARING PROGRAMS: PEER-TO-PEER NETWORKS PROVIDE READY ACCESS TO CHILD PORNOGRAPHY 13 (2003), *available at* <http://www.gao.gov/new.items/d03537t.pdf> (describing government studies finding significant amounts of child pornography on Kazaa, as well as figures from the National Center for Missing and Exploited Children indicating that peer-to-peer services are an increasingly popular means of obtaining child pornography).

as evidenced by a recent probe targeting the use of peer-to-peer networks to exchange child pornography.¹⁵³

Thus the problem with the broad distribution enhancement is not only that it might encompass file sharing, which arguably does not involve actual distribution,¹⁵⁴ but also that it will be triggered too frequently as defendants increasingly turn to these networks for the purpose of obtaining the images or videos. Once an enhancement becomes so common that it is triggered in the majority of cases,¹⁵⁵ it ceases to be an “enhancement” at all, but instead constitutes a core part of the offense. The unfortunate result is that the typical, and least culpable, child pornography defendant will be sentenced in ranges that should be reserved for the most serious offenders.

2. *The Number-of-Images Enhancements*

The staggered enhancements based on number of images possessed reflect yet another misunderstanding about the nature of internet use. As with the computer use and distribution enhancements, the number-of-images enhancements have resulted in lengthy sentences for the least culpable child pornography offenders.¹⁵⁶ The current section 2G2.2 enhancement for number of images requires a two-level increase if the offense involves over ten images, a three-level increase for over 150 images, a four-level increase for over 300 images, and a five-level increase for more than 600 images.¹⁵⁷ These quantity enhancements were added to the guidelines in 2003 as part of the much-criticized Feeney Amendment, discussed above.¹⁵⁸ Stabenow notes that “[n]o research, study, body of experience, or rationale, was provided to justify . . . the choice of the triggering quantities for the two to five point enhancement related to the number of images.”¹⁵⁹

While there is some validity to the argument that a defendant who possesses more images of child pornography should endure a longer sentence, this argument is less tenable in light of the ease with which a person can download large numbers of images or videos from the internet. One sentencing judge acknowledged this problem by noting that “the internet seems analogous to a huge file cabinet containing an

153. Press Release, U.S. Immigration & Customs Enforcement, 55 Charged in Multi-Agency Agency Probe Targeting Use of Peer-to-Peer Networks To Exchange Child Pornography (Aug. 19, 2008), available at <http://www.ice.gov/pi/nr/0808/080819losangeles1.htm>.

154. The question of whether “making available” is the same as “distribution” has spurred controversy and litigation in the copyright context. See generally Kristy Wiehe, Note, *Dollars, Downloads and Digital Distribution: Is “Making Available” a Copyrighted Work a Violation of the Author’s Distribution Right?*, 15 UCLA ENT. L. REV. 117, 119–20 (2008).

155. See *supra* note 143.

156. See *supra* notes 88–90 and accompanying text.

157. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (2009).

158. See *supra* Part II.B.

159. STABENOW, *supra* note 65, at 21.

almost limitless number of documents and other forms of information. Under this view, accessing child pornography can be rationalized as simply pulling out a drawer and simply looking at [a] photo that someone else took in the past.”¹⁶⁰ The enhancement also ignores documented evidence of compulsive and addictive use of the internet.¹⁶¹ A recent article exploring the intersection between child pornography offenders and internet addiction concludes that voluminous child pornography downloading may simply be a result of boredom, anxiety, or depression.¹⁶² Finally, linking length of sentence to number of images has the illogical consequence of rewarding more sophisticated defendants who clear their cache memory on a regular basis.¹⁶³

Supporters of the number-of-images enhancements argue that it is justified because, though it may be easy to accumulate hundreds of images, the accumulation is still intentional.¹⁶⁴ Punishment, the argument goes, should not be lessened simply because the crime is easy to commit.¹⁶⁵ Judge John Adams, for example, notes that “[r]obbery is certainly simplified from the criminal’s perspective by the use of a firearm and the choice of a feeble, elderly victim. The guidelines, however, do not lessen punishment because the crime was easier to commit.”¹⁶⁶ But this analogy fails to appreciate the difference between “culpable” factors that facilitate criminal activity (e.g., victimizing an elderly person) and “nonculpable” factors that facilitate criminal activity (e.g., the ability to download images quickly). It is sensible to punish more severely for the former, but not necessarily for the latter.

In sum, it is quite possible that a defendant will download large numbers of child pornography images not so much out of a specific desire to view each and every image, but simply because it is easy to do so or because of compulsive internet behavior. As another district judge recently noted, “given the unfortunate ease of access to this type of

160. *United States v. Ontiveros*, No. 07-CR-333, 2008 U.S. Dist. LEXIS 58774, at *17 (E.D. Wis. July 24, 2008).

161. Jerald J. Block, *Issues for DSM-V: Internet Addiction*, 165 AM. J. PSYCHIATRY 306, 306 (2008) (arguing that internet addiction is a common disorder and should be included in the DSM-V and noting that it includes a “sexual preoccupation” subtype).

162. See Ethel Quayle et al., *Sex Offenders, Internet Child Abuse Images and Emotional Avoidance: The Importance of Values*, 11 AGGRESSION & VIOLENT BEHAV. 1, 3–5 (2006).

163. Telephone Interview with Troy Stabenow, Assistant Fed. Pub. Defender (Jan. 13, 2010). Stabenow also argues that punishing a defendant based on the number of images he or she has accumulated is akin to punishing a habitual marijuana smoker for every marijuana cigarette he or she has consumed over the past several years. *Id.*; see also *United States v. Kuchinski*, 469 F.3d 853, 862 (9th Cir. 2006) (noting that most unsophisticated internet users are unfamiliar with the concept of automatically stored temporary internet files).

164. See, e.g., *United States v. Cunningham*, No. 1:09CR154, 2010 U.S. Dist. LEXIS 6097, at *22 (N.D. Ohio Jan. 26, 2010).

165. *Id.*

166. *Id.* at *22–23.

material in the computer age, compiling a collection with hundreds of images is all too easy, yet carries a 5 level enhancement.”¹⁶⁷ In short, the number-of-images enhancements suffer from the same deficiency as the computer-use and distribution enhancements: they are based on a misunderstanding of the basic nature of internet use, which has resulted in disproportionate sentences for the least culpable child pornography defendants.

IV. INITIAL MOVEMENT TOWARD REFORM

This Part will review recent calls for reform that have come from the judiciary and even, perhaps, the Sentencing Commission itself. Numerous federal judges across the country have sentenced child pornography defendants below the guideline range.¹⁶⁸ It should be noted, however, that though these particular judges varied from the recommended guidelines, sentencing courts must still afford considerable deference to the recommended range.¹⁶⁹ Thus, Congress and the Sentencing Commission cannot simply rely on sentencing courts to compensate for the problematic guidelines, but rather, as I argue in this Note, the guidelines themselves must be amended.

Several recent district court opinions have called into question the harshness of the sentencing guidelines for possession of child pornography.¹⁷⁰ In 2008, the non-government-sponsored below-guideline rate, for section 2G2.2 sentences, was 35.7%.¹⁷¹ In contrast, for all offenders, the non-government-sponsored below-guideline rate was 13.4%.¹⁷² In other words, sentencing courts are more likely to depart from the child pornography guidelines than from other guidelines. Many of the below-guidelines opinions relied on the *Rita*, *Gall*, and *Kimbrough* line of cases.¹⁷³ Under these cases, and *Kimbrough* in particular, district courts may refuse to follow the guideline ranges if they find that the

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

168. *See infra* note 171 and accompanying text.

169. *See Gall v. United States*, 552 U.S. 38, 46–49 (2007) (explaining that “a district judge must give serious consideration to the extent of any departure from the Guidelines” and that the “Guidelines should be the starting point and initial benchmark” for a sentencing decision); *Rita v. United States*, 551 U.S. 338, 347 (2007) (“[A] court of appeals may apply a presumption of reasonableness to a . . . proper application of the Sentencing Guidelines.”).

170. For a recent survey of such cases, see Ian N. Friedman & Kristina W. Supler, *Child Pornography Sentencing: The Road Here and the Road Ahead*, 21 FED. SENT’G REP. 83, 86–88 (2008). *Accord* *United States v. Grober*, 595 F. Supp. 2d 382, 394–97 (D.N.J. 2008); Amir Efrati, *Making Punishments Fit the Most Offensive Crimes*, WALL ST. J., Oct. 23, 2008, at A14.

171. *See* U.S. SENT’G COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.28 (2008), available at <http://www.ussc.gov/ANNRPT/2008/SBtoco8.htm>. The 35.7% figure was obtained by adding the totals under the “Downward Departure” column and the “Below Range” column, and then dividing that sum by the total number of sentences imposed under section 2G2.2.

172. *Id.* tbl.N.

173. *See supra* Part II.A.

guidelines “do not exemplify the [Sentencing] Commission’s exercise of its characteristic institutional role.”¹⁷⁴

For example, in *United States v. Ontiveros*, the recommended guideline range was 97 to 121 months for a defendant convicted of receiving child pornography.¹⁷⁵ The range was so high in part because of enhancements for computer use, distribution, and possession of a large number of images (over 600).¹⁷⁶ The judge disregarded the guidelines, however, noting the defendant’s lack of criminal history, his steady employment, and his efforts to stop viewing child pornography before even knowing he was being investigated.¹⁷⁷ The defendant thus did not “pose a significant threat of re-offending or otherwise endangering the public,” and the five-year (sixty month) mandatory minimum was deemed sufficient.¹⁷⁸ Critical to the court’s analysis was a finding that section 2G2.2 does “not reflect the kind of empirical data, national experience, and independent expertise that are characteristic of the Commission’s institutional role.”¹⁷⁹

Similarly, in *United States v. Grober*, the defendant’s guideline range was 292 to 365 months (roughly twenty-five to thirty years).¹⁸⁰ The sentencing judge asked herself the following question: “Am I working with a rational sentencing structure, or administering the Code of Hammurabi?”¹⁸¹ The court sought to answer the question with an in-depth hearing on the reasonableness of section 2G2.2, including testimony from Stabenow and noted sentencing scholar Douglas Berman, and it essentially concluded the latter.¹⁸² Judge Katharine Hayden summarized her findings as follows:

The Court believes as a matter of conscience that the imposition of any term of incarceration above the mandatory minimum of 60 months attached to the offenses to which [the defendant] pleaded guilty would be unfair and unreasonable. In reaching this conclusion, the Court joins thoughtful district court judges whose work has convinced them that the present guideline, § 2G2.2, must be given less deference than the guidelines traditionally command. The Court’s scrutiny of the guideline has led it to conclude that the guideline does not guide.¹⁸³

The judiciary is not alone in recognizing the problems associated with the child pornography guidelines. Since February 2009, the

174. See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007); see also *supra* Part II.A.

175. No. 07-CR-333, 2008 U.S. Dist. LEXIS 58774, at *1 (E.D. Wis. July 24, 2008).

176. *Id.* at *2.

177. *Id.* at *8–10.

178. *Id.* at *9, 16.

179. *Id.* at *20.

180. 595 F. Supp. 2d 382, 386 (D.N.J. 2008).

181. *Id.* at 384. The Code of Hammurabi is an ancient code of laws, created in Babylon in 1760 B.C.E. See THE CODE OF HAMMURABI (L.W. King trans., Kessinger Publ’g 2004).

182. *Grober*, 595 F. Supp. 2d at 390–94.

183. *Id.* at 412.

Sentencing Commission has held a series of regional public hearings on federal sentencing policy.¹⁸⁴ The purpose of the hearings is to solicit “suggestions regarding changes to the Sentencing Reform Act and other relevant statutes, the federal sentencing guidelines and policy statements.”¹⁸⁵ Witnesses at several of these hearings—including several federal judges and United States Attorney Patrick Fitzgerald—have expressed concerns about the fairness of the child pornography sentencing scheme.¹⁸⁶ The Commission itself has published a comprehensive history of the child pornography guidelines.¹⁸⁷ The Commission describes the report as “the first step in the Commission’s work” on its consideration of possible amendments to the guidelines for the amendment cycle ending May 1, 2010.¹⁸⁸

The rising chorus of concern from district courts, and their decisions to disregard the guidelines, are important responses to a flawed scheme. The public hearings and the Commission report on the guidelines are also promising developments. But sentencing judges still have limited discretion to vary from the guidelines, and hundreds of defendants are still being imprisoned under a misguided framework driven by a moral panic. It is far past time for the Sentencing Commission to reassert itself in the realm of child pornography and amend section 2G2.2 to better reflect scientific and empirical data about why people consume child pornography and what risk these consumers pose to society.

Specifically, the Commission should (1) reduce the guidelines for possessors of child pornography who have no history of contact offenses, since studies show that these defendants are at a very low risk of future contact offenses; (2) narrow the definition of distribution so that it does not cover mere possession via peer-to-peer file-sharing services; and (3) recalibrate the enhancements for number of images in light of the ease with which a defendant can amass a voluminous collection.

CONCLUSION

The production, distribution, and possession of child pornography are serious crimes that victimize the most vulnerable members of society. Federal prosecutors are justified in increasing the number of

184. Press Release, U.S. Sentencing Comm’n, United States Sentencing Commission To Conduct Regional Public Hearings on Federal Sentencing Policy (Jan. 13, 2009), available at http://www.ussc.gov/PRESS/rel20090113_01.htm.

185. *Id.*

186. See Statement of Patrick Fitzgerald, U.S. Attorney, Before the U.S. Sentencing Comm’n, Regional Hearing on the State of Federal Sentencing at 8–9 (Sept. 10, 2009), http://www.ussc.gov/AGENDAS/20090909/Fitzgerald_testimony.pdf; see also Lynne Marek, *Sentences for Possession of Child Porn May Be Too High, Judges Say*, NAT’L L.J., Sept. 10, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202433693658>.

187. See U.S. SENT’G COMM’N, *supra* note 64.

188. *Id.* at 1.

prosecutions for these offenses, and the United States Sentencing Commission should promulgate strict sentencing guidelines for child pornography defendants. But, in their haste to condemn these perpetrators, our elected representatives have crafted blunt sentencing guidelines based on moral conviction rather than empirical evidence. The unfortunate result is that the least culpable offenders, including those with no criminal history, are being sentenced near the upper range of the guidelines because the typical offender will trigger most of the enhancements.

This Note reviewed the problematic evolution of these guidelines and then investigated the type of empirical evidence that should inform sentences for child pornography offenders. On the critical question of whether possession of child pornography will lead an offender to “cross over” to contact offenses, many studies have found no causal connection between the two. These findings call into serious question one of the primary rationales behind severe sentences for possessors of child pornography: that possession leads to molestation.

This Note has also exposed infirmities of specific section 2G2.2 enhancements that are based on a misunderstanding of how the public uses the internet. First, the guidelines treat a defendant who uses a peer-to-peer file-sharing service to obtain images as a “distributor,” even though many of these defendants use the service simply to obtain images. Second, the guidelines place too much weight on the number of images possessed by a defendant. Given the great ease with which a person can download hundreds of images with a few clicks, the images enhancements have become a misleading measure of actual culpability. Moreover, these enhancements ignore the fact that voluminous downloading may be a symptom of a more generalized, compulsive use of the internet.

The sentencing guidelines for possession of child pornography are not problematic merely because they are, in the abstract, irrational. The more urgent problem is that criminal defendants are receiving lengthy sentences, sometimes close to twenty years’ imprisonment, that are disproportionate to the crimes they have committed. The Sentencing Commission should address this injustice by amending section 2G2.2 in a way that more accurately reflects the actual culpability of possessors of child pornography.
