

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 distribution⁴ 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

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

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,

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

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

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 DeBrotta, Assistant United States Attorney (Southern District of Indiana) 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

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

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

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 v. 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 judiciary⁵⁸ — 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 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 today⁶² and result in overly severe penalty ranges for typical offenders⁶³ — particularly those convicted of receipt or possession offenses⁶⁴ — and also fail to meaningfully distinguish among offenders in terms of their culpability and dangerousness.⁶⁵

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 DeBrotta, 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

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

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 RPT’R 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

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

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 “[I]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

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.

