A Call for Judicial Scrutiny: How Increased Judicial Discretion Has Led To Disparity and Unpredictability in Federal Sentencings for Child Pornography

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I. INTRODUCTION

In the past decade, possession of child pornography has been recognized as one of the most serious federal crimes.[1] In an effort to close the thriving Internet market for obscene depictions of children, Congress has proscribed a base-level sentencing range of twenty-seven to thirty-three months in federal prison for defendants convicted of child pornography offenses.[2] This sentencing range can increase drastically based on a multitude of often-applicable sentencing enhancements.[3]

Similarly, the United States Sentencing Commission (USSC) has made child pornography related crimes among the most harshly punishable federal offenses.[4] Nevertheless, sentencing judges have regained the right to depart from the recommended Federal Sentencing Guidelines (Guidelines), and have done so with increasing frequency for these offenses.[5] Child pornography sentences have thus functioned as the equivalent of a lightning strike; the congressionally mandated harsh sentences

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1. *See* U.S. SENTENCING COMM'N, ANN. REP. SOURCEBOOK, tbls. 13 & 17 (2008).

2. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2008). The twenty-seven to thirty-three month sentence above is the proscribed Guideline range for an offender with no criminal history and no offender enhancements.

3. For example, the use of a computer, the age of the child victim depicted, and the number of images or videos can all greatly enhance this base-level range. *Id.* A person with no criminal history, who uses the Internet to download a two-minute video depicting pornographic images of a ten-year-old child through a file-sharing network, would have a Guideline range of 87–108 months in prison. *Id.* (basing this number off of a nine-point sentencing enhancement for the base-level offense).

4. ANN. REP. SOURCEBOOK, s*upra* note 1, at tbl.13.

5. *See* United States v. Booker, 543 U.S. 220 (2005).

strike some defendants but miss many others. The cases discussed below illustrate the disparate results that characterize federal sentencings for child pornography offenses.

In July 2006, an investigation in Europe uncovered an Internet bulletin board called "Funny World," which was designed to facilitate the exchange of child pornography.[6] The board was shut down soon after, but not before, law enforcement agents recovered numerous screen captures of Internet provider (IP) addresses belonging to users of the database.[7] One of these IP addresses was traced back to Ralph Rausch, a forty-nine-year-old divorced ex-Air Force Sergeant with three children, who lived in Colorado.[8]

Upon searching Rausch's home, federal agents uncovered several thousand images and videos depicting what was described as explicit, "hard-core" child pornography.[9] Further inquiry into "Funny World" revealed that Rausch had made over one hundred postings to the group in the span of less than three months.[10] The postings varied from those sharing photos of young children in sexually explicit positions to comments about Rausch's own sexual excitement while viewing the images to other users' requests for child pornography material.[11] Rausch admitted that looking at child pornography had been a "hobby" for him since 2000 and that he had visited several other Internet bulletin boards where he would trade and share up to 100 child pornography images a night with other users.[12]

Rausch pled guilty in federal district court to one count of possession of child pornography.[13] His advisory Guideline range was 97–120 months in federal prison.[14] He was sentenced to one day in prison, with credit for time served, and supervised release.[15] The sentencing judge in *Rausch* found the defendant's poor physical health to be the biggest mitigating factor justifying his exceptionally low sentence.[16]

Less than two months after the *Rausch* decision, the Eighth Circuit Court of Appeals had occasion to review a similar case.[17] The defendant, Orville Toothman, had pled guilty to one count of possession of child

6. United States v. Rausch, 570 F. Supp. 2d 1295, 1298 (D. Colo. 2008).
7. *Id.*
8. *Id.* at 1298–99.
9. *Id.* at 1299.
10. *Id.* at 1298.
11. *Id.* at 1299.
12. *Id.*
13. *Id.* at 1296.
14. *Id.* at 1306.
15. *Id.* at 1307.
16. *See id.* at 1308.
17. United States v. Toothman, 543 F.3d 967 (8th Cir. 2008).

pornography[18] and had the same advisory sentencing range as Rausch: 97–121 months.[19] Toothman sought the mandatory minimum sentence of sixty months due in large part to his poor health.[20] He was completely blind in one eye, legally blind in the other, and suffered from hypertension, high blood pressure, diabetes, and low blood sugar. Additionally, Toothman was at high risk of needing an emergency retina-repair surgery that could not be performed in a timely manner if he were incarcerated.[21] Toothman's treating ophthalmologist testified at his sentencing hearing that Toothman would be completely blind in both eyes in three years and would be unable to defend himself in a prison setting.[22] The Court of Appeals upheld the district court judge's sentence of ninety-seven months in prison.[23]

These widely disparate sentences for very similar crimes are an unfortunate, and alarmingly frequent, side effect of judicial uncertainty in imposing sentences. Recent years have seen a marked increase in federal prosecutions for the crimes of distribution, production, and possession of child pornography,[24] and as a result of the Guidelines being only advisory,[25] judges are afforded a great deal of discretion in imposing sentences. This broad discretion has led to widely disparate sentences for similarly situated defendants such as Rausch and Toothman, who served one day and ninety-seven months, respectively, for the same offense. This outcome is contrary to the very purpose for which the Guidelines were imposed in the first place—to achieve fairness and proportionality among defendants convicted of similar crimes.[26] Judges exercise their discretion in imposing below-Guideline sentences for the crime of child pornography to circumvent the Guidelines completely and substitute their personal opinion for that of Congress and the Sentencing Commission.

The Guideline range for child pornography reflects sound and clear congressional intent to impose harsh penalties on defendants to deter,

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18. 18 U.S.C. § 2252(a)(2) (2009).

19. *Toothman*, 543 F.2d at 968.

20. *Id.* at 969.

21. *Id.* at 969–70.

22. *Id.* at 969.

23. *Id.* at 971.

24. U.S. DISTRICT COURTS, CRIMINAL CASES FILED BY MAJOR OFFENSE (EXCLUDING TRANSFERS), tbl.5.34, *available at* http://www.uscourts.gov/judicialfactsfigures/2007/Table503.pdf. (showing that for the crime of sexually explicit material, there were 85 cases in 1995 as compared to 1,544 in 2007).

25. United States v. Booker, 543 U.S. 220 (2005).

26. U.S. DEP'T OF JUSTICE, FACT SHEET: THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (March 15, 2006),http://www.usdoj.gov/opa/documents/United_States_v_Booker_Fact_Sheet.pdf.

and ultimately eliminate, the market for child pornography. For this reason, this Comment argues that sentences that fall outside the Guidelines range should be reviewed with much greater scrutiny and should not be used solely to reflect a judge's view that the advised sentence is too harsh for the crime it serves to punish. Specifically, below-Guideline sentences are being imposed with greater frequency because judges fail to consider all appropriate factors—namely, the nature of the offense, the purpose of punishment, and the need to avoid unwarranted sentencing disparities among defendants convicted of similar crimes.

Part II of this Comment examines the history of the Federal Sentencing Guidelines, starting with their creation and then the jurisprudence that led to the Guidelines being advisory only. It also tracks the simultaneous legislative and Department of Justice (DOJ) measures that were implemented to impose harsher penalties for child pornography. Part III discusses the current state of sentencing for child pornography by looking at trends over the past decade in a number of prosecutions, the class of defendant that is being prosecuted, and the types of sentences being imposed. It also looks at recent cases in different circuits and examines how judges have been exercising their broad discretion in imposing sentences. Part IV considers arguments that the Guideline levels for child pornography offenses are too high, and posits that these arguments are unpersuasive because child pornography offenses should not be viewed merely as propensity crimes, but as the deliberate and repeated victimization of a child. Additionally, it considers the class of defendants charged with child pornography offenses and argues that such offenses pose a particular challenge to judges because they are demographically atypical. Part V proposes how judges should consider the 18 U.S.C. § 3553(a) sentencing factors in regard to these crimes so that greater predictability in sentencing is once again achieved.

II. JUDICIAL AND LEGISLATIVE HISTORY OF THE FEDERAL SENTENCING GUIDELINES AND CHILD PORNOGRAPHY LAW

The current sentencing structure affords federal district judges significant discretion in imposing sentences for all federal offenses.[27] Although Congress has frequently attempted to limit the sentencing discretion of judges through legislative enactment, successful constitutional challenges to mandatory sentencing have restored the historical role of judges in choosing from a wide range of sentencing options.[28]

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27. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 at 3 (2008).

28. *See Booker*, 543 U.S. 220; United States v. Kimbrough, 552 U.S. 85 (2007); Spears v. United States, 129 S. Ct. 840 (2009).

This Part briefly summarizes the legal and historical background that has given rise to the current system of federal sentencing. First, it discusses the USSC's creation of the Guidelines. Second, it considers the congressional limit placed on judicial discretion through the PROTECT Act. Third, it discusses the landmark Supreme Court decision of *United States v. Booker*, which rendered the Guidelines advisory only. Finally, it analyzes the string of post-*Booker* Supreme Court decisions that further define the role of the advisory Guidelines and the ways in which reviewing courts must consider a sentence that deviates from the Guidelines.

A. The Shift from Judicial Discretion to Mandatory Guidelines

Prior to 1984, the U.S. had a long history of indeterminate sentencing in federal criminal matters.[29] Although Congress prescribed statutory maximum penalties, a great deal of judicial discretion was afforded to the sentencing judge.[30] This broad discretion had the adverse effect of creating unpredictable sentencing disparities among defendants convicted of similar crimes.[31] To achieve fairer and more consistent sentences, Congress passed the Sentencing Reform Act of 1984 (SRA),[32] which established a statutory framework for federal sentencing.[33]

Among other things, the SRA created the USSC, an independent commission of the Judicial Branch in charge of creating sentencing guidelines that would be mandatory for all courts.[34] The Guidelines yielded a sentencing range, and the sentencing judge, taking into account both the offense and the defendant's criminal history, would then be required to sentence within this range.[35] The SRA compelled sentencing judges to impose sentences consistent with the policy considerations enumerated in 18 U.S.C. § 3553(a).[36] Overall, judges are instructed to

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29. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 at 2 (2008).

30. ROGER W. HAINES, JR., FED. SENT'G GUIDELINES HANDBOOK 1 (2006). *See also* Douglas A. Berman, *Punishment and Crime: Reconceptualizing Sentencing*, U. CHI. LEGAL F. 1, 3 (2005).

31. Berman, *supra* note 30, at 3.

32. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3626 (2000 & Supp. III 2003); 28 U.S.C. §§ 991–998 (2000).

33. FACT SHEET: THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, *supra* note 26.

34. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION (June 2005), http://www.ussc.gov/general/USSCoverview.pdf.

35. *Id.* Although the SRA returned greater determinacy to sentencing, judges still reserved some discretion under the mandatory Guideline system. In special circumstances and upon motion of either the government or defense, a judge could impose an exceptional upward or downward sentence for cases where the Guideline range was not appropriate. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1–2.0 (2007).

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

"impose a sentence sufficient, but not greater than necessary" to achieve the goals of punishment.[37] Consistent with § 3553(a), a judge must consider the following: (1) the nature and circumstance of the offense and the characteristics of the offender;[38] (2) the need for the sentence imposed to reflect the aims of a sentence that are providing a just punishment, deterrence, rehabilitation, retribution, and incapacitation;[39] (3) the kinds of sentences available;[40] (4) the Sentencing Guidelines;[41] (5) the Sentencing Commission policy statements;[42] (6) the need to avoid disparities in sentencing;[43] and (7) the need to provide restitution.[44]

The Guidelines became binding; however, judges were given some discretion to impose exceptional upward or downward departures from the Guideline range in response to sufficient aggravating or mitigating circumstances.[45] The goal of the Guidelines was to provide a system to ensure that "criminals with similar backgrounds who commit similar crimes received similar sentences, irrespective of race, socioeconomic status, or geographic locations."[46]

In 1996, the Supreme Court decided, in *Koon v. United States*, that on appeal, sentences that departed from the Guidelines would be reviewed for abuse of discretion.[47] The Court's decision in *Koon* afforded greater discretion to the district court judge than previously recognized under the Guidelines.[48] The Court stated that deferential review was appropriate because it would afford "the district court the necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization."[49] *Koon* was the first of several cases in which the Supreme Court restored sentencing discretion to district judges in the face of a congressional act limiting such discretion.[50]

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37. *Id.* § 3553(a).

38. *Id.* § 3553(a)(1).

39. *Id.* § 3553(a)(2).

40. *Id.* § 3553(a)(3).

41. *Id.* § 3553(a)(4).

42. *Id.* § 3553(a)(5).

43. *Id.* § 3553(a)(6).

44. *Id.* § 3553(a)(7).

45. United States v. Minstretta, 488 U.S. 361, 367 (1989); U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1–2.0 (2007); 18 U.S.C. § 3553(b)(1) (setting out the standard for a judge to deviate from the Guidelines).

46. FACT SHEET: THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, *supra* note 26.

47. Koon v. United States, 518 U.S. 81, 91 (1996).

48. *Id.*

49. *Id.* (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990)).

50. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 151, 117 Stat. 650 (2003).

B. The PROTECT Act

The surge in permissible discretion realized in *Koon* was short-lived; several years later, Congress again took measures to limit judicial discretion in sentencing. In 2003, Congress unanimously passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act.[51] The PROTECT Act aimed to strengthen the government's ability to investigate, prosecute, and prevent crimes committed against children, specifically child pornography and abduction crimes.[52] The two major catalysts for the PROTECT Act were (1) congressional concern that the high percentage of downward departures in sentences was too great to deter crimes, particularly sex offenses involving children; and (2) congressional desire to impose harsher penalties for sex offenses against children.[53]

The Act, as passed, also contained an amendment sponsored by Representative Tom Feeney of Florida, which enacted several reforms to ensure that the Guidelines would be applied more stringently.[54] Ultimately, the Feeney Amendment sought a return to the original ideals Congress was seeking to bring to federal sentencing with the SRA—consistency and predictability.[55] Specifically, the PROTECT Act, along with the Feeney Amendment, included numerous reforms aimed toward reducing the number of downward departures from the Guidelines.[56] After enactment of the PROTECT Act, judges who imposed a downward sentence were now required to submit detailed reports setting forth findings of fact and conclusions of law for their decision.[57]

Additionally and perhaps most notably, the Act changed the standard of appellate review to de novo.[58] This gave appellate courts the power to overturn any departure that they believed did not comport to the objectives set out in § 3553(a), which severely limited district court

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51. U.S. DEP'T OF JUSTICE, FACT SHEET: PROTECT ACT (Apr. 30, 2003).

52. *Id.*

53. U.S. SENT'G COMM'N, FINAL REP. ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FED. SENT'G 115 (2006), *available at* http://www.ussc.gov/booker_report/booker_report.pdf.

54. The Feeney Amendment was enacted as Title IV of the PROTECT Act of 2003. PROTECT Act of 2003, Pub. L. No. 108-21, § 3553, 117 Stat. 650, 667 (2003).

55. Memorandum from Attorney Gen. John Ashcroft to all Fed. Prosecutors, Office of the Attorney Gen., Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals (Jul. 28, 2003), *available at* http://www.usdoj.gov/ag/readingroom/ag-072803.pdf.

56. *Id.*

57. *New Chair Talks About U.S. Sentencing Commission Post*-Blakely, NEWSL. FED. CTS. (The Third Branch, Washington D.C.) Oct. 2004, *available at* http://www.uscourts.gov/ttb/oct04ttb/interview.

58. PROTECT Act § 401(d)(1)–(2), 117 Stat. at 670.

judges' discretion.[59] The PROTECT Act, therefore, marked a return to Congress's intent when it adopted the SRA; the Guidelines should be mandatory and generally enforced, and judicial discretion should be limited to cases that presented extreme mitigating or aggravating circumstances.[60]

C. United States v. Booker *and an Advisory Guideline System*

The limits placed on judicial discretion by the PROTECT Act came to a screeching halt in 2005 when the Supreme Court held that the mandatory Guidelines were constitutionally impermissible.[61] The Court held that an enhanced sentence under the Guidelines based on a judge's assessment of an aggravating fact violated the defendant's Sixth Amendment right to a trial by jury.[62] The Court, in a 5–4 decision authored by Justice Scalia, remedied this constitutional violation by excising the provisions of the SRA that made the Guidelines mandatory.[63] Therefore, the Guidelines became advisory only.[64] Although, post-*Booker*, the Guidelines are only advisory, they are still one of the statutory considerations judges must evaluate when imposing a sentence.[65]

The *Booker* decision effectively restored the vast judicial discretion that had been limited by Congress through both the SRA and the PROTECT Act. The majority in *Booker* stated that the new advisory Guidelines were consistent with congressional intent;[66] however, the dissent expressed serious doubt about this contention.[67] The dissent pointed to the Senate report following the floor debate on the SRA where Congress had explicitly refused an advisory system as evidence that the ma-

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59. Lawrence Goldman, *The Feeney Amendment*, CHAMPION, June 2003, at 4, *available at* http://www.nacdl.org/public.nsf/search (search for Feeney Amendment; then follow the Feeney Amendment hyperlink).

60. *Id.*

61. Blakely v. Washington, 542 U.S. 296 (2004). The *Blakely* decision held that a defendant's Sixth Amendment right to a jury trial was violated when the court sentenced a defendant to a sentence above the statutory maximum of the standard range for his offense based on the sentencing judge's independent finding that the defendant acted with "deliberate cruelty." *Id.* The facts supporting the aggravating circumstances were not found by a jury, but rather solely decided by the sentencing judge. *Id.*

62. United States v. Booker, 543 U.S. 220, 226–27 (2005). The *Booker* majority was a somewhat atypical combination of Justices—Justices Scalia, Souter, Stevens, Thomas, and Ginsburg. The dissenting Justices were O'Connor, Breyer, Rehnquist, and Kennedy.

63. 18 U.S.C. § 3553(b)(1) (2009); 18 U.S.C. § 3742 (e) (2009).

64. *Booker*, 543 U.S. at 227.

65. *Id.* at 259–60.

66. *Id.* at 249–58.

67. *Id.* at 299.

jority's holding was not consistent with congressional intent.[68] The dissent also pointed out that Congress again reiterated its desire to limit judicial discretion and impose mandatory Guidelines by passing the PROTECT Act.[69]

Additionally, *Booker* changed the appellate review standard for departures from Guideline sentences from de novo to a reasonableness review.[70] In so doing, the *Booker* decision restored trial court judges with their traditional discretion and went further to ensure that it was less likely that they would be overturned on appeal. Still unclear, however, was how higher courts would review departure sentences post-*Booker*.

D. Presumption of Reasonableness: Rita *and* Gall

This question was soon addressed when, in 2007, the Supreme Court had occasion to determine the proper presumption to apply to both within- and below-Guideline sentences on appeal.[71] In *Rita*, a case in which the defendant was sentenced within the Guideline range for perjury, obstruction of justice, and false statements, the Court was presented with the issue of whether an appellate court could presume that a within-Guideline sentence was reasonable.[72] The majority found that a circuit court could legally apply a presumption of reasonableness to a within-Guideline sentence.[73] Justice Breyer, writing for the majority, went on to explain that when the sentencing judge and the Sentencing Commission agree on the proper sentence to impose on a defendant, this "double de-

68. *Id.* at 295–96. *See* 133 CONG. REC. 33109 (1987) (remarks of Sen. Hatch) ("The core function of the guidelines and the underlying statute . . . is to reduce disparity in sentencing and restore fairness and predictability to the sentencing process. Adherence to the guidelines is therefore properly required under the law except in . . . rare and particularly unusual instances . . . .") *Id.* at 33110 (remarks of Sen. Biden) ("That notion of allowing the courts to, in effect, second-guess the wisdom of any sentencing guideline is plainly contrary to the act's purpose of having a sentencing guidelines system that is mandatory, except when the court finds a circumstance meeting the standard articulated in § 3553(b). It is also contrary to the purpose of having Congress, rather than the courts, review the sentencing guidelines for the appropriateness of authorized levels of punishment.").

69. *Booker*, 543 U.S. at 299. *See* 149 CONG. REC. 9345, 9353, 9354 (2003) (remarks of Sen. Hatch) (arguing that the PROTECT Act "says the game is over for judges: You will have some departure guidelines from the Sentencing Commission, but you are not going to go beyond those, and you are not going to go on doing what is happening in our society today on children's crimes, no matter how softhearted you are. That is what we are trying to do here . . . . We say in his bill: We are sick of this, judges. You are not going to do this anymore except within the guidelines set by the Sentencing Commission"). *Id.* at 9354 ("Trial judges systematically undermine the sentencing guidelines by creating new reasons to reduce these sentences.").

70. *Booker*, 543 U.S. at 260.

71. Rita v. United States, 551 U.S. 338 (2007).

72. *Id.*

73. *Id.*

termination significantly increases the likelihood that the sentence is a reasonable one."[74]

Later that year, the Supreme Court considered whether it was proper to apply a presumption of unreasonableness to sentences falling outside of the Guideline range.[75] The case that served as the vehicle to resolve this question centered on Brian Gall's conviction for conspiracy to distribute a controlled substance.[76] The government argued for the minimum Guideline range of thirty months; however, due to the mitigating circumstances of the case,[77] the sentencing judge chose to depart from the Guidelines and imposed a sentence of only thirty-six months probation.[78] The Court held that post-*Booker*, federal courts have the power to impose any reasonable sentence so long as they explain their reasoning.[79] Therefore, although under *Rita* a presumption of reasonableness may be applied to review a within-Guideline sentence, appellate courts may not apply a presumption of unreasonableness to a sentence that departs from the Guidelines.[80]

The effects of *Rita* and *Gall* are twofold: *Rita* reinforces the sound legislative intent of imposing the Guidelines by affording deference to a trial judge's decision to impose a within-Guideline sentence, while *Gall* appears to strengthen judicial discretion by making it less likely for a trial judge to be overturned on appeal when departing from the Guidelines.[81] The result of this judicial discretion has led to unpredictable and disparate outcomes in sentences imposed on defendants. In recent years, the negative effects of this trend have been dramatically played out in federal sentencings for child pornography crimes. While *Rita* and *Gall* represented substantial changes in federal sentencing, they were not the last in this long line of cases. The *Kimbrough* case discussed below was a monumental ruling that forever changed federal sentencings.

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74. *Id.* at 350. ("The courts of appeals' 'reasonableness' presumption, rather than having independent legal effect, simply recognizes the real-world circumstances that when the judge's discretionary decision accords with the Commission's view of the appropriate application of section 3553(a) in the mine run of cases, it is probably that the sentence is reasonable.").

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

76. *Id.*

77. Gall had been involved in a drug ring that was distributing ecstasy while he was in college. *Id.* at 41–42. He voluntarily withdrew from the drug conspiracy and moved across the country where he started his own business and led a crime-free life. *Id.* He voluntarily turned himself in when federal agents later tracked him down. *Id.*

78. *Id.* at 43.

79. *Id.* at 46.

80. *Id.* at 47.

81. *Id.*

E. 100-to-1 Ratio in Sentencing: Kimbrough *and* Spears

While the Supreme Court, in *Booker* and later in *Rita* and *Gall*, demonstrated an inclination toward providing judges with greater discretion in imposing sentences, its decision two years later in *United States v. Kimbrough* took a big step toward complete elimination of some Guidelines.[82]

In *Kimbrough*, the Court allowed mere disagreement with the Sentencing Commission's prescribed range to serve as a basis to impose a below-Guideline sentence.[83] Following the defendant's guilty plea, the trial judge had imposed a sentence of fifteen years in prison and five years of supervised release; the Guideline range was nineteen to twenty-two-and-a-half years.[84] The primary reason for this sentence was the trial judge's finding that the Guideline range for that offense—which equated 100 grams of powder cocaine with 1 gram of crack cocaine—was per se unreasonable.[85] According to the Court, this exercise of judicial discretion was permissible.[86]

In a landmark decision, the Supreme Court reversed the Fourth Circuit and reinstated the sentence imposed by the trial court.[87] It held that since the trial court judge had appropriately considered the § 3553(a) factors when imposing a sentence, the sentence was reasonable, even though it did not fall within the Sentencing Commission's prescribed range.[88] Most notably, *Kimbrough* seems to support the position that judges can categorically reject a Guideline range if they find it yields too high of a sentence.[89]

Just a year later, the Court strongly reinforced its holding in *Kimbrough* when it issued a per curiam opinion granting summary reversal in *Spears v. United States*.[90] After the Eighth Circuit Court of Appeals had held that a trial court "may not categorically reject the ratio set forth by the Guidelines"[91] and had "impermissibly varied [from the Guidelines] by replacing the 100:1 quantity ratio inherent in the advisory Guideline

82. United States v. Kimbrough, 552 U.S. 85 (2007).

83. *Id.*

84. *Id.* at 92.

85. *Id.*

86. *Id.*

87. *Id.* at 111–12.

88. *Id.*

89. *Id.* at 110. The Court stated that "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, *even in a mine-run case*." *Id.* (emphasis added).

90. Spears v. United States, 129 S. Ct. 840 (2009).

91. United States v. Spears (*Spears II*), 533 F.3d 715, 717 (8th Cir. 2008) (en banc).

range with a 20:1 quantity ratio,"[92] the Supreme Court took the unusual step of granting summary reversal (without accepting briefing or oral argument) and reinstating the trial court's sentence.[93] The *Spears* court firmly reinforced the discretion given to judges in *Kimbrough* when it stated "we now clarify that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines."[94]

Though *Kimbrough* and *Spears* stand for the proposition that a trial court can categorically reject a Guideline range for a "run of the mill" case,[95] these holdings only address the 100:1 sentencing ratio of crack versus powder cocaine.[96] However, the precedent set by this line of cases would allow a judge to reject the Guidelines completely for a possession of child pornography case in the absence of any particular findings of mitigating circumstances. In short, the current jurisprudence conveys to trial judges an inordinate amount of discretion in sentencing. Given that the child pornography Guidelines reflect sound and supported Congressional determinations, judges should not abuse the discretion afforded to them through *Booker* and *Kimbrough* to circumvent the Guidelines because this would lead to even greater disparity and unpredictability in sentencing.

III. TRENDS IN CHILD PORNOGRAPHY PROSECUTIONS: STATISTICAL DEVELOPMENTS AND CURRENT CASE LAW

The increased judicial discretion that has resulted from *Booker*, *Rita*, and *Kimbrough* cases has had an extreme effect on federal prosecutions of child pornography offenses. This Part examines the current statistical data for this crime and analyzes the ways in which child pornography prosecutions have posed a unique problem for sentencing judges.

This Part begins by analyzing the current statistics involving the number of prosecutions and average length of sentences for child pornography offenses. It then discusses statistics regarding the demographics of child pornography defendants as compared to the average federal defendant. It ends by discussing how the atypically high sentence length and number of prosecutions, as well as the atypical demographic makeup of defendants, sets child pornography offenses far apart from the typical federal crime.

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92. *Id.* (quoting United States v. Spears (*Spears I*), 469 F.3d 1166, 1178 (8th Cir. 2006) (en banc)).

93. *Spears II*, 533 F.3d at 717.

94. *Id.*

95. United States v. Kimbrough, 552 U.S. 85 (2007).

96. *Id.*

A. Number of Prosecutions and Length of Sentences

The number of federal prosecutions for child pornography has drastically increased since Congress passed the PROTECT Act in 1996.[97] In 1995, only eighty-five criminal cases were filed in federal court for sexually explicit material.[98] By 2000, this number had increased by more than 500%.[99] The number of cases has continued to grow—reaching 1,544 in 2007,[100] which makes federal prosecutions for sexually explicit material by far the fastest-growing offense being filed in federal courts.[101]

Additionally, the median length of sentences imposed has drastically increased in recent years.[102] The USSC releases annual reports tracking statistics of federal prosecutions based on circuit and primary offense type.[103] The average sentence length for the primary offense category[104]—which includes production, possession, and distribution of child pornography—has increased from 29.1 months in 1996[105] to 119 months in 2008.[106] The only primary offense categories with a higher average sentence length are murder and kidnapping or hostage taking.[107] It is clear that the past decade has seen a rapid and remarkable increase in not only the number of federal prosecutions for child pornography, but also the severity of the crime (reflected by the comparatively harsh sentences being imposed on offenders).

A cursory glance at these statistics may suggest that increased judicial discretion post-*Booker* has not had an adverse affect on the imposition of appropriate penalties on child pornography defendants. However, a closer review shows a vast disparity among the sentences being im-

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97. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 151, 117 Stat. 650 (2003).

98. U.S. DISTRICT COURTS, *supra* note 24.

99. *Id.*

100. *Id.*

101. *Id.*

102. ANN. REP. SOURCEBOOK, *supra* note 1, at tbl.13. *See also* USSC reports for 1996–2008.

103. *Id.*

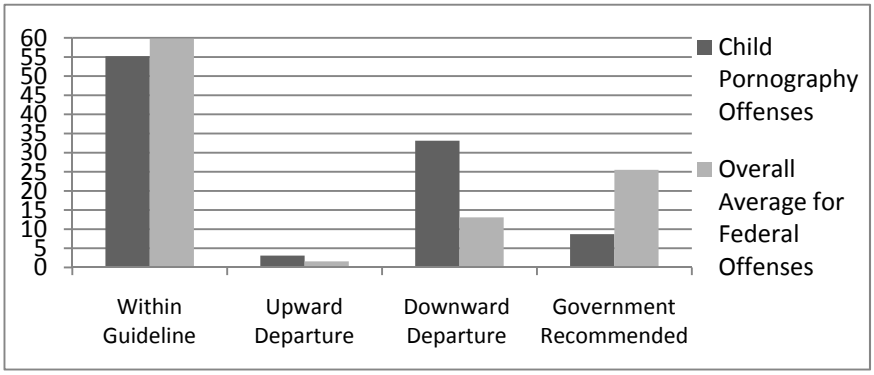
104. The USSC publishes annual statistics on federal prosecutions and sentences. For simplicity, many of the statistics are divided into "primary offense categories," which are determined by the judgment of conviction order. The primary offense category groups similar crimes into categories to make the Sentencing Commission reports more manageable. The crimes analyzed in this Comment fall into the pornography/prostitution category, which includes: dealing in obscene matter, transportation of minor for prostitution/sex, transportation for prostitution/sex (adult), sexual exploitation of minors, materials involving sexual exploitation of minors, obscene telephone or broadcasting, and selling or buying children for pornography. U.S. SENTENCING COMMISSION PRELIMINARY QUARTERLY REPORT (2008) app. A at 1, 7.

105. U.S. SENTENCING COMMISSION STATISTICAL INFORMATION PACKET (2007), at tbl.13.

106. ANN. REP. SOURCEBOOK, *supra* note 1, at tbl.13.

107. *Id.*

posed, which demonstrates a lack of consensus among federal judges about how to sentence these defendants. Sentencing Commission reports for 2008 indicate that 55.2% of the cases in the child pornography primary offense category were within Guideline range.[108] About 3.1% of cases were upward departures from the Guideline range and 33.1% were downward departures.[109] Only 8.7% of the cases were government recommended downward departures as a result of plea bargains or prosecutorial discretion.[110] These numbers reflect a vast disparity with the overall averages for all federal prosecutions. The overall average for within Guideline range sentences across all crimes in 2008 was 59.7%.[111] Overall, upward departures occurred in only 1.6% of cases and downward departures only accounted for 13.1%; both of these numbers are less than half of the amount for child pornography cases.[112] Furthermore, the overall average for government recommended downward departures was 25.5%.[113]



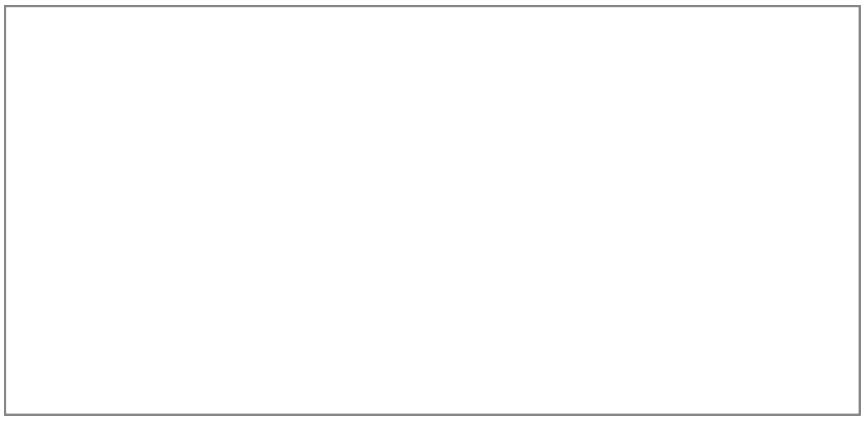
These numbers indicate two alarming trends for child pornography prosecutions. First, there is a far greater disparity in the sentences imposed in the child pornography primary offense category than the overall average of federal prosecutions. Not only are there fewer within-Guideline sentences, but there are drastically more upward and downward departures from the Guidelines than the overall average for federal prosecutions. Second, this disparity is attributable to judicial discretion, not prosecutorial discretion, because far less of these cases are government-sponsored departures than the overall average.

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*

B. Demographic Profile of Child Pornography Defendants

So why exactly are judges having such difficulty sentencing child pornography defendants? One possible explanation is the severity of the sentences imposed. The Internet has drastically aided the ease of transporting child pornography. For this reason, a defendant is able to accumulate several sentencing enhancements based on the number of images he or she acquires or the age of the children or sexual acts being depicted in the image.[114] Additionally, since child pornography viewers often trade images with each other, defendants can incur significant sentencing enhancements based on transporting the images over state lines for pecuniary gain. Thus, due in large part to the ease of using the Internet, the mean sentence for child pornography defendants has drastically risen in the past few years. Judges may be exercising increased discretion as a way to circumvent what they believe to be unnecessarily harsh advisory sentences.

A second possible explanation is that child pornography defendants represent a drastically different demographic make-up than federal judges are used to encountering. Specifically, Sentencing Commission reports show that the primary offense category that includes child pornography is made up of defendants who are overwhelmingly white, older, and more educated than the overall average of defendants in federal prosecutions.[115] These defendants are 85.6% white as compared to the overall average that is only 29.8% white.[116]



114. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2008).
115. ANN. REP. SOURCEBOOK, *supra* note 1, at tbls. 4, 6 & 8.
116. *Id.* at tbl.4.

Additionally, child pornography defendants are much older than the average defendant. About 25.4% of defendants are over fifty years old, as compared to 9.7% of defendants for all federal crimes.[117] The second highest percentage of child pornography defendants, comprising 25.7%, falls in the 41–50 year age range.[118] While the average federal defendant falls into a much lower age range, child pornography defendants are drastically older.[119]

Finally, child pornography defendants fall into a much higher education demographic than the average federal defendant. While nearly half of all federal prosecutions are of defendants with less than a high school level education, only 11% of child pornography defendants have not completed high school.[120] Also, about 33% of child pornography defendants have completed some college as compared to an overall average of only 15.5%, and 18.2% are college graduates as compared to the overall average of only 5.4%.[121]

Regardless of whether judges are exercising increased discretion based on demographics, disapproval of the Guideline range, or for some other reason, the result is that the child pornography sentences imposed in the past few years are less than predictable. The fact that the Guidelines are considered advisory allows judges to use their discretion to circumvent legislative intent completely by imposing below-Guideline sentences. Furthermore, post-*Gall*, judges are far less likely to be reversed on appeal because below-Guideline sentences are not presumed unrea-

117. *Id.* at tbl.6.
118. *Id.*
119. *Id.*
120. *Id.* at tbl.8.
121. *Id.*

sonable.[122] So long as a sentencing judge uses the factors set out in § 3553(a) to explain a downward departure, and does not consider factors extrinsic to those in the statute, most below-Guideline sentences will be affirmed on appeal. This has caused federal sentences to return to a state similar to how it was prior to the SRA—unpredictable and, ultimately, unfair.

IV. ARGUMENTS AGAINST THE GUIDELINE RANGE: PROPENSITY CRIME OR CREATING A MARKET FOR CHILD VICTIMIZATION?

Despite increased below-Guideline sentences for child pornography defendants, this crime remains amongst those with the harshest sentences attached to it.[123] Many critics oppose the child pornography Guidelines as being too strict or unnecessarily harsh.[124] There are two main arguments against the child pornography Guidelines: (1) that they are not representative of empirical data and congressional intent and, therefore, should not be presumed reasonable;[125] and (2) that child pornography is not a propensity crime—child pornography defendants do not have an increased likelihood to engage in sexually explicit conduct with children.[126]

These two arguments are unsound and unpersuasive. First, the Guidelines are supported by years of congressional and DOJ measures to impose harsher penalties on child pornography offenders due in large part to public concern.[127] Imposing appropriate punishments is a job properly left to the legislature, and in the case of child pornography Guidelines, sentences reflect public sentiment and support for imposing harsher penalties.[128] Second, child pornography sentencing laws are not simply meant to deter or incapacitate to prevent future wrongful acts against children;[129] possessing, producing, and distributing child pornography are wrongful in and of themselves because they continually vic-

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

123. ANN. REP. SOURCEBOOK, *supra* note 1, at table 23.

124. *See* Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (Jul. 3, 2008) (federal defender paper), *available at* http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf. *See generally* United States v. Baird, 580 F. Supp. 2d 889, 892 (D. Neb. 2008); United States v. Shipley, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008); United States v. Hanson, 561 F. Supp. 2d 1004, 1009-1011 (E.D. Wis. 2008).

125. *Id.*

126. *See* Laura M. Klever, *Reinvigorated Judicial Discretion After* Booker*: Burden or Boon to Sexual Exploitation Offenders?*, 11 J. GENDER RACE & JUST. 93, 108 (2007).

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

128. *Id.*

129. *Id.*

timize the child.[130] Harsh penalties are necessary not because child pornography is a propensity crime, but because harsh sentences will help eliminate the market for child pornography altogether and bring an end to the continual victimization of innocent children.[131]

This Part begins by discussing the legislative intent arguments against the current Guidelines for child pornography offenses. It then argues that the child pornography Guideline range is consistent with congressional and DOJ intent and proportionate in relation to other offenses. It ends by discussing the criticism that child pornography offenses are merely propensity crimes and by arguing that, in fact, these crimes are themselves completed and harmful offenses.

A. Legislative Intent

Critics of the current child pornography Guidelines argue that the advisory sentencing ranges are too harsh and do not reflect sound congressional intent and empirical research.[132] While it is true that Congress continues to modify the Guidelines—including raising the statutory minimum sentence for some offenses[133]—these modifications both reflect congressional intent and response to public concern.[134] This section begins by discussing the numerous legislative and DOJ measures taken to further criminalize child pornography related offenses and ends by considering the Guideline range for child pornography against the use of Guidelines in the context of other crimes. Taken together, these considerations overcome arguments that the Guidelines are unduly harsh. Thus, the Guidelines reflect sound policy choices made by Congress to impose harsh, deterrent penalties for this offense.

1. Congressional and DOJ Actions

In November of 1990, Congress criminalized possession of child pornography.[135] Prior to 1990, the act of merely possessing a sexually explicit image involving a minor was not viewed as a federal crime; however, congressional intent and public sentiment shifted, in part with

130. *Id.*

131. *Id.*

132. Stabenow, *supra* note 124.

133. *Id.*

134. Press Release, Sen. Bill Frist, Frist, Walsh Hail Passage of Child Predators Legislation (July 21, 2006). *See also Dateline: To Catch a Predator* (NBC television broadcast Apr. 26, 2006) (stating that after the third showing of *To Catch a Predator* aired, *Dateline* received over 15,000 emails from parents, teachers, and law enforcement agents lending their support for the show).

135. Pub. L. 101-647 tit. III, § 323(a)–(b), 104 Stat. 4818, 4819 (1990). *See also* Stabenow, *supra* note 124 at 4.

the rise of the Internet, to view possession as a punishable offense.[136] Over the next several years, many other legislative acts would serve to further criminalize and monitor the child pornography market.[137]

Legislative concerns about downward departures in sentencing for defendants engaged in viewing sexually explicit materials depicting minors spawned the PROTECT Act of 2003.[138] The heavily supported[139] PROTECT Act represents a relatively recent and landmark legislative acknowledgement that child pornography crimes require harsh sentences for a deterrence purpose.[140] Similarly, government recognition of the increasing severity of the problem of child pornography spurred the Department of Homeland Security's Bureau of Immigration and Customs Enforcement (ICE) to launch Operation Predator, an initiative designed to protect children worldwide by enacting measures to help law enforcement arrest foreign pedophiles, human traffickers, and pornographers.[141]

In 2006, the DOJ launched Project Safe Childhood (PSC) to fight the proliferation of Internet facilitated sexual exploitation of children.[142] PSC works in partnership with state and local law enforcement, the FBI, ICE, the U.S. Marshals Service, and various advocacy organizations to identify child victims and apprehend Internet predators.[143] PSC has been successful in increasing the number of indictments filed against offenders and raising public awareness of the dangers of Internet crimes.[144]

Later that year, President Bush signed the Adam Walsh Child Protection and Safety Act of 2006, which aimed at strengthening federal law to protect children from sexual crimes, to prevent child pornography, and to make the Internet safer for children.[145] The Adam Walsh Act is criticized in part for being a sensationalized response to child pornography and the victimization of children through the Internet.[146] Particularly, critics note that Senate Majority Leader Bill Frist, motivated by his out-

136. Stabenow, *supra* note 124.

137. *Id.*

138. FINAL REP. ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FED. SENT'G, *supra* note 53.

139. FACT SHEET: PROTECT ACT, *supra* note 51.

140. *Id.*

141. Press Release, Department of Homeland Security, Fact Sheet: Operation Predator (July 9, 2003), *available at* http://www.dhs.gov/xnews/releases/press_release_0210.shtm.

142. Press Release, Department of Justice, Fact Sheet: Project Safe Childhood (Nov. 12, 2008), *available at* http://www.projectsafechildhood.gov/video/PSC_Announcement_FactSheet.pdf.

143. Press Release, Department of Justice, Fact Sheet: Project Safe Childhood (Sept. 23,2008), *available at* http://www.usdoj.gov/opa/pr/2008/September/08-opa-845.html.

144. *Id.*

145. Press Release, President George W. Bush, Fact Sheet: The Adam Walsh Child Protection and Safety Act of 2006, H.R. 4472 (July 27, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/07/20060727-7.html.

146. *See* Dara L. Schottenfeld, *Witches and Communists and Internet Sex Offenders, Oh My: Why it is Time to Call Off the Hunt*, 20 ST. THOMAS L. REV. 359 (2000); Stabenow, *supra* note 124.

rage over the *Dateline* series, *To Catch a Predator*, pushed hard for the Act.[147] *To Catch a Predator* began airing in 2004 and featured a series of undercover investigations of child sex predators that used the Internet to communicate with minors.[148] The show tracked defendants as they engaged in sexually explicit conduct with decoy minors and then agreed to meet them at the children's homes.[149] Many critics of the child pornography Guidelines argue that the so-called "*To Catch a Predator* effect" has sensationalized the crime of child pornography and has been a catalyst for disproportionate sentences.[150] One commentator went so far as to analogize the treatment of Internet sex offenders to the Salem witch trials and the McCarthy era.[151] However, in reality, the show has served to boost public knowledge of the dangerousness and ease of Internet crimes and the vast market that exists for child pornography.[152] Public outrage, generated in part by the show, has prompted thousands of letters and emails nationwide calling for harsher penalties and legislative action.[153] Effectually, the show's popularity demonstrates that the Guidelines reflect the evolving standards of decency of the American public, and thus, indicates that the Guideline range for child pornography related offenses reflect clear and sound legislative intent.

The above discussion illustrates a long history of legislative and DOJ efforts to impose harsher penalties on child pornography related offenses. These efforts were, in large part, a response to public concern. Furthermore, the number of prosecutions and the length of sentences have increased proportionately with an increase in legislative awareness of the problem. Thus, the argument that the child pornography Guidelines do not represent congressional intent is both weak and false.

2. Child Pornography Guidelines in Relation to Other Offenses

Finally, perhaps the most compelling argument against the Guideline range for child pornography offenses is that these defendants receive an even longer mean sentence than defendants convicted of sexual assault.[154] Critics argue that the Guidelines cannot be reasonable and cannot reflect sound congressional intent if they yield a higher sentence for a

147. Press Release, Sen. Bill Frist, Frist, Walsh Hail Passage of Child Predators Legislation (July, 21, 2006).

148. *Dateline: To Catch a Predator* (NBC television broadcast May 24, 2005).

149. *Id.*

150. Klever, *supra* note 126; Stabenow, *supra* note 124; Schottenfeld, *supra* note 146.

151. Schottenfeld, *supra* note 146.

152. *See generally* Frist, *supra* note 147.

153. *Dateline: To Catch a Predator* (NBC television broadcast Apr. 26, 2006).

154. Stabenow, *supra* note 124.

person who merely looks at a pornographic image of a child versus a person who actually rapes or molests a child.[155]

This argument is flawed because it misappropriates the cause of lower sentences for defendants convicted of sexual assault to the Guidelines, when actually it is the result of prosecutorial or judicial discretion.[156] While the base Guideline range for a first time offender convicted of child pornography is eighteen months,[157] the base Guideline range for a first time offender convicted of sexually assaulting a minor is nearly double this.[158] Clearly, the Guidelines proscribe a much higher sentence for sexual assault than possession of pornography.

There are many explanations for the incongruent results that appear in the mean length of sentences for child pornography versus sexual assault of a child. Most compelling is the argument that a sexual assault trial is more arduous, emotional, and difficult to prevail at than a child pornography trial.[159] Almost without fail, a sexual assault case requires the child victim to testify in court if the case proceeds to trial.[160] It is emotionally scarring for a young child who has already been victimized to then have to go through the traumatizing experience of testifying in court with his or her assailant sitting right there.[161]

In addition to the impact the trial process has on the child victim, there are often much more difficult proof issues with sexual assault cases than with child pornography cases.[162] For child pornography, the proof of the crime is the image itself, and often the only thing a prosecutor must show is a chain of custody between the defendant and his or her computer.[163] Sexual assault cases are much more difficult to prove because much of the jury's decision comes down to the weight of the victim's testimony.[164]

For these reasons, it is likely that many more sexual assault defendants receive favorable plea bargains whereas child pornography defendants are pleading as charged.[165] Favorable plea bargains may include the prosecutor foregoing adding certain sentencing enhancements that

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155. *Id.*

156. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2008).

157. *Id.*

158. *Id.*

159. Eva J. Klain et al., *Child Pornography: The Criminal-Justice-System-Response*, Nat'l Ctr. For Missing & Exploited Children at 10 (Mar. 2001), *available at* http://www.missingkids.com/en_US/publications/NC81.pdf.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

would increase the defendant's recommended Guideline range in exchange for a guilty plea.[166] Since child pornography crimes do not present the same failure of proof and increased trauma to the child victim issues as sexual assault cases, defendant-favorable plea bargains are not as necessary.[167] Therefore, even though the base Guideline range for sexual assault cases is much higher than child pornography cases, child pornography can often yield a much higher sentence because it presents a much easier case to prove.[168]

Years of congressional and DOJ actions have shown an increased effort to impose harsher penalties for child pornography.[169] The Guideline range directly reflects these efforts.[170] Harsher penalties serve the overall goals of punishment, such as retribution and, most notably, deterrence.[171] The government's effort to impose harsher penalties on child pornography defendants is a major stride towards elimination, or at least minimization, of the market for child pornography altogether. Additionally, the Guideline range for child pornography is not unnecessarily harsh as it is proportional to the Guideline range for other similar offenses such as sexual assault of a minor.

B. Propensity

Critics of child pornography sentences also argue that the Guidelines are unnecessarily harsh because no empirical data suggests that viewers of child pornography are more likely to commit acts of physical abuse.[172] Furthermore, although there is no research to suggest that viewing child pornography actually makes a person more likely to engage in sexual contact with a minor, some authors have attempted to argue that there is at least a casual relationship between increased web access of pornography and decreased acts of sexual violence.[173] However, even if this argument is true, it is unpersuasive and irrelevant. The Guidelines do not serve to punish child pornography defendants simply because they possess a heightened propensity to commit sexual acts with a minor;[174] rather, the act of viewing child pornography itself is a crime

166. *Id.*

167. *Id.*

168. *Id.*

169. *See generally* discussion *supra* Part IV.A.

170. *Id.*

171. 18 U.S.C. § 3553(a)(2) (2009).

172. *See* Amir Efrati, *Making Punishments Fit the Most Offensive Crimes: Societal Revulsion at Child Pornography Consumers Has Led to Stiff Prison Sentences and Caused Some Judges to Rebel*, WALL ST. J., Oct. 23, 2008, at A14.

173. Steven E. Landsburg, *How the Web Prevents Rape: All That Internet Porn Reduces Sex Crimes, Really*, SLATE, Oct. 30, 2006, http://www.slate.com/id/2152487.

174. Klain et al., *supra* note 159, at 10.

because it contributes to a lucrative industry that promotes the abuse of children and child trafficking.[175] Child pornography should not be viewed as an inchoate offense, but as its own substantive completed offense.

Conservative estimates suggest that child pornography generates $4.9 billion annually worldwide.[176] Nearly one-fifth of the victims of child pornography are between the ages of six and ten.[177] The victimized children experience severe physical and psychological harm as a result of being utilized to produce these obscene images and videos.[178] The child is victimized during the act itself, then victimized again and again as the image is spread online, immortalized by the Internet.[179] Viewers of child pornography exchange images and videos for money or for other images; thus, the very act of viewing child pornography fuels a billion-dollar industry that is supported by sexual exploitation and victimization of children.[180] The Guidelines for the crime reflect the Sentencing Commission's view that imposing strict punishments will have a deterrent effect on defendants and will serve to limit, and eventually eliminate, the market for child pornography.[181]

The Sentencing Commission's logic is endorsed by numerous legislative and justice department initiatives, which are fueled in part by widespread public concern and support.[182] Because the Guidelines for child pornography reflect sound policy and sentencing concerns, judicial discretion should be limited to serve the deterrent effects envisioned by the Sentencing Commission.

V. THE NEED FOR GREATER JUDICIAL SCRUTINY OF POST-*BOOKER* DOWNWARD DEPARTURES IN ACCORD WITH § 3553

To provide greater stability and predictability in sentencing child pornography defendants, judges should return to a closer and more deliberate consideration of the 18 U.S.C. § 3553(a) factors. Specifically, courts should give great weight to the nature and circumstance of the offense,[183] the need to impose a sentence that reflects the aims of pu-

175. *Id.*

176. Press Release, Internet Filter Review 2006, http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html; Klever, *supra* note 126.

177. Klain et al., *supra* note 159, at 6; Klever, *supra* note 126, at 108.

178. Klain et al., *supra* note 159.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. 18 U.S.C § 3553(a)(1) (2009).

nishment,[184] and the need to avoid disparities in sentencing.[185] Though current Supreme Court jurisprudence renders the Guidelines merely advisory, great deference should be given to the Sentencing Commission's recommendations because they are the result of empirical research and reflect sound congressional policy.[186]

This Part details how trial courts and reviewing courts should consider the § 3553(a) factors in imposing sentences. Three factors in particular are regularly under-utilized by the sentencing courts that hear child pornography cases. First, this Part begins by discussing the nature of the offense. It then argues that because child pornography is a particularly graphic and lucrative industry that continuously victimizes children, this crime is appropriately amongst the harshest punished offenses. Second, it discusses how sentencing judges should consider the goals of punishment when imposing sentences and argues that these specific goals cannot be met by gross downward deviations from the Guideline range. Finally, this Part discusses how the current state of federal sentencing for child pornography has a disparate impact on defendants convicted of similar crimes. It argues that increased judicial discretion in child pornography sentencings will lead to the very harm the Court, in *Kimbrough*, sought to avoid—unwarranted sentencing disparities on demographic lines. Because the child pornography Guidelines reflect sound congressional intent and serve to punish a serious offense, the Supreme Court's holding in *Kimbrough* should not be relied on by judges to circumvent the Guidelines altogether.

A. Nature of the Offense

In considering the nature of the offense,[187] courts should evaluate the number of images and videos a defendant possesses, as well as the age of the victims depicted and the gravity of the material.[188] Child pornography cases yield notably high advisory Guideline ranges in part because of the multitude of sentencing enhancements available for this crime.[189] Defendants who take part in an online file-sharing program to trade images with other users can incur significant sentencing enhancements based on the number of images or videos they accrue, the age of the child victims, and the gravity of what is depicted in the images or

184. *Id.* § 3553(a)(2).

185. *Id.* § 3553 (a)(7).

186. *See* discussion *supra* Part II.

187. 18 U.S.C § 3553(a)(1).

188. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2008). The Federal Sentencing Guidelines Manual dictates an advisory Guideline range based on the offender's characteristics and criminal history and the nature of the offense. *Id.*

189. *Id.*

videos.[190] However, the fact that these severe sentencing enhancements exist gives even greater weight to Congress's intent to impose harsh penalties on child pornography defendants.[191]

The sentencing enhancements reflect congressional intent and acknowledgment that the nature and seriousness of the offense are important factors that will justify, if not require, a harsher sentence.[192] As discussed, possession of child pornography should not be viewed as a victimless crime because the very act of trading or viewing images fuels an industry that victimizes countless children each year.[193] Many district court judges have relied on the unpersuasive logic that possession of child pornography is an innocent and victimless crime and, therefore, a harsh sentence is not necessary.[194] However, the Ninth Circuit has rejected this approach and instead argued that creation, distribution, and possession of child pornography creates a "permanent record of the children's participation and the harm to the child is exacerbated by their circulation."[195] In this way, child pornography does not fit into the same category of victimless crimes as drug-related offenses because there is a very real and identifiable victim.[196] The fact that the victim is a child who is continually victimized every time the image is exchanged online for pecuniary gain[197] exacerbates the serious level of the offense.

When imposing a sentence, district court judges should give great deference to § 3553(a)(1) and consider the particularly serious nature of this offense.[198] The exploitation of child victims through a forum that will continually solicit and distribute its images for monetary gain is a heinous and sadistic offense that requires an equally harsh punishment. Judges should provide detailed and explicit rationales before departing from this reasoning.

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190. *Id*

191. *Id.*

192. U.S. v. Pugh, 515 F.3d 1179 (11th Cir. 2008).

193. Rogers, *supra* note 127.

194. *See* United States v. Goff, 501 F.3d 250, 253 (3d Cir. 2007), in which the sentencing judge referred to the crime of possession of child pornography as "truly a psychological crime. It is not a taking crime . . . almost one might say a psychiatric crime." *See also* United States v. Pugh, 515 F.3d, 1187 (11th Cir. 2008) (characterizing possession as "passive and incidental"); United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990) (holding that the primary victim in child pornography offenses is society in general and not the specific child depicted).

195. United States v. Boos, 127 F.3d 1207 (9th Cir. 1997).

196. *See* Rogers, *supra* note 127.

197. *Id.*

198. 18 U.S.C. §3553 (2009).

B. Goals of Punishment

Additionally, when imposing sentences, judges should strictly adhere to the primary goals of punishment: deterrence, retribution, rehabilitation, and incapacitation.[199] Particularly, deterrence should be given great weight as strict sentences will help to eliminate the market for child pornography altogether.

Child pornography is a multi-billion-dollar industry that relies on child trafficking, rape, and exploitation to accrue a profit.[200] The industry is sustained by people who choose to become consumers of this illegal business. Most child pornography sites function as file-sharing networks; that is, people do not actually pay for the images and videos but they trade images and videos with other users.[201] In this way, the image itself becomes a means of pecuniary value that perpetuates the child pornography industry.[202] People who do nothing more than download pornographic images from their home computers are actively contributing to an industry that is fueled by child trafficking and exploitation.

There is a clear and evident need to deter child pornography consumers from aiding and promoting the industry. Imposing harsh sentences for child pornography related offenses has both an individual deterrent effect on the particular defendant and a general deterrent effect on other child pornography consumers. As noted previously, child pornography cases have, at least lately, generated widespread media attention. By imposing a strict punishment, sentencing judges send the message that child pornography is a serious and offensive crime and those who engage in it will be punished to the fullest extent proscribed by law. Sentencing judges who wish to depart from this goal[203] should do so only in extreme and special circumstances and should fully explain their reason for deviation. A failure to adhere to the recommended Guideline range in the average case would fail to satisfy the deterrent goals of punishment.

C. Need to Avoid Disparate Impacts in Sentencing

Finally, judges should give great weight to the need to avoid disparities in sentencing among defendants convicted of similar crimes.[204] Par-

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199. *Id.*

200. Klever, *supra* note 126; Stabenow, *supra* note 124; Schottenfeld, *supra* note 146.

201. Press Release, National Center for Missing & Exploited Children, Fact Sheet: The Financial Coalition Against Child Pornography (Dec. 3, 2008), *available at* http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3703.

202. *Id.*

203. 18 U.S.C. § 3553(a)(2) (2009).

204. *See* sentencing disparity discussion *supra* Part I.

ticularly, sentencing should not be based on the sentencing judge randomly assigned to the case.[205] Instead, judges should do their best to ensure that sentences are imposed somewhat systematically and predictably so as not to have the disparate outcome that child pornography sentences have today.[206]

As a result of *Kimbrough*, sentencing judges can categorically reject a Guideline range if they find that it yields an inappropriate result. However, *Kimbrough* should be construed as a narrow holding that applied to the 100-to-1 crack cocaine disparity and should not be extended to categorically reject the child pornography Guidelines. The concern in *Kimbrough* was that the 100-to-1 sentencing ratio yielded disparate impacts on defendants, particularly on racial lines.[207] Effectually, the ratio imposed a much higher sentence on crack cocaine defendants, who were largely minorities, than it imposed on powder cocaine defendants, who were largely white.[208] Additionally, it had the effect of imposing harsher sentences on low-level dealers, who usually distribute crack cocaine, than on high-level dealers, who usually distribute powder cocaine.[209] The Court found that the 100-to-1 ratio was based on flawed empirical and scientific evidence and therefore a judge's categorical rejection of the ratio was sound.[210]

The same reasoning does not extend to child pornography Guidelines. The Guidelines reflect a history of sound and specific legislative intent to impose harsher penalties on defendants convicted of child pornography related offenses and to eliminate, or at least vastly reduce, the market for child pornography.[211] Furthermore, deviation from the Guideline range would potentially have the same negative effect that adherence to the Guideline range in *Kimbrough* sought to avoid: sentencing disparity based on racial lines.[212] The *Kimbrough* sentencing ratio had the negative effect of imposing harsher penalties on minority defendants.[213] However, downward departures from the Guidelines for child pornography have the adverse effect of giving lighter sentences to white defendants. As discussed above, child pornography defendants are completely

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205. *Id.*

206. *Id.*

207. United States v. Kimbrough, 552 U.S. 85, 86 (2007).

208. *Id.*

209. Jason Harrow, *Commentary: Winners and Losers in* Gall *and* Kimbrough, SCOTUS BLOG, (Dec. 10, 2007), http://www.scotusblog.com/wp/commentary-winners-and-losers-in-gall-and-kimbrough.

210. *Id.*

211. *See* discussion *supra* Part IV.

212. *Kimbrough*, 552 U.S. at 111.

213. *Id.*

atypical from the average federal defendant.[214] Specifically, they are overwhelmingly white, older, and more educated than the average defendant.[215] Demographically, child pornography defendants mirror white-collar defendants.[216] Judicial leniency for these offenses could have the exact adverse effect that *Kimbrough* was largely trying to avoid—creating sentencing disparity along racial lines.

The goals of punishment require equal penalties for similarly situated defendants who commit similar crimes.[217] As it stands, federal sentencing for child pornography related offenses have little to no predictability. To comply with § 3553(a), judges should give greater deference to the Sentencing Commission's research and recommendations. Post-*Booker*, judges should exercise their broad discretion with greater regard for the Guidelines and not merely as an attempt to circumvent the Guidelines altogether.

VI. CONCLUSION

Undoubtedly, recent years have shown a rapid and notable increase in federal prosecutions for child pornography related offenses. In response to this enhanced concern, Congress and the DOJ have proscribed numerous measures to further criminalize and better prosecute those who victimize children. The USSC has reflected these efforts by proscribing harsh but fair advisory Guidelines for child pornography related offenses.

However, recent Supreme Court jurisprudence has afforded sentencing judges almost unbridled discretion. Though they must consider the Guidelines when imposing a sentence, judges are allowed to impose a sentence that completely deviates from the advised range so long as they explain their reasoning. This increased discretion has led to vast disparity and unpredictability in sentencing that is completely contradictory to the original conception of the SRA.

In order to avoid this unwarranted and undesirable disparity, judges should give much greater consideration to the § 3553(a) factors when imposing sentences. Particularly, they should consider child pornography as a multi-billion dollar industry fueled by child trafficking and exploitation. People who support this industry by distributing or possessing child pornography are directly fueling this business. Sentencing judges should properly recognize child pornography offenses as serious crimes requiring a harsh punishment.[218] Second, judges should accom-

214. *See* discussion *supra* Part III.
215. *Id.*
216. *Id.*
217. 18 U.S.C. § 3553(a)(7) (2009).
218. *Id.* § 3553(a)(1).

plish the goals of punishment, especially the need to send a strong deterrent message, by imposing harsh sentences that reflect the gravity of the crime.[219] Finally, judges should avoid disparate sentences.[220] The Guidelines assure that similarly situated defendants will receive similar punishments. Therefore, any deviation from this range should be very particular and well-reasoned and should not simply reflect a sentencing judge's disagreement with the Guideline range.

219. *Id.* § 3553(a)(2).
220. *Id.* § 3553(a)(7).