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# Courts Caught in the Web: Fixing a Failed System with Factors Designed for Sentencing Child Pornography Offenders

Brendan J. Sheehan

*Cuyahoga County Common Pleas Court*

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# COURTS CAUGHT IN THE WEB: FIXING A FAILED SYSTEM WITH FACTORS DESIGNED FOR SENTENCING CHILD PORNOGRAPHY OFFENDERS

BRENDAN J. SHEEHAN\*

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\* Judge Sheehan has served on the Cuyahoga County Common Pleas Court since January 2009. Prior to assuming the bench, Judge Sheehan practiced as a civil and criminal litigator for 14 years. He earned his B.A. from Baldwin Wallace University, J.D. from Cleveland-Marshall College of Law, and his Masters of Judicial Studies at the University of Nevada, Reno. As a prosecutor in the Major Trial Division of the Cuyahoga County Prosecutor’s Office he was the first chair prosecutor in *State v. Goldblatt* and *State v. Pompa*. Additionally, he served as Chairman of the Ohio Internet Crimes Against Children Taskforce, Chairman of the Legal Committee for the National Internet Crimes Against Children Taskforce and instructed law enforcement officials across the country on the investigation and prosecution of internet crimes. The author expresses his gratitude to his assistants, Associate Professor Matthew C. Leone, Ph.D., of the University of Nevada, Reno and Lindsay Raskin for their assistance in completing this study, as well as Nicholas E. Froning for his assistance in completing, editing and publishing this study.

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## I. INTRODUCTION

Northeast Ohio judges inconsistently impose criminal sentences for child pornography offenders (CPOs) because the currently utilized Presentence Investigation Report (PSIR) is an inadequate tool for assessing the likelihood of recidivism of these offenders. This Article introduces a Study, compiling data of 238 internet crimes against children occurring between 2008-2012, and concludes there is no correlation between presentence risk assessment scores and the subsequent sentences imposed by Northeast Ohio judges. The current risk assessment tools are insufficient and should be replaced by a comprehensive multi-factor approach that assesses relevant factors and identifies an offender's placement on the "Spiral of Abuse" to aid Northeast Ohio judges in crafting fair, just, and consistent sentences for CPOs.

Part II of this Article introduces two cases involving internet crimes against children to illustrate the sentencing disparity for CPOs in Northeast Ohio. These cases support this author's position that the current risk assessment tools upon which sentencing judges rely are inadequate and result in punishments that do not fit the crime. Part III provides a background and discusses the legislative, executive and judicial responses to the emergence of internet crimes against children, examines the historical sentencing models, and traces the development of PSIRs to aid sentencing judges. This section also discusses the challenges of identifying CPOs and the risks of improperly assessing CPOs as low risk offenders. Part IV introduces the author's 2008-2012 Study of 238 Ohio felony internet crimes against children cases and concludes that there is no correlation between current PSIRs and the subsequent sentences imposed by Northeast Ohio judges—demonstrating that PSIRs are inadequate tools in aiding sentencing decisions. In Part V, the author proposes a multi-factor approach to assessing CPOs along the Spiral of Abuse, which will aid Ohio judges in imposing fair, just, and consistent sentences. Part VI provides the author's concluding thoughts.

## II. SENTENCING OUTCOMES IN TWO OHIO INTERNET CRIMES AGAINST CHILDREN CASES

As an illustration of the disparity in sentencing, two very different cases and outcomes are described below. The first defendant, Jay Goldblatt, arranged to meet a young girl in a park and was sentenced to 5 years of community control.<sup>1</sup> The second defendant, Roy Pompa, was convicted of multiple counts related to the creation of child pornography and was sentenced to 386 years in prison.<sup>2</sup> The crimes for which these individuals were convicted show a vast disparity among sentencing: Goldblatt went so far as to meet a young girl for sex, yet was only sentenced to 5 years of community control; whereas Pompa used the internet to create and disseminate child pornography and acted on his sexual impulses, and was justly sentenced to a lifetime in prison. These cases will serve as examples of the inadequacy of Ohio's current sentencing system and later be reexamined under this author's proposed multi-factor approach to fairly, justly, and consistently sentence Ohio CPOs.

### A. State of Ohio v. Jay Goldblatt

Jay Goldblatt was born on April 17, 1958 in a suburb of Cleveland.<sup>3</sup> Goldblatt had a close relationship with both of his parents during his childhood, never suffering from any type of abuse as a child.<sup>4</sup> As an adult, Goldblatt married twice and had two children from his first marriage.<sup>5</sup> At the time of his arrest, he was a practicing attorney in Ohio.<sup>6</sup>

The case began in June of 2004.<sup>7</sup> At that time, the FBI had received numerous leads on Jay Goldblatt that indicated he might be looking for young girls.<sup>8</sup> On June 18, 2004, an undercover FBI agent contacted Jay Goldblatt at his law office, where Goldblatt asked the agent to secure a nine to eleven year old girl for sex and agreed to pay two hundred dollars for the procurement.<sup>9</sup> On July 13, 2004, the undercover agent called Goldblatt confirming he found a girl that was exactly what he was looking for and arranged to meet Goldblatt at a local park later that afternoon.<sup>10</sup> Goldblatt arrived at the park at the designated time and was arrested by FBI agents.<sup>11</sup>

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<sup>1</sup> Ohio v. Goldblatt, No. CR-04-454259-A (Cuyahoga Cty. C.P., Oct. 5, 2005) (on file with author).

<sup>2</sup> Ohio v. Pompa, No. CR-070493438 (Cuyahoga Cty. C.P., May 8, 2007) (on file with author).

<sup>3</sup> *Goldblatt*, No. CR-04-454259 (on file with author).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

During the investigation, FBI agents retrieved pornographic pictures of children, a digital media playlist of video files of child pornography, and paid subscriptions, usernames, and passwords to pornographic websites on the hard drive of the company-owned computer from Goldblatt's law office.<sup>12</sup>

FBI agents interviewed Goldblatt's ex-wife, who admitted to discovering in March 1995 that Goldblatt was buying child pornography via mail and storing it in their house.<sup>13</sup> Goldblatt's collection included videotapes, magazines, catalogs, and brochures from nudist colonies showing children, as well as hardcore pornography in which children were depicted as having sex with adults.<sup>14</sup> She also provided telephone bills with hundreds of dollars in charges to 1-900 numbers that offered children, or adults posing as children, to engage in sexual conversations.<sup>15</sup> She did not know if Goldblatt had ever had sexual contact with a child.<sup>16</sup>

On November 11, 2004, Goldblatt was charged with Compelling Prostitution, Attempted Rape, Attempted Kidnapping, and Possessing Criminal Tools.<sup>17</sup> On October 5, 2005, Goldblatt was found guilty of Compelling Prostitution, a third degree felony, and Possessing Criminal Tools, a fifth degree felony.<sup>18</sup> During his presentence investigation on October 12, 2005, Goldblatt provided the following statement:

I was talking to another adult about sex with prostitutes including underage prostitutes. The other adult was an FBI agent pretending to be a pimp. I went to meet him and was arrested. I believe that due to depression, I was fantasizing about things that I should never have even thought about. This can never happen again.<sup>19</sup>

Following his presentence investigation, Goldblatt was not sentenced to serve any prison time.<sup>20</sup> However, Goldblatt was given five years of community control sanctions.<sup>21</sup> Jay Goldblatt subsequently violated the terms of his probation when pornography was found on his computer.<sup>22</sup> Instead of imprisonment, the length of his community control was modified and extended.<sup>23</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

*B. State of Ohio v. Roy C. Pompa*

Roy Pompa was born on October 13, 1956 in Sun Valley, California.<sup>24</sup> Pompa married and divorced three times between 1975 and 2007.<sup>25</sup> From 1989 to the time of his divorce and arrest, Pompa, his wife, and his two teenage daughters lived in Brook Park, Ohio, a Cleveland suburb.<sup>26</sup>

The City of Brook Park and the Internet Crimes Against Children Taskforce, hereinafter “ICAC,” obtained information that between October 2006 and November 2006 an individual in Brook Park, Ohio had downloaded or uploaded child pornography 860 times.<sup>27</sup> The information was forwarded to the Brook Park Police Department, which identified the address as belonging to Roy Pompa.<sup>28</sup> Brook Park Police obtained and executed a search warrant on Pompa’s property on December 4, 2006.<sup>29</sup>

During their investigation, the officers learned that Pompa’s daughter had observed child pornography on her father’s computer in the past.<sup>30</sup> At Pompa’s residence, police seized a pinhole camera and a box of VHS tapes.<sup>31</sup> Police played one of the tapes to check the material, and observed a young girl lying motionless on a bed with an adult male placing his fingers inside of her vagina.<sup>32</sup> Pompa was arrested and taken into custody.<sup>33</sup>

Police conducted another search at Pompa’s house on December 7, 2006 and discovered a tray containing a syringe of Trazodone, a known sedative, which was not prescribed, and melatonin, an over-the-counter sleep aid.<sup>34</sup> During the investigation, police discovered that Pompa’s young daughters frequently had sleepovers at their house.<sup>35</sup> During the sleepovers Pompa would insist on making the girls late night snacks and would insist they drink tea, juice, or water before bed.<sup>36</sup> Each of the girls interviewed said the drinks always tasted bad, but that Pompa

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<sup>24</sup> Ohio v. Pompa, No. CR-070493438 (Cuyahoga Cty. C.P., May 8, 2007) (on file with author).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

would insist they drink them before going to bed.<sup>37</sup> Police determined that Pompa used the syringe to inject the sedative into drinks, specifically juice boxes.<sup>38</sup>

Police obtained and executed additional search warrants, which, in turn, produced additional VHS tapes.<sup>39</sup> Many of the tapes showed young girls being victimized by an adult male while they lay motionless at night, indicating that they had been drugged.<sup>40</sup> One of the videos involved Pompa's daughter.<sup>41</sup> The video showed Pompa forcing his daughter to perform oral sex on him as she lay asleep and unconscious in the bed.<sup>42</sup> This video was one of the files uploaded to the internet and tracked by ICAC.<sup>43</sup> All of the children with which Pompa interacted in the videos were between the ages of six and fourteen years old.<sup>44</sup>

At trial, the jury found Pompa guilty on forty-six counts of Pandering Sexually Oriented Matter Involving a Minor, seventeen counts of Rape, five counts of Kidnapping, twenty-one counts of Gross Sexual Imposition, two counts of Illegal Use of Minor in Nudity Oriented Material/Performance, one count of Disseminating Obscene Matter to Juveniles, and one count of Possessing Criminal Tools.<sup>45</sup> Pompa was sentenced to three hundred eighty-six years and six months in prison.<sup>46</sup>

### III. BACKGROUND

#### *A. The Emergence of Internet Crimes Against Children (ICAC)*

Nationally, children spend an average of seven hours and thirty-eight minutes per day devoted to media consumption which includes TV, internet, video games, and cell phone usage.<sup>47</sup> Of the 2,002 survey respondents between the ages of 8-18 in a 2010 Kaiser Permanente study, the average time devoted exclusively to computer usage and online content per day exceeded one and half hours, which totals almost eleven hours per week on the internet.<sup>48</sup> Additionally, each year children and young adults spend increasing amounts of time surfing the internet, playing video games, watching TV, and communicating using cell phones.<sup>49</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Victoria J. Rideout, Ulla G. Foehr, & Donald F. Roberts, *Generation M<sup>2</sup> Media in the Lives of 8- to 18-Year Olds*, The Henry J. Kaiser Fam. Found. 1, 2 (Jan. 2010), available at <http://files.eric.ed.gov/fulltext/ED527859.pdf>.

<sup>48</sup> *Id.* at 9.

<sup>49</sup> *Id.* at 2.

### 1. Legislative and Executive Responses

In direct response to this increase in internet usage amongst children and teenagers combined with heightened online activity by CPOs, the United States Department of Justice Office of Juvenile Justice and Delinquency (OJJDP) formed a national committee in 1998 to investigate and prosecute offenders who download, create, and/or transmit child pornography over the internet.<sup>50</sup> After a national committee was formed, states such as Ohio followed suit, creating their own task forces with federally funded grants to locally combat this emerging crime.

The Ohio ICAC Task Force was created as part of the anti-crime initiative funded by the OJJDP.<sup>51</sup> The Ohio ICAC Task Force is comprised of city, county, state and federal law enforcement authorities across Ohio whose primary goal is to identify, arrest and prosecute offenders who: (1) use the internet to lure minor individuals into illicit sexual relationships; or (2) use the internet to download, create, or transmit child pornography.<sup>52</sup> The Ohio ICAC Task Force currently consists of 331 total agencies, divided into 189 police departments, 73 sheriffs' departments, 60 prosecutors' offices, 6 federal law enforcement agencies, one state agency, and two other agencies.<sup>53</sup>

Pursuant to the mission of the Ohio ICAC Task Force, local law enforcement has developed both proactive and reactive investigation techniques. In the search for offenders, undercover officers throughout Ohio proactively scan the web for sites containing child pornography or those that encourage peer-to-peer sharing and trading of child pornography.<sup>54</sup> Undercover officers also disguise themselves online by creating underage profiles through which sexual predators chat with the officers, believing that the officers are young children.<sup>55</sup>

Law enforcement officials also respond reactively to tips submitted by the National Center for Missing and Exploited Children (NCMEC). Investigators submit tips to NCMEC after getting complaints about child pornography and information about the location of offenders.<sup>56</sup> After receiving the tips, law enforcement officials locate the offenders and investigate such tips by interrogation, forensic searches of electronic devices, and physical property searches.<sup>57</sup>

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<sup>50</sup> U.S. DEP'T OF JUSTICE, NAT'L STRATEGY FOR CHILD EXPLOITATION PREVENTION & INTERDICTION: A REPORT TO CONG. 5 (2010), *available at* <http://www.justice.gov/sites/default/files/psc/docs/natstrategyreport.pdf>.

<sup>51</sup> OHIO INTERNET CRIMES AGAINST CHILDREN TASK FORCE, <http://www.ohioicac.org/> (last visited Apr. 28, 2015).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> NAT'L CENTER FOR MISSING AND EXPLOITED CHILDREN, CYBERTIPLINE, <http://www.missingkids.com/cybertipline/> (last visited Apr. 28, 2015).

<sup>57</sup> *Id.*



When the Task Force was created, not only did law enforcement have to alter the methods of detecting sex crimes, prosecutors also had to adjust their practices.<sup>58</sup> Prosecutors had to be trained to charge and prosecute these new sexual offenses.<sup>59</sup> Prosecutors also had to learn how to submit digital evidence to a jury and how to explain forensic computer analysis to jurors without a background in the computer sciences.<sup>60</sup> The entire justice system needed to be updated in order to process search warrant requests on computers and to accurately identify a child's age in a photograph.

Based on the proactive and reactive investigative techniques effectuated as a result of the legislative response to the emergence of the internet crimes against children, law enforcement officials and prosecutors have become better educated about this new and flourishing crime and the techniques to aid in preventing, investigating, and prosecuting the CPO. However, as detailed below, the judiciary has not similarly adopted revised methods of evaluating CPOs.

## 2. Judicial Response

To date, Northeast Ohio courts have failed to obtain training or adopt tools to adequately assess and sentence the CPO. Generally, the courts continue to rely on PSIRs despite the lack of comprehensive studies conducted on the impact of PSIRs on the criminal sentences issued in Ohio for internet crimes against children. Currently, Ohio courts use PSIRs to focus on legal and extralegal factors, discussed below, and consequently fail to address CPOs individually or assess recidivism potential when making sentencing determinations.<sup>61</sup> Since judges do not have adequate information with regard to CPOs, judges are not fairly, justly, or consistently sentencing these offenders causing sentence disparity.

Sentence disparity is a form of unequal treatment based upon unexplained extralegal factors such as race or sex.<sup>62</sup> At the very least, disparity is incongruous and unfair, and, at worst, it is disadvantageous in its consequences.<sup>63</sup> As such, sentence disparity is a problem because two judges facing cases with similar facts and evidence could conceivably come to different conclusions regarding the lengths and severity of criminal sentences.

To address the issue of sentence disparity among courts, we must define the three primary factors that impact judges' sentencing decisions in criminal cases. In determining adequate sentences, judges evaluate three primary factors: legal,

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<sup>58</sup> U.S. DEP'T OF JUSTICE, DIGITAL ENFORCEMENT IN THE COURTROOM: A GUIDE FOR LAW ENFORCEMENT AND PROSECUTORS ch. 5 (Jan. 2007), available at <https://www.ncjrs.gov/pdffiles1/nij/211314.pdf>.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> OHIO REV. CODE ANN. § 2951.03 (West 2014).

<sup>62</sup> *Blakely v. Washington*, 542 U.S. 296, 315 (2004) (O'Connor, J., dissenting).

<sup>63</sup> ALFRED BLUMSTEIN ET AL., NAT'L INST. FOR JUSTICE, U.S. DEP'T OF JUSTICE, RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 9 (1983).

extralegal, and contextual influences,<sup>64</sup> which vary among defendants.<sup>65</sup> Legal factors include both the offender's prior contact with the justice system and details related to the current offense. Legal factors detail the offender's criminal history (prior arrests, convictions, incarcerations) and important features of the current convicted offense including the type of crime committed, severity of crime, or the use of a weapon.<sup>66</sup> Extralegal factors are those related to the offender's social status, demographic information, and a subjective evaluation of the offender's attitude toward the offense.<sup>67</sup> Extralegal factors include the offender's race, age, sex, education, socioeconomic background, marital status, and employment history.<sup>68</sup> Finally, contextual factors are those that describe the location of the crime or the location of the sentencing court.<sup>69</sup>

Legal factors are the primary determinant in sentencing outcomes because they have been determined to be legally relevant and reliable.<sup>70</sup> Specific facts regarding the offender and the crime committed are the strongest predictors of sentence disposition.<sup>71</sup> Research also suggests that extralegal factors, such as race or sex, may significantly affect sentencing decisions.<sup>72</sup> Yet, outside of race and sex, no other extralegal factors have been found to play an extraordinary role in the sentencing of CPOs.<sup>73</sup>

Ohio PSIRs, however, take into account irrelevant extralegal factors such as offender's social status, demographic information, and a subjective evaluation of the offender's attitude toward the offense, all of which possibly affect how adequately individual recidivism is predicted and lead to sentence disparity. It is thus necessary to develop specific processes that consider not only the legal factors, but also the

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<sup>64</sup> CHARLES W. OSTROM, BRIAN J. OSTROM, MATTHEW KLEIMAN, *JUDGES AND DISCRIMINATION: ASSESSING THE THEORY AND PRACTICE OF CRIMINAL SENTENCING* (Feb. 2004), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/204024.pdf>.

<sup>65</sup> SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, *THE COLOR OF JUSTICE: RACE, ETHNICITY AND CRIME IN AMERICA* 202 (3d ed. 2011).

<sup>66</sup> Victoria A. Springer, Janice R. Russell, Matthew C. Leone & James T. Richardson, *Felony Sentencing in Rural and Urban Courts: Comparing Formal Legal and Substantive Political Models in the West*, GRANT SAWYER CTR. FOR JUSTICE STUDIES, UNIV. OF NEV., RENO 1, 3 (2009), <http://ssrn.com/abstract=1441593>.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 15.

<sup>69</sup> Thomas L. Austin, *Criminal Sentencing in Urban, Suburban, and Rural Counties*, 6 CRIM. JUST. REV. 31, 32 (1981).

<sup>70</sup> Jo Dixon, *The Organizational Context of Criminal Sentencing*, 100 AM. J. SOC. 1157, 1157 (1995).

<sup>71</sup> Springer et al., *supra* note 66, at 4.

<sup>72</sup> Chester Britt, *Social Context and Racial Disparities in Punishment Decisions*, 17 JUST. Q. 707, 729 (2000); see also Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges' Sentencing Decisions: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145, 145 (2001); see also Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 POL'Y PROC. & DECISIONS CRIM. JUST. SYS. 427, 435 (2000).

<sup>73</sup> *Id.*

most important extralegal aspects of the offense and the offender to adequately sentence these CPOs.

### *B. Sentencing Models*

#### 1. Historical Sentencing Theories

Researchers have attempted to explain sentencing patterns through various sentencing models related to legal, extralegal and contextual factors. Despite years of research, there has been no universally agreed upon sentencing model to explain the disparity that exists in sentencing CPOs.<sup>74</sup> The two most recognized sentencing models are the formal legal theory of sentencing and the substantive political theory.<sup>75</sup>

The formal legal theory of sentencing provides that sentencing is primarily determined by the legally relevant variables.<sup>76</sup> This approach is premised on the assumption that judges' sentencing decisions are driven by a rational system.<sup>77</sup> Because of the rationality in sentencing decisions under the formal legal theory, sentencing decisions are predictable and are primarily based on concrete factors that are equally applied to all offenders, regardless of the extralegal factors. Under the formal legal theory, the most important sentencing factors are the offender's criminal history and features of the current convicted crime.<sup>78</sup> Because of these two features, the formal legal theory would predict similar sentences.

In contrast, the substantive political theory holds that the legal and extralegal variables are the most important factors in sentencing.<sup>79</sup> Jo Dixon argues that sentencing is a politically organized and oriented system and unlike the formal legal theory, substantive political perspective predicts that extralegal factors will influence sentencing, but these are not the only factors at work. This model merely maintains that extralegal factors play a role in sentencing decisions in addition to the strictly legal factors.<sup>80</sup>

#### 2. A Shift From Punishment to Rehabilitation—The Presentence Investigation Report (PSIR)

Determining the appropriate disposition for a criminal offender is the most difficult decision facing criminal court judges. The difficulty in sentencing arises from the lack of adequate, complete, and reliable information on the offender and the circumstances of the crime. Because of the shift from punishment to rehabilitation in sentencing, judges must weigh and consider additional information with regard to both legal and extralegal factors. This shift to rehabilitation within the justice system has created one of the most important documents within the courts—the PSIR.

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<sup>74</sup> Dixon, *supra* note 70, at 1157.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1161.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1161-2.

<sup>79</sup> *Id.* at 1161.

<sup>80</sup> *Id.*

The creation of the PSIR can be attributed to Boston shoemaker John Augustus in the 1840s.<sup>81</sup> Augustus believed that the “object of the law is to reform criminals and to prevent crime, and not to punish maliciously or from a spirit of revenge.”<sup>82</sup> In his efforts to redeem certain offenders, Augustus gathered background information about the offender’s life and criminal history.<sup>83</sup> If he thought the person was worthy, he would provide bail money and provide the offender with employment and housing.<sup>84</sup> Augustus would later appear at the sentencing hearing and provide the judge with a detailed report on the individual’s performance. This movement for a more individualized sentencing was given further momentum by the reformatory movement of the 1870s.<sup>85</sup> Proponents of the movement advocated an individualized approach toward the redemption of the criminal, in accordance with the goal of his rehabilitation.<sup>86</sup>

Under current Ohio law, judges are allowed but are not required to order a PSIR prior to sentencing.<sup>87</sup> Judges often order PSIRs, however, to gather important information relating to extralegal factors of the crime and the offender including the offender’s character, background, and interpersonal relationships.<sup>88</sup> The PSIR is designed to assist the court in selecting the most effective penal measure—the one that is best suited to the individual needs of the offender and the goals of society.<sup>89</sup> Ideally, the report should contain information regarding the offender’s socio-biographical data such as the past history and the present circumstances.<sup>90</sup> Also included in the PSIR should be information relating to the offender’s psychological

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<sup>81</sup> CTR. ON JUVENILE & CRIMINAL JUSTICE, *THE HISTORY OF THE PRE-SENTENCE INVESTIGATION REPORT 1* (2008), available at [http://www.cjcb.org/uploads/cjcb/documents/the\\_history.pdf](http://www.cjcb.org/uploads/cjcb/documents/the_history.pdf).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 2.

<sup>87</sup> OHIO REV. CODE ANN. § 2951.03 (West 2014).

No person who has been convicted of or pleaded guilty to a felony shall be placed under a community control sanction until a written presentence investigation report has been considered by the court. If a court orders the preparation of a presentence investigation report pursuant to this section, section 2947.06 of the Revised Code, or Criminal Rule 32.2, the officer making the report shall inquire into the circumstances of the offense and the criminal record, social history, and present condition of the defendant, all information available regarding any prior adjudications of the defendant as a delinquent child and regarding the dispositions made relative to those adjudications, and any other matters specified in Criminal Rule 32.2.

*Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Mary W. Daunton-Fear, *Information for the Court: A New Look at Social Inquiry Reports*, 15 BRIT. J. CRIMINOLOGY 128, 132 (1974).

<sup>90</sup> Harvey Treger, *A Meaningful Inquiry into the Life of an Offender: Stressing the Significant in the Presentence Investigation*, 11:3 CRIME & DELINQUENCY 249, 250-54 (1965).

state, future criminal expectations, and rehabilitative potential.<sup>91</sup> A physical and mental examination of the defendant may be conducted pursuant to the PSIR, and with that information, the offender is evaluated and assigned a risk assessment score.<sup>92</sup>

It is this specific process of collecting data for the PSIR that is inadequate with regard to CPOs. Determining a CPO's risk score is very difficult because these offenders tend to be employed, with little or no criminal history, and are usually stable members of the community.<sup>93</sup> Because of this data collected through the PSIR, CPOs are often classified as low risk for recidivism, contrary to known statistics regarding recidivism.<sup>94</sup> Judges rely on these inadequate PSIRs as risk assessment tools, to craft sentences of CPOs, which results in unfair, unjust and disparate sentences.

### *C. The Challenge of Identifying CPOs*

In determining whether a sentence disparity exists in ICAC cases in Northeast Ohio, we must define and outline the development of CPOs. Based on the existing data, this author hypothesizes that the majority of these offenders are Caucasian males under the age of 40 with steady employment and little to no criminal history. Based on those statistics, these offenders would be assessed as low risk on the current PSIRs within Ohio. If this hypothesis is correct, the current method utilizing PSIRs under the Ohio Revised Code to assess recidivism is inadequate, ineffective, and causes sentence disparity; and, as discussed in detail below, this author proposes new sentencing factors that should be utilized by the court as the method of assessing a fair, just and consistent sentence amongst CPOs. In defining the CPO, it is necessary to look at existing data regarding sexual offenders.

#### 1. Characteristics of CPOs

According to 2010 Sentencing Commission Reports presented to Congress, the majority of defendants in child pornography cases are Caucasian, older, and well educated—significantly different from most defendants being prosecuted in courts for other crimes.<sup>95</sup> In its report on child pornography cases, the Sentencing Commission looked at 610 offenders, of which 99.4% were males and of that 88.8% were Caucasian. Compare this with 29.8% of Caucasian males reported to commit all other criminal offenses.<sup>96</sup> The Commission found that the average age of these CPOs was 42 years old and the median education level was “some college.”<sup>97</sup>

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<sup>91</sup> SOL RUBIN, *LAW OF CRIMINAL CORRECTION* 93-96 (2d ed. 1973).

<sup>92</sup> *Id.*

<sup>93</sup> JAMES BONTA & R. KARL HANSON, *VIOLENT RECIDIVISM OF MEN RELEASED FROM PRISON* (1995).

<sup>94</sup> *Id.*

<sup>95</sup> *See generally* U.S. SENT'G COMM'N, *REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES*, ch. 8 (2012).

<sup>96</sup> U.S. SENT'G COMM'N, *REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES*, ch. 6 at 143 (2012).

<sup>97</sup> U.S. SENT'G COMM'N, *REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES*, ch. 9 at 257 (2012).

In a study conducted by Kyckelhahn and Motivans, reviewing 3,661 child sex exploitation offenders within the federal system, they found similar results.<sup>98</sup> Of the 1,275 offenders charged with child pornography, 98.7% were male and 88.9% of those males were Caucasian.<sup>99</sup> Of the 98.7% of males, 33% had some college education and were between the ages of 25 and 50 years old.<sup>100</sup> Their study also found that over 75% of these offenders had no felony record, were more likely to be in a relationship and steadily employed.<sup>101</sup> Similarly, a study of 255 offenders conducted by Burgess, Mahony, Visk and Morgenbesser in 2008 found that over 50% of offenders were employed in some position of authority at the time of arrest.<sup>102</sup>

## 2. Why CPOs Commit These Crimes

To provide proper guidance on sentencing CPOs, it is important for sentencing judges to understand the reasons why these offenders commit crimes. Three main criminological theories apply to the analysis of criminals engaging in internet sex crimes: the Concentric Zone Theory, Deterrence Doctrine, and the Rational Choice Theory.

### *a. Concentric Zone Theory*

The Concentric Zone Theory provides that people engage in crime because of specific factors in their environment, the most concentrated areas of which are called the “zones of transitions.”<sup>103</sup> The internet can be regarded as a zone of transition. Three factors define a zone of transition: heterogeneity, mobility, and poverty.<sup>104</sup> The internet has made it possible for people from across the globe to communicate and interact with each other at any time bringing different cultures of individuals together. Heterogeneity interests increase contact between pedophiles to accelerate acceptance because searching out another CPO with similar interests is made easy via the internet. The internet knows few socioeconomic, cultural, and political bounds—making it an extremely diverse environment. Mobility and accessibility are major benefits of the internet. Since the internet can be considered a “zone of transition,” it is predictably an attractive forum for criminal activity. Though research on zones of transition is compelling, the results from this author’s Study do not coincide with this theory.

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<sup>98</sup> Tracy Kyckelhahn & Mark Motivans, *Federal Prosecution of Child Sex Exploitation Offenders*, BUREAU OF J. STAT. BULL. 1 (2006).

<sup>99</sup> *Id.* at tbl. 6.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> A.W. Burgess, M. Mahoney, J. Visk & L. Morgenbesser, *Cyber Child Sexual Exploitation*, 46 J. PSYCHOL. NURSING 1-8 (2008).

<sup>103</sup> ROGER HOPKINS BURKE, AN INTRODUCTION TO CRIMINOLOGICAL THEORY 138 (2d ed. 2005); see also J. ROBERT LILLY, FRANCIS T. CULLEN & RICHARD A. BALL, CRIMINOLOGICAL THEORY: CONTEXT AND CONSEQUENCES 39 (5th ed. 2011).

<sup>104</sup> CLIFFORD R. SHAW & HENRY D. MCKAY, JUVENILE DELINQUENCY AND URBAN AREAS: A STUDY OF RATES OF DELINQUENTS IN RELATION TO DIFFERENTIAL CHARACTERISTICS OF LOCAL COMMUNITIES IN AMERICAN CITIES (1942).

*b. Deterrence Doctrine*

More in line with the modern sentencing goals, the Deterrence Doctrine aims to prevent offenders from repeating crimes through punishment; and to make an example out of offenders so that the public fears punishment.<sup>105</sup> Classical Deterrence Doctrine focuses on three main cornerstones: severity, certainty, and celerity of the punishment.<sup>106</sup> The Deterrence Doctrine asserts that the public's perception of the severity, certainty, and quickness of punishment is all that matters when choosing to conform to the law or commit a crime.<sup>107</sup> Using the internet to perpetuate a crime, such as child pornography, is especially appealing because the internet lacks certainty. The often times anonymous nature of internet participation provides CPOs a sense of safety from the risk of detection and punishment. In *United States v. Williams*, the court provided a detailed summary of the problem surrounding the internet and CPOs stating:

The anonymity and availability of the online world draws those who view children in sexually deviant ways to websites and chat rooms where they may communicate and exchange images with other like-minded individuals. The result has been the development of a dangerous cottage industry for the production of child pornography as well as the accretion of ever-widening child pornography distribution rings. Our concern is not confined to the immediate abuse of the children depicted in these images, but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children. Regulation is made difficult, not only by the vast and sheltering landscape of cyber-space, but also by the fact that mainstream and otherwise innocuous images of children are viewed and traded by pedophiles as sexually stimulating.<sup>108</sup>

As shown in the results of this author's Study, there is little to no deterring effect on CPOs when the court utilizes the currently inadequate PSIRs. In fact, in this study just over 60% of the CPOs analyzed were incarcerated and of those incarcerated, over 55% were sentenced to less than 5 years, allowing for judicial release under the Ohio Revised Code.<sup>109</sup> This is significant because the inadequate PSIRs are diminishing the deterring effects perceived by CPOs through both severity and certainty. Severity is diminished because judicial release allows a CPO a significantly reduced sentence. Certainty is diminished, by way of inadequate PSIRs, causing sentence disparity and a lack of fair, just and consistent sentences throughout the courts.

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<sup>105</sup> RONALD A. AKERS, CRIMINOLOGICAL THEORIES: INTRODUCTION AND EVALUATION 23 (1994).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *United States v. Williams*, 444 F.3d 1286, 1290 (11th Cir. 2006).

<sup>109</sup> *See infra* Part IV.

*c. Rational Choice Theory*

The Rational Choice Theory is based on the assertion that individuals will make decisions based on what will minimize losses and maximize benefits.<sup>110</sup> Rational Choice Theory was originally viewed as an extension of the Deterrence Doctrine, but has since been seen as the “general, all-inclusive explanation of both the decision to commit a specific crime and the development of, and desistance from, a criminal career.”<sup>111</sup> Though some of these theories can aid in explaining the behavior of these offenders, it is important that the current sentencing structure within the courts be adapted to better serve fair, just and consistent sentences.

*D. Risks of Improper Assessment of CPOs*

1. Recidivism Statistics

The criminal justice system manages most convicted sex offenders with incarceration, community supervision, and/or specialized treatment, or some combination thereof.<sup>112</sup> Sex offenders often reoffend even after they have been convicted and served out any sentence.<sup>113</sup> This conduct is known as recidivism, and a familiarity with the research on sex offender recidivism can help the public and policymakers understand the risks posed by convicted sex offenders.<sup>114</sup>

Measuring recidivism of sexual offenses is very difficult for a variety of reasons. Primarily, sexual offenses are vastly underreported. The National Crime Victimization Surveys conducted in 1994, 1995, and 1998 by the Bureau of Justice Statistics indicate that less than 32% of sexual offenses against individuals 12 or older are reported to the proper law enforcement agency.<sup>115</sup> A three-year longitudinal study of 4,008 adult women found that 84% of respondents who identified themselves as rape victims did not report the crime to authorities.<sup>116</sup> Because sex offenses are tragically underreported, sex offense recidivism is also drastically underreported.

Several studies support the hypothesis that sexual offense recidivism rates are underreported. Marshall and Barbaree conducted a study with a sample of sex offenders whereby official records were compared with “unofficial” sources of data,

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<sup>110</sup> AKERS, *supra* note 105, at 23.

<sup>111</sup> *Id.*

<sup>112</sup> See generally FAY HONEY KNOPP ET AL., NATIONWIDE SURVEY OF JUVENILE AND ADULT SEX OFFENDER TREATMENT PROGRAMS AND MODELS (1992).

<sup>113</sup> *Id.*

<sup>114</sup> LIN SONG & ROXANNE LIEB, ADULT SEX OFFENDER RECIDIVISM: A REVIEW OF STUDIES, WASH. STATE INST. FOR PUB. POL’Y CMTY. PROTECTION RES. PROJECT 1 (1994), available at <http://www.wsipp.wa.gov/ReportFile/1161>.

<sup>115</sup> BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, CRIME VICTIMIZATION SURVEY 84 (1994); BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, CRIME VICTIMIZATION SURVEY (1995); BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, CRIME VICTIMIZATION SURVEY (1998).

<sup>116</sup> NAT’L VICTIM CTR. FOR VICTIMS OF CRIME, CRIME VICTIMS RES. & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 6 (1992).



which revealed that the subsequent sex offenses were actually 2.4 times higher than those officially reported.<sup>117</sup> In fact, data collected through polygraph tests on a sample of imprisoned sex offenders who had been convicted of contact with 1-2 victims revealed that these offenders actually had an average of 110 victims and 318 offenses.<sup>118</sup> Another polygraph study found a sample of imprisoned sex offenders to have extensive criminal histories, committing sex crimes for an average of 16 years before being caught.<sup>119</sup>

There is no research documenting the actual recidivism rates of these offenders.<sup>120</sup> In a study conducted by Michael Bourke and Andres Hernandez, 155 sexual offenders voluntarily participated in a year and a half program in a federal prison in Butner, North Carolina called the "Butner Study."<sup>121</sup> There, the researchers determined that the vast majority of CPOs had sexual contact with children prior to being charged, convicted, and incarcerated.<sup>122</sup> Of these offenders, 74% had no prior contact offenses documented in their PSIRs.<sup>123</sup> The study revealed that even though these offenders were documented to have no contact offenses prior to incarceration on the PSIRs, 85% admitted to having at least one hands-on offense, averaging 13.56 victims per offender.<sup>124</sup> The Butner Study strongly indicates that CPOs have already committed, or will commit upon release, sexual offenses against children that will likely remain undetected.

Several studies have analyzed convicted child molesters after their release. One such study included both official and unofficial measures of recidivism (reconviction, new charge, or unofficial record).<sup>125</sup> Using these types of measures, Barbaree and Marshall found that 43% of these offenders sexually reoffended within a four-year follow-up period. In a more recent study, child molesters were followed

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<sup>117</sup> W.L. Marshall & H.E. Barbaree, *Outcomes of comprehensive cognitive-behavioral treatment programs*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 363, 363-385 (W. L. Marshall, D. R. Laws, & H. E. Barbaree eds., 1990).

<sup>118</sup> Sean Ahlmeyer et al., *The Impact of Polygraphy on Admissions of Crossover Offending Behavior in Adult Sexual Offenders*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 123, 129 (2000).

<sup>119</sup> *Id.* at 131.

<sup>120</sup> Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child Pornography Offenders*, 17 SEXUAL ABUSE: J. RES. & TREATMENT 201, 201 (2005).

<sup>121</sup> Michael C. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 185 (2009).

<sup>122</sup> *Id.* at 187.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> H.E. Barbaree & W.L. Marshall, *Deviant sexual arousal, Offense History, and Demographic Variables as Predictors of Reoffense Among Child Molesters*, 6 BEHAV. SCI. & L. 267, 267 (1988).

for an average of six years after the initial charging offense.<sup>126</sup> During that time, 31% of those followed were reconvicted for a second sexual offense.<sup>127</sup>

## 2. Methods of Assessing Recidivism Risk: Clinical and Actuarial

No risk prediction process is completely accurate, and errors do occur. For example, a false negative result occurs when an offender is classified as a low risk for reoffending, yet re-offends after release.<sup>128</sup> While there are many different methods of risk assessment, they generally fall into one of two categories: clinical or actuarial.<sup>129</sup>

“The clinical method of risk assessment requires the observation of an offender by a psychiatrist or a psychologist where the clinician(s) assess risk based on their professional training, theoretical knowledge and experience with offenders.”<sup>130</sup> A clinical assessment is a tool utilized by mental health professionals to determine whether and to what extent a specific individual possesses a significant risk for future offenses.<sup>131</sup> The clinician interviews and/or observes the individual in a neutral setting and considers any available information about the offender’s personality, behavior, and details of the crime itself.<sup>132</sup> The clinician contemplates various risk factors in a clinical assessment, and these risk factors can change over time. Risk factors include mental disabilities, attitudes, behavior, personal history, and social skills.<sup>133</sup> Taken together, the individual characteristics of both the individual and the crime give clinicians a clearer picture of the person in question.<sup>134</sup> At that point, the clinician forms a conclusion as to the level of risk the offender poses to the public.<sup>135</sup> The ability of clinicians to accurately distinguish offenders who will reoffend from those who will not is questionable.<sup>136</sup> In fact, when given enough information, laypersons making clinical predictions have been found to be as accurate as trained clinicians.<sup>137</sup>

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<sup>126</sup> Marnie E. Rice, Vernon L. Quinsey & Grant T. Harris, *Sexual Recidivism Among Child Molesters Released From a Maximum Security Institution*, 59 J. CONSULTING & CLINICAL PSYCHOL. 381, 381 (1991).

<sup>127</sup> Barbaree & Marshall, *supra* note 125, at 272-77.

<sup>128</sup> JOHN HOWARD SOCIETY OF ALBERTA, OFFENDER RISK ASSESSMENT 10 (2000), available at <http://www.johnhoward.ab.ca/pub/C21.htm>.

<sup>129</sup> Don Grubin, *Actuarial and Clinical Assessment of Risk in Sex Offenders*, 14 J. INTERPERS. VIOLENCE 331, 331 (1999).

<sup>130</sup> JOHN HOWARD SOCIETY OF ALBERTA, *supra* note 128, at 4.

<sup>131</sup> *Id.* at 7.

<sup>132</sup> *Id.* at 8.

<sup>133</sup> *Id.* at 7.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Robert Menzies et al., *The Dimensions of Dangerousness Revisited: Assessing Forensic Predictions About Violence*, 18 LAW & HUM. BEHAV. 1, 18 (1994).

<sup>137</sup> *Id.* at 19.

An alternative assessment method is the actuarial method of risk assessment. In contrast to the clinical method, “[t]he actuarial method involves assessing a risk score based on scientific factors and considering an individual’s behavior on the basis of (1) how others have acted in similar situations, or (2) an individual’s similarity to members of other groups.”<sup>138</sup> Through the actuarial method, “characteristics of the individual and the crime are recorded and the offender’s risk is determined by the extent to which he possesses the various risk factors correlated with recidivism.”<sup>139</sup> The data considered in the assessment process using an actuarial method includes the offender’s demographics, education level, employment status, the individual’s criminal history, and known or suspected mental disabilities.<sup>140</sup> Unlike clinical assessments, actuarial assessments have the advantage of providing “offenders with more concrete information on their status, making the system appear less arbitrary.”<sup>141</sup>

Unfortunately, neither the actuarial nor clinical method of risk prediction has proven particularly accurate.<sup>142</sup> Studies have found that actuarial judgments are more predictive of recidivism than clinical judgments, but the factors have not been sufficiently standardized.<sup>143</sup>

#### IV. THE STUDY

There is a disparity in sentences for CPOs in internet crimes against children cases in Northeast Ohio because the PSIR under the Ohio Revised Code §2951.03 will classify most sex offenders as low risk, regardless of where the crimes fall on the Spiral of Abuse.<sup>144</sup> The current risk assessment tools (PSIR) are inadequate and should be replaced by a test, using comprehensive factors, which identifies an offender’s placement on the Spiral of Abuse and assesses relevant factors relating to that placement to aid Northeast Ohio judges in crafting fair, just, and consistent sentences for CPOs.

Data was collected from 238 felony offenses that were prosecuted for violations of internet crimes against children in Northeast Ohio from October 2008 to November 2012. The data set is comprised of information provided from PSIRs produced by the individual courts’ probation departments. The data includes information on the offender’s sex, age, gender, criminal history, offense details, employment, mental health, zip code, third party assistance, physical evidence,

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<sup>138</sup> J. Milner & J. Campbell, *Prediction Issues for Practitioners*, in *ASSESSING DANGEROUSNESS: VIOLENCE BY SEXUAL OFFENDERS, BATTERERS, AND CHILD ABUSERS 20-40* (J.C. Campbell ed., 1995).

<sup>139</sup> JOHN HOWARD SOCIETY OF ALBERTA, *supra* note 128, at 5.

<sup>140</sup> *Id.*

<sup>141</sup> Ralph Serin & H.E. Barbaree, *Decision Issues in Risk Assessment*, 5 *FORUM ON CORRECTIONS RES.* 22-25 (1993).

<sup>142</sup> JOHN HOWARD SOCIETY OF ALBERTA, *supra* note 128, at 10.

<sup>143</sup> Edmund Howe, *Judged Person Dangerousness as Weighted Averaging*, 24 *J. APPLIED SOC. PSYCHOL.* 1270, 1270-90 (1994); *see also* Steven Gottfredson & Don Gottfredson, *Behavioral Prediction and the Problem of Incapacitation*, 32 *CRIMINOLOGY* 441, 441-474 (1994).

<sup>144</sup> BONTA ET AL., *supra* note 93; *see also* OHIO REV. CODE ANN. §2951.03 (West 2014).

digital evidence, risk assessment score, and personal interactions with the victim. Data was stripped of identifying information before any analysis was performed. This research has been reviewed by the University of Nevada, Office of Human Research Protection and is considered exempt from human subject protection requirements.<sup>145</sup>

Data analysis was conducted using the Statistical Package for Social Sciences (SPSS) Version 22. Descriptive statistics, including frequencies, ranges, means, and standard deviations, were used to describe the study sample. The analysis used generalized linear models and mixed methods of analysis to allow for the examination of variation between group means, while also accounting for within-group variance. This design permitted review of sentencing outcomes, the exploration of the relationship between legal and extralegal factors and the disposition of cases.

#### *A. Description of the Study Sample*

The data analysis began with 238 felony offenses that were prosecuted for violation of internet crimes against children in Northeast Ohio from October 2008 to November 2012.<sup>146</sup> An examination of these PSIRs revealed that 98% of the offenders were men, ranging in age from 18 to 71. The majority of the offenders were Caucasian (79.8%), while only 5.9% were African American, 2% Hispanic, and 1% Asian. Over half of the men (51.5%) were employed full time at the time of arrest, while no employment was listed on the PSIR in 49.2% of the cases. Of the sample, 48.4% of offenders had a high school or GED equivalent, 20.4% had a college degree, and 4.3% had attended post graduate school. Only 17.2% had less than a high school education. In terms of family history, 20.2% of the sample had been married, with 61.6% never married and 16.2% divorced. 67% reported no children, and 33% reported having children. In terms of personal history, 42.6% reported taking medication for mental health, 45.2% reported drug abuse, and 62.7% reported alcohol abuse.

#### *B. Convicted Offenses Included in the Study*

Of the 238 cases examined, 14.7% were convicted of assault, molestation, or abuse. 14.7% were convicted of possession of child pornography, 61.8% were convicted of distribution, 4.2% were convicted of manufacturing, 2.1% were convicted of enticement, 1.3% convicted of obscenity directed to a minor, and 0.4% were cases involving a traveler who went to meet a minor. Of the sample, 84.5% of the CPOs were convicted of multiple counts.

#### *C. Types of Pornographic Images Used to Charge CPOs in the Study*

The Primary Ohio ICAC agency<sup>147</sup> referred 77.3% of the 238 cases, while 22.7% were from an ICAC affiliate.<sup>148</sup> The Ohio ICAC works with the National Center for

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<sup>145</sup> Data on file with author.

<sup>146</sup> To note, only 99 of these cases contained fully, 100% completed PSIRs.

<sup>147</sup> OHIO INTERNET CRIMES AGAINST CHILDREN TASK FORCE, <http://www.ohioicac.org/> (last visited Apr. 28, 2015).

<sup>148</sup> NAT'L CENTER FOR MISSING AND EXPLOITED CHILDREN, <http://www.missingkids.com/home> (last visited Apr. 28, 2015).

Missing and Exploited Children (NCMEC). NCMEC has been chartered with the task of identifying the children used in pornography and provides a cyber tip line for third parties to report possible child pornography.<sup>149</sup> If the child has been identified and has given a victim impact statement, it is used in the offender's sentencing hearing.

Child pornography in this 238-case sample was found in multiple technological formats and media, including print, videotape, film, CD-ROM, and DVD. It was transmitted on various internet platforms, including newsgroups, Internet chat rooms, Instant Message, File Transfer Protocol, e-mail, websites, and peer-to-peer technology (e.g., LimeWire). NCMEC has provided the hash codes for previously identified child pornography images to internet service providers and other agencies.<sup>150</sup> These codes have increasingly helped identify offenders because the codes allow internet service providers and other agencies not to have to view the images but rather, to be able to notify authorities.<sup>151</sup> The Ohio ICAC only charges offenders for images that are known to be child pornography. The evidence that was used in these charges was 90.5% digital and 10.9% physical.

#### *D. Case Dispositions*

Of the 202 valid cases<sup>152</sup> that are part of this sample 91.58% were resolved by way of plea, 2.97% went to trial, and 5.45% were dismissed. In all valid samples,<sup>153</sup> 62.15% of the CPOs were incarcerated and, of that number, 56.4% were incarcerated for 48 months or fewer. Of the 37.85% of offenders for whom probation was ordered, 54.5% received 48 months or fewer of supervision.

#### *E. Risk Assessments Analyzed*

Risk assessments were conducted for 61 offenders, or 25.6% of the entire sample. As stated above, this data include demographic information such as age, sex, race, citizenship, education, and marital status, offender's family and home history, physical health, substance abuse history, employment, and income.

#### *F. Narrowing the Research: Analyzing the 61 Risk Assessments Collected*

After analyzing the general statistics described in the 238 PSIRs, it became necessary to narrow the sample to the 61 PSIRs that included risk assessment scores. As stated above, there is a possibility that the sentencing of CPOs may be unrelated to the risk assessment score because the offender is typically a white male with education and steady employment, which results in an unreasonably low risk assessment score under the current PSIR utilization reflected in this data. Taking a closer look at the data collected, of those with a risk assessment, 68.9% of the

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<sup>149</sup> See *supra* note 56.

<sup>150</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-334, COMBATING CHILD PORNOGRAPHY: STEPS ARE NEEDED TO ENSURE THAT TIPS TO LAW ENFORCEMENT ARE USEFUL AND FORENSIC EXAMINATIONS ARE COST EFFECTIVE 65 (2011).

<sup>151</sup> *Id.*

<sup>152</sup> To note, 36 of the sample cases did not have a valid disposition, thus 202 were analyzed.

<sup>153</sup> To note, 61 of the sample cases did not have a valid incarceration, thus 177 were analyzed.

offenders are under the age of 40, and 100% were males with 83.6% of the males being Caucasian. Additionally, 34.4% were married, divorced, or separated, and 29.5% had children. Of those with risk assessment scores, 60% were either employed or retired at the time of arrest, and 26.2% had completed education past high school. The majority of the offenders lived within Ohio at the time of their offense. Further analysis of the 61 risk assessments collected shows that no individual extralegal factor contributed significantly to determining an adequate sentence. In cases of incarceration, risk assessment was not a significant contributing factor.

#### Correlation Between Risk Assessment Score and Punishment<sup>154</sup>

Descriptive Statistics	Mean	Std. Deviation	N
Number of Months Incarceration	94.32	184.398	37
Number of Months Probation	41.74	16.529	23
Jail Days	27.98	57.752	59
Risk Assessment Score	5.13	2.778	61

CORRELATIONS		Number of Months Incarceration	Number of Months Probation	Number of Jail Days Sentenced
Risk Assessment Score	Pearson Correlation	-.058	.094	.471**
	Sig. (2-Tailed)	.732	.671	.000
	Number	37	23	59

The information included in the table above shows that a correlation only exists between risk assessment and number of days spent in jail prior to sentencing, with higher risk assessment cases resulting in more days in jail for the offender. No correlation exists with regard to the number of months incarcerated analyzed against the risk assessments collected, thus showing that the use of PSIRs within the trial courts is inadequate and misused.

Looking specifically at the number of months incarcerated for each risk assessment score, the majority of offenders were sentenced to terms less than 5 years.

<sup>154</sup> Data on file with author.

**Months of Incarceration v. PSIR Score**<sup>155</sup>

Number of Months Incarcerated	RISK ASSESSMENT SCORE										Totals
	2	3	4	5	6	7	8	10	11	12	
10	0	0	0	1	0	0	0	0	0	0	1
12	0	0	0	1	0	0	0	0	0	0	1
24	0	2	2	1	1	0	0	0	0	0	6
36	1	3	1	1	3	0	2	0	1	0	12
48	0	0	1	2	0	0	0	1	0	0	4
60	1	1	0	0	1	0	0	0	0	0	3
96	0	1	0	1	1	0	0	0	0	0	3
120	0	1	0	0	0	0	0	0	0	1	2
144	0	0	0	0	0	0	0	0	0	1	1
192	1	0	0	0	0	0	0	0	0	0	1
204	0	0	0	0	0	0	1	0	0	0	1
336	0	0	0	0	0	1	0	0	0	0	1
1116	0	1	0	0	0	0	0	0	0	0	1
<b>TOTALS</b>	<b>3</b>	<b>9</b>	<b>4</b>	<b>7</b>	<b>6</b>	<b>1</b>	<b>3</b>	<b>1</b>	<b>1</b>	<b>2</b>	<b>37</b>

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<sup>155</sup> Data on file with author.

As displayed within the crosstab, 27 out of 37 individuals were sentenced to 5 years or fewer regardless of the risk assessment score. This result is significant and likely caused by judges wanting to sentence offenders under the concept of “judicial release.” The assumption underlying judicial release is that offenders will be “shocked” into a realization of the severity of prison life and thereby deterred from future conduct.<sup>156</sup> Accordingly, shock probation or judicial release allows trial courts to review offenders within set periods of time and assess whether or not the principles and purpose of sentencing have been achieved during the time an offender was already incarcerated.

#### Chi-Square Tests<sup>157</sup>

	Value	Df	Asymp. Sig. (2-sided)
Pearson Chi-Square	126.686 <sup>a</sup>	108	.106
Likelihood Ratio	67.956	108	.999
Linear-by-Linear Association	.122	1	.727
N of Valid Cases	37		

Pearson’s chi-squared test is a statistical test applied to sets of data to evaluate how likely, or not, it is that any observed difference between the data sets arose purely by chance.<sup>158</sup> Based on the data analysis, there is no significant relationship between the risk assessment and the number of months incarcerated, displayed by the Pearson Chi-Square. This could be explained by; 1) the probation department compiling the PSIR data failed to adequately assess the recidivism risk, or 2) judges failed to consider the risk assessment and sentenced CPOs based on the stigma of either the crime or statutory defined penalties.

## V. PROPOSED SOLUTION

### A. Introducing a New Method of Risk Assessment

The Spiral of Abuse, created by Dr. Joseph Sullivan, is a conceptual framework that has been utilized as a clinical tool for understanding sex offenders.<sup>159</sup> The first rung of the Spiral is that time period when offenders first become aware of their sexual interest in children.<sup>160</sup> At this stage, offenders will try to deny, rationalize, or

<sup>156</sup> Gennaro F. Vite et al., *Shock Probation in Ohio: A Comparison of Outcomes*, 25 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 70 (1981) (noting that in Ohio, shock probation is not part of the original sentence; rather it is a program of judicial reconsideration). Pursuant to Ohio Revised Code §2929.20, judicial release or “shock probation” permits the trial court to reduce a previous prison term and place an eligible offender on release as long as the sentencing term is under 60 months.

<sup>157</sup> Data on file with author.

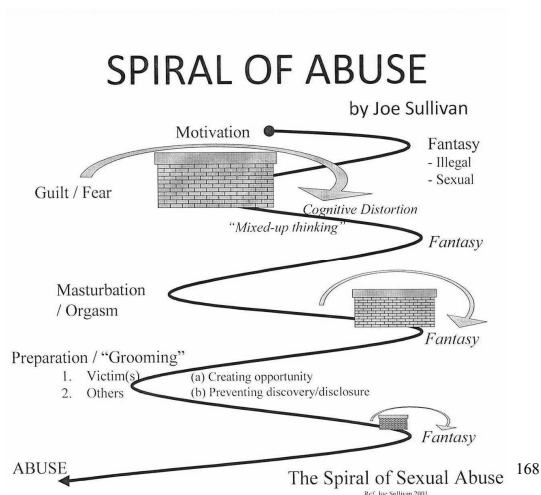
<sup>158</sup> NARINER KAUR GOSALL & GURPAL SINGH GOSALL, *THE DOCTOR'S GUIDE TO CRITICAL APPRAISAL* 129-30 (3d ed. 2012).

<sup>159</sup> Joseph Sullivan, *The Spiral of Sexual Abuse: A Conceptual Framework for Understanding and Illustrating the Evolution of Sexually Abusive Behaviour*, NOTA NEWS, 2002, at 17-21.

<sup>160</sup> *Id.*



minimize their actions.<sup>161</sup> This behavior allows offenders to overcome the fear of being taboo in order to achieve the sexual gratification and arousal desired.<sup>162</sup> The offenders begin a behavioral conditioning process by continually fantasizing about their sexual interests in children, re-enforcing and strengthening their belief that their sexual desires are acceptable.<sup>163</sup> The next stage in the downward Spiral is when an offender begins “grooming” a child. This stage occurs over time as the individual becomes accustomed to his physical manifestations and seeks to make the fantasy a reality.<sup>164</sup> At this point, the individual will begin preparing or seeking out ways to make his fantasies come true.<sup>165</sup> This can be accomplished in numerous ways, such as showing a child special attention, giving him or her gifts, or even alienating a child in order to make the child less likely to report the abuse or place doubt in the minds of adults as to whether the child is being truthful.<sup>166</sup> If an opportunity is presented to an offender because of his grooming, then the final stage of the downward Spiral will be actualized and the offender will engage in the sexual conduct with the child.<sup>167</sup>



<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> JOE SULLIVAN & ANTHONY R. BEECH, CHILD SEXUAL ABUSE & THE INTERNET: TACKLING THE NEW FRONTIER 69 (Martin C. Calder ed. 2004).

<sup>167</sup> *Id.*

<sup>168</sup> Sullivan, *supra* note 159, at 17-20.

*B. Identifying the CPO's Placement on the Spiral of Abuse—Stage 1, 2, or 3*

In light of the emergence of the internet crimes against children over the past decade, the sentencing structure currently utilized must be adapted to effectively sentence CPOs. The crux of effectively sentencing CPOs is ensuring that trial courts engage in a thorough analysis not only of the crime which the offender has been convicted, but also the mental state and intentions of the defendant. To accomplish this goal, a comprehensive list of factors based upon the Spiral of Abuse and case specific circumstances has been developed as an aid for trial courts when sentencing CPOs. The current risk assessment tools are inadequate and should be replaced by this set of factors, which identify an offender's placement on the Spiral of Abuse and allow Northeast Ohio judges to craft fair, just, and consistent sentences for CPOs.

The trial court should first identify the stage at which the defendant's conduct falls on the Spiral of Abuse. The proposed stages are as follows:

Stage One: Engaging in Cognitive Distortion	Possessing Child Pornography
Stage Two: Grooming	Contacting Children
Stage Three: Abuse	Creating Child Pornography or Taking Affirmative Action to Realize Sexual Fantasy

These stages are designed to assist the trial court judges in determining the proper colloquy to undertake with a defendant during sentencing, and to utilize specific factors that correlate with each stage. By engaging in a colloquy that is stage-specific, trial court judges will gain deeper insight into the motivations of the offenders, the trauma suffered by the victim, and the risk of danger the offender poses to the community.

**The proposed factors for each stage in the Spiral of Abuse include:**

Stage	Description	Factors
Stage One	Possessing Child Pornography	<p>How many images does the offender have in his/her possession?</p> <p>What are the ages of the children depicted in the images?</p> <p>What is the type of download, and has the offender shared the images with others? If so, how many individual shares?</p> <p>How long has the offender possessed these images?</p> <p>Are the images known or unknown images of child pornography?</p> <p>Were the images stored in an allocated or unallocated location on the offender's computer?</p> <p>Is there a pattern of the images downloaded, including, but not limited to, incest or bondage, which show an increased harm to the victim?</p>
Stage Two	Contacting Children	<p>Has the offender contacted minors through the use of chat rooms or other internet forums?</p> <p>Has the offender asked a minor if he or she would like to meet, or attempted to set up a time and location to meet?</p> <p>Has the offender sent a minor any gifts?</p> <p>Has the offender asked a minor for sexual images?</p> <p>Has the offender attempted to groom a minor through providing sexual images of himself or herself to the minor?</p> <p>What are the age, mental state, and physical capabilities of the minor contacted by the offender?</p>
Stage Three	Creating Child Pornography or Taking Affirmative Action to Realize Sexual Fantasy	<p>Has the offender created child pornography by engaging in a sexual act with a minor?</p> <p>Has the offender taken an affirmative act such as getting in their car to meet a minor?</p> <p>Has the offender used hidden devices, such as a hidden camera, to capture images of a minor?</p> <p>If the answer is "yes" to any of the questions in 1-3, then:</p> <p>Has the offender placed those images on the internet, or shared the images with others?</p> <p>Does the offender have a relationship with the victim?</p>

## 1. Stage One

The stage one factors are designed to aid trial court judges in assessing the severity of the offense and the likelihood that an offender will continue to fall down the Spiral of Abuse if the offender is given probation or insignificant incarceration.

According to the data collected in this author's Study, there is no correlation between the risk assessment score and the number of months incarcerated.

**Correlations of Risk Assessment Score and Number of Months Incarcerated<sup>169</sup>**

Correlations		Number of Months Incarcerated
Risk Assessment Score	Pearson Correlation	-.058
	Sig. (2- Tailed)	.732
	Number of Individuals	37

In taking the 37 individuals sentenced to incarceration and evaluating their risk assessment scores, the Pearson Correlation shows that there is no relationship between risk assessment score and number of months incarcerated, again showing that the use of the extralegal factors gathered in the PSIR fails as a sentencing tool in ICAC cases. The purpose of these stage one factors is to dispel the notion that offenders who possess images have not committed a serious offense that warrants punishment. For example, the lack of criminal history sometimes influences courts to give these first time offenders lighter sentences regardless of how many images they possessed. Some may view possession of child pornography as less serious than actual abuse of a minor. Nonetheless, the trauma is enduring for victims whose pain and suffering grow exponentially from having images of them being sexually exploited constantly shared and spread across the internet.<sup>170</sup> The minor is re-victimized each time the image is shared, often occurring for the rest of his or her life.<sup>171</sup> Examining the number of images the offender possessed, the length of time the images had been possessed, the location of the images, and the pattern of downloads will help trial courts gain insight into an offender's motivation, by examining how long the defendant has been offending, and the likelihood of whether or not intensive therapy might rehabilitate the individual.

<sup>169</sup> Data on file with author.

<sup>170</sup> See *Testimony of the Victims of Advisory Group: Pub. Hearing on Fed. Child Pornography Offenses Before the U.S. Sent'g Comm'n* (2012) (statement of Susan Howley, Victims Advisory Group Chair).

<sup>171</sup> See *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982). The Supreme Court likewise has described child pornography images as "a permanent record" and explained that "the harm to the child is exacerbated by their circulation." *Id.* at 759.

There is a common misconception that all child pornography is downloaded for the purpose of achieving sexual gratification. Indeed, there are both sexual and non-sexual motivations for downloading child pornography.<sup>172</sup> Non-sexual motivations include downloading the images out of curiosity, compulsive collecting behaviors, and problems interacting socially.<sup>173</sup> For offenders who obtain the images for non-sexual motivations, programs that have intensive therapy aimed at strengthening impulse control will be more beneficial than for offenders who obtain the images for the purpose of masturbating and achieving other forms of sexual releases.<sup>174</sup> For example, an offender who has three images of child pornography in an unallocated location is a better candidate for intensive therapy and probation than an offender who has five hundred images categorized and saved in folders which he has shared with other offenders.

The remaining stage one factors are designed to aid the court in assessing the risk the offender poses to the public and the likelihood of continuing to harm the victims. For example, it is important for trial courts to inquire whether the offender possessed images that were unknown and therefore not considered in the offender's conviction. Often in ICAC cases, prosecutors do not charge for "unknown" images—where the age of the photographed or videotaped victim cannot readily be established.<sup>175</sup> In cases where images are known, law enforcement officers are better able to reach out to victims, provide courts with impact statements that allow courts to personalize the offensive nature of the images, and assist victims in gaining access to treatment and therapy that they may need.<sup>176</sup> Conversely, if the image is unknown, law enforcement officers must spend time and resources locating the victims who may be unaware that the images were taken or shared.<sup>177</sup> Additionally, these victims are unable to provide impact statements to courts, do not have access to the treatments and therapy that they may need, and will continue to be re-victimized as the unknown image is spread across the internet while law enforcement works to locate and identify them.<sup>178</sup>

Moreover, by inquiring whether the offender shared the image with others, trial court judges will be able to assess whether the offender has re-victimized the minor by spreading the image. Often, trial courts do not examine whether or not the offender engages in "community" behavior.<sup>179</sup> While not all offenders are engaged in an online community, many are.<sup>180</sup> Trading forums allow offenders to share images through anonymous mass distribution and often encourage the collection of new images. Offenders who are active in these forums pose a greater risk as they

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<sup>172</sup> SULLIVAN ET AL., *supra* note 166, at 69.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> PATTI B. SARIS ET AL., FEDERAL CHILD PORNOGRAPHY OFFENSES 73-106 (2012).

continuously spread the images of child abuse and enable others to continuously break the law.<sup>181</sup>

## 2. Stage Two

The stage two factors will aid trial court judges in assessing an offender's motivation for possessing the images and whether an offender is likely to escalate his behavior into committing acts of sexual abuse on children in the future. Offenders whose actions fall within the second stage require trial courts to carefully analyze the scope of the offenders' communication and the depth of the offenders' cognitive distortion. This is a critical stage for the offender and the trial court, particularly because it serves as the final gateway to committing physical acts of child abuse. The level of grooming—whether the offender has targeted a specific child, sent a child a gift, or alienated a child to the offender's benefit—will give the trial court the necessary insight into whether an offender was likely to actually seek out a child victim to sexually abuse. The farther along in the grooming process an offender is, the greater the threat he poses to children and the public community at large.<sup>182</sup>

Grooming is designed to desensitize child victims, making them more susceptible to being abused and less likely to report the abuse because of the relationship the offender has forged with the victims.<sup>183</sup> The factors in stage two are further designed to aid trial courts in determining whether an offender has placed himself in a position within his community which has or will enable him to abuse a position of power or trust. An offender who holds a position of power and trust will have access to a readily available pool of potential victims. Several positions that should be of great concern to trial courts include, but are not limited to, immediate and extended family members and their significant others, healthcare workers, education workers, counselors, religious leaders, and community activity leaders like coaches.

## 3. Stage Three

The stage three factors assist trial court judges in understanding the circumstances surrounding the child abuse. Offenders in the final stage of the downward Spiral clearly pose a high risk to the safety of children and the community at large; but examining the specific facts of the crime will help courts effectively sentence the offender. The factors are designed to aid trial courts in their analysis of the potential and actual physical, mental and emotional harm committed by the offenders.

A crucial aspect of a trial court's analysis in stage three is examining the magnitude of the victim's mental and emotional harm, which is often incorrectly given less weight by trial courts than physical harm. For example, if the offender placed a hidden camera in a victim's bedroom or bathroom, the emotional and mental trauma will be significant and semi-permanent, even though the offender may not have physically touched the child. Similarly, if the offender was a family member or an individual who held a position of trust within the community, the long-term effects may be extensive, and may commit the victim to a mental "life

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<sup>181</sup> *Id.*

<sup>182</sup> SULLIVAN ET AL., *supra* note 166, at 69.

<sup>183</sup> *Id.*

sentence” inasmuch as such abuse may lead a victim to have severe trust issues and trouble developing normal intimate relationships.

Additionally, ICAC victims often struggle with understanding and coming to terms with the abuse they suffered based on their age. Children are most vulnerable to sexual abuse between the ages of 7 and 13.<sup>184</sup> One prominent study found that the median age for reported abuse is children who are 9 years of age.<sup>185</sup> Due to the young age of many of the victims and their limited cognitive capabilities, it is particularly difficult for the children to mentally process the abuse they suffered, resulting in years of trying cope with the abuse and the extent of the trauma, which, in turn, often results in children being re-traumatized throughout their healing process.<sup>186</sup> Accordingly, in addition to considering the intent of the offender, the stage three factors enable sentencing judges to gain a deeper insight into the struggles an ICAC victim will experience throughout his or her life.

### C. Revisiting *Ohio v. Goldblatt* and *Ohio v. Pompa*

The dispositions in *Ohio v. Goldblatt* and *Ohio v. Pompa* clearly exemplify the sentencing disparity in Ohio CPO cases, where judges relied on PSIRs to impose sentences. Under the current PSIR method utilized in Ohio, both offenders would be classified as a low risk for recidivism, thus allowing judges to sentence these individuals to anywhere from a minimum sanction of community control (*Goldblatt*) to a maximum life sentence (*Pompa*). The PSIR method assesses individual’s risk based on a set of factors such as age, race, employment, citizenship, education, marital status, family and home history, physical health, substance abuse history, and criminal history. Here, both individuals were in their late 40s, Caucasian, U.S. citizens, well educated, employed, married with children, no criminal history or substance abuse, and trusted members within their respective communities. Based upon these factors, both *Pompa* and *Goldblatt* would receive an assessment indicating a low risk for recidivism.

Under this author’s suggested Spiral of Abuse method, however, First the trial court would determine where *Goldblatt* and *Pompa*’s conduct fell among the three stages on the Spiral of Abuse. It is clear that both: (1) possessed child pornography under stage one, (2) contacted children under stage two, and (3) either created child pornography or took affirmative action to realize their fantasy. Under this analysis both *Goldblatt* and *Pompa* would be determined to fall within Stage Three: Abuse. After determining the stage into which *Goldblatt* and *Pompa* fell, the court would then apply the stage three factors to gain a better understanding of the circumstances surrounding the child abuse. Here, Jay *Goldblatt* took affirmative action by setting up a meeting with an FBI agent posing as a mother who was to prostitute her child and then got into his vehicle to meet with the child to perform sexual acts. Roy *Pompa* created child pornography, used hidden devices to photograph his child abuse, and uploaded the child pornography to the internet. Under this stage three

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<sup>184</sup> David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 4 THE FUTURE OF CHILDREN 31, 46-48 (1994).

<sup>185</sup> Frank W. Putnam, *Ten-Year Research Update Review: Child Sexual Abuse*, 42 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 269, 269-78 (2003).

<sup>186</sup> *New York v. Ferber*, 458 U.S. 747, 759 n.10 (1982).

analysis, it is clear that both would pose a high risk to the safety of children and the community at large.

This Spiral of Abuse analysis illustrates that Goldblatt and Pompa moved through each stage—motivation, guilt/fear, masturbation, preparation/grooming, and, finally, an affirmative act to realize his sexual fantasy—yet received significantly different sentences. Had the trial court judge relied on this author's Spiral of Abuse analysis rather than the problematic PSIRs, both offenders would have justly received substantial prison time, alleviating the disparity of sentences within Northeast Ohio.

#### *D. Additional Recommendations*

Outside of analyzing the factors set forth above, the trial court should also consider the circumstances and conduct an in camera review of the images. Trial court judges should consider the circumstances surrounding the offender being caught with child pornography for multiple reasons. First, it will give the trial court insight into the length of time the offender has been in possession of or has shared images of child pornography. Second, it will aid the trial court in its analysis of the risk and danger the offender poses to the public. For example, if a wife turned her husband in because she was concerned about her children, that would show an increased risk to the safety of children, as opposed to an offender who was caught downloading child pornography that was mixed with adult pornography. If the offender's primary focus was on the adult pornography, then the offender most likely poses a lesser risk of safety to children.

The trial court should also conduct an in camera review of the images the offender possessed. While the natural inclination for most judges is to avoid seeing the images, declining to review the images in the offender's possession is highly detrimental to effectively sentencing the offender. Trial courts must treat the images just as they treat all other evidence presented to them in non-sex offense cases. The ICAC images in offenders' possession show a crime scene and the crime committed, just as crime scene and coroner photographs show what crime occurred in a homicide case. Just as trial courts often use factors such as how a victim was killed, such as the proximity of a shooter, the number of times a victim was shot or stabbed, and where the crime occurred, a trial court should also consider the location of the abuse and the circumstances surrounding the abuse in an ICAC case. It cannot be ignored that trial courts should take all necessary steps to ensure that the images are not made public or viewed in a manner that would increase the harm to a victim. An in camera review of the images alleviates this problem, as it ensures the sensitive nature of the images will not be improperly exposed, while enabling the trial court to gain a deeper understanding of the crime for which it is sentencing the offender.

#### *E. Study Limitations*

This Study was conducted to determine the validity of PSIRs utilized with sexual offenders within Northeast Ohio. It is important to note certain limitations that exist within the current research in order to leave open the development of a more comprehensive study. The first problem encountered is that only 61 of the 238 PSIRs collected included a risk assessment score. It would be much more beneficial to have more data on the risk assessments of these CPOs, but not every judge orders a risk assessment with the PSIR. Though there were only 61 risk assessments calculated, that number is sufficient to show that there is a trend within the data that proves the PSIR is flawed or seriously suspect.



Additionally, it is important to note that Ohio is one of the few remaining states in which judges are elected to the bench. Since judges must run for re-election at the completion of their six-year term, a possibility exists that judges strategically become “tough on crime” during campaigning. This may influence sentencing in all criminal cases, including internet crimes against children. This report did not examine individual members, the bench, or the possible correlation between sentencing and election years; however it is an issue that could be properly examined in a future study.

## VI. CONCLUSION

This Study examines the patterns of sentencing CPOs in Northeast Ohio between October 2008 and November 2012. The data reveals that a correlation exists only between risk assessment and number of days spent in jail prior to sentencing, with the higher risk assessment cases resulting in more days in jail for the offender. No correlation exists, however, between the risk assessments and the number of months incarcerated. This is extremely troubling as it reveals that trial court judges are either (1) not sentencing offenders to terms of incarceration based upon a totality of the circumstances in their individual cases or (2) not engaging in the colloquy necessary to adequately and appropriately sentence CPOs. Sentences should be commensurate with, and not demeaning to, the seriousness of the offender’s conduct, while considering the impact on the victim and the consistency with sentences for similar crimes by similar offenders.<sup>187</sup>

While the federal and state governments have taken a strong, proactive approach to investigating and prosecuting CPOs, there is a clear and undesirable disparity in sentencing offenders. Offenders who commit internet crimes against children are not the typical defendants many trial courts have become accustomed to sentencing, which often leads to low sentencing ranges and the possibility of judicial release for an overwhelming majority of CPOs in Northeast Ohio. Several attempts to correct sentencing disparities have been implemented, such as PSIRs and risk assessments, yet none have been successful in CPO sentencing.

PSIRs and risk assessments are inadequate because of the demographics of the typical CPO, who, under these assessment tools, qualify as low risk offenders. PSIRs and risk assessments rely solely on extralegal factors that have proven, based upon the data collected in this Study, to have no correlation to sentences imposed on CPOs. Just as investigators, prosecutors, and others in the law enforcement community have become educated about internet crimes against children, the judiciary must now do so. Trial court judges must conduct more than just a cursory review of the crime, the charge, and pleading in order to properly assess the risk of danger an offender poses to the community. Utilizing the Spiral of Abuse and the factors provided in this article, sentencing judges could conduct a thorough colloquy with offenders. The factors are not designed to eliminate judicial discretion, but rather to aid sentencing judges by providing a better understanding of internet crimes against children. The unique nature of internet crimes against children requires trials courts to conduct a more comprehensive analysis in order to eliminate sentencing disparities.

First, the trial court judge must determine which stage an offender falls on the Spiral of Abuse. Second, the trial court judge must examine the factors within the

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<sup>187</sup> OHIO REV. CODE ANN. § 2929.11(B) (West 2014).

appropriate stage to properly account for the physical, mental, and emotional abuse the victim suffers. Finally, the trial court judge must carefully consider the type of child pornography the offender had in his possession.

Protecting the community requires that sentencing judges have the necessary knowledge and understanding of the crimes, the intent of the offender who committed the crime, and likelihood of an offender committing future crimes to properly sentence CPOs. The goal of this Study was to design a tool that can aid trial court judges in traversing the complex, uncharted world of internet crimes against children cases so that victims and the public can receive the protection and peace of mind that they deserve. The data collected show that the PSIRs and risk assessments currently used are inadequate, and it is time for the bench to proactively eliminate sentencing disparity.

