

10-30-2023

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Lucy T. Shephard
New York County District Attorney's Office

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Recommended Citation

Lucy T. Shephard, *When a Picture is Worth a Thousand Sentences: A Call to Reword Federal Sentencing of Non-Production Child Pornography Offenses in the United States*, 71 Buff. L. Rev. 841 (2023).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol71/iss4/4>

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COMMENT

When a Picture is Worth a Thousand Sentences: A Call to Reword Federal Sentencing of Non- Production Child Pornography Offenses in the United States

LUCY T. SHEPHARD[†]

INTRODUCTION

The harm and everlasting trauma child victims experience through the making, distributing, and repeated viewing of child pornography is inconceivable and heartbreaking.¹ A prison sentence that an individual receives for possessing, receiving, and distributing child pornography based on section 2G2.2 of the Federal Sentencing Guidelines (“the Guidelines”),² however, is unjustifiable.

[†] J.D. 2023, University at Buffalo School of Law. Assistant District Attorney, New York County District Attorney's Office. The views expressed herein are those of the author alone and do not necessarily reflect the view of the New York County District Attorney's Office or the City of New York.

1. See *Child Sexual Abuse Material (CSAM)*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., <https://www.missingkids.org/theissues/csam> (last visited May 19, 2023). Children are sexually abused in the production of child pornography as well as re-victimized each time someone views the image or video of their sexual abuse. *Id.*; CHARLES PATRICK EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN: PSYCHOLOGICAL, LEGAL, AND PUBLIC POLICY PERSPECTIVES 114 (2014).

2. U.S. SENT'G GUIDELINES MANUAL § 2G2.2 (U.S. SENT'G COMM'N 2021).

In 2022, John Smith³ was sentenced to ninety-six months' (eight years') incarceration for possession of child pornography. Mr. Smith's recommended sentence under the Guidelines would have been *twice* that simply because he used a computer and accessed more than 600 pornographic images. Meanwhile, Mr. Smith *never* sexually abused a minor and had *never* committed a crime in the past. Nevertheless, Mr. Smith could have served up to 210 months' (17.5 years') incarceration for just possessing child pornography.

In the same courthouse, James Doe⁴ was sentenced to eighty-four months' (seven years') incarceration, one year less than Mr. Smith, for kidnapping and raping a minor. Mr. Doe picked up the minor from school, drove her across state lines, and had sex with her. Law enforcement only found the victim after issuing an Amber Alert and using GPS tracking to trace her phone. Under the Guidelines recommendation, however, Mr. Doe deserved *half* the sentence that Mr. Smith's conduct warranted, even though Mr. Smith never touched a minor.

Mind you, Mr. Smith still committed a serious offense, and he should spend time in prison. On his iPhone, law enforcement discovered thousands of child pornography images, which depicted minors under twelve years old. Prior to his sentencing, however, Mr. Smith expressed genuine remorse for his offense. He had dedicated himself to intensive therapy, and his strong support system of friends and family devoted themselves to his addiction recovery.

At sentencing, though, the judge wore his own shackles; the judge had to consider the Guidelines. Even though the judge varied significantly below the recommended Guidelines range, Mr. Smith still received ninety-six months' (eight years') incarceration and six years' supervised release.

3. "John Smith" is an alias for a real individual convicted of possession of child pornography. His name was changed to protect his identity. His case documents are on file with the author.

4. "James Doe" is an alias for a real individual convicted of enticing travel to engage in criminal sexual activity under 18 U.S.C. § 2422(a). His name was changed to protect his identity. His case documents are on file with the author.

Currently, Mr. Smith sits in his prison cell at a federal correctional institution. For the next eight years, taxpayers will pay approximately \$313,264⁵ to house him. Luckily, the Federal Bureau of Prisons (BOP) placed him in a facility that offers a sex offender treatment program.⁶ Mr. Smith, however, will wait at least five years to receive any sort of treatment.⁷ Meanwhile, he will likely lose any mental health progress from his pre-sentencing counseling and treatment as he prepares to survive the dangerous prison environment. Slowly, Mr. Smith will lose contact with his loved ones as individuals grow tired of traveling thousands of miles to visit, receiving sporadic fifteen-minute phone calls, and returning inconsistent emails. He will also see Mr. Doe leave before him and hopefully not return. Ultimately, in eight years, Mr. Smith will reenter society, and we can only hope that paying \$313,264 for him to sit in prison miraculously transformed him into a productive citizen.

Mr. Smith's case is not an anomaly, both in its extraordinarily high Guidelines recommendation and in the ultimate "leniency" of the below-Guidelines sentence received. Indeed, from 2017 to 2021, 100% of offenders convicted of possessing child pornography in the Western District of New York who had no criminal history received

5. Annual Determination of Average Cost of Incarceration Fee (COIF), 85 Fed. Reg. 49,060 (Sept. 1, 2021), <https://www.federalregister.gov/documents/2021/09/01/2021-18800/annual-determination-of-average-cost-of-incarceration-fee-coif>. In fiscal year 2020, the average annual cost of incarceration per federal inmate in a federal facility was \$39,158 (\$120.59 per day). *Id.*

6. Only nine facilities offer sex offender treatment programs: FMC Carswell, FMC Devens, FCI Elkton, FCI Englewood, FCI Marianna, USP Marion, FCI Petersburg Medium, FCI Seagoville, and USP Tucson. *See Custody & Care: Sex Offenders*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/sex_offenders.jsp (last visited May 18, 2023).

7. *Id.* (stating that "[o]ffenders typically participate in sex offender treatment in the final three years of their incarceration").

below-Guidelines sentences.⁸ Nationwide, nearly 85% of these offenders received below-Guidelines sentences.⁹

As displayed by Mr. Smith's case, sentencing judges notice the harsh, disproportionate sentences calculated by child pornography statutes and the Guidelines.¹⁰ Despite public perception, non-production child pornography offenders generally have not and are not more likely to abuse children physically or sexually.¹¹ Additionally, long prison

8. *Commission Datafiles*, U.S. SENT'G COMM'N, <https://www.ussc.gov/research/datafiles/commission-datafiles> (last visited May 15, 2023). This statistic was computed using data extracted from the U.S. Sentencing Commission's "Individual Offender Datafiles," spanning fiscal years 2017 to 2021. The datafile is titled: "Fiscal Year 2022." The calculation was made by using the "BOOKERCD" and "SENTRNGE" variables, which denote whether a sentence was within, above, or below the Guidelines range.

9. *Id.*

10. *See* United States v. Cheever, No. 15-cr-00031-JLK, 2016 U.S. Dist. LEXIS 93384, at *4–7 (D. Colo. July 18, 2016) ("[T]he mandatory minimum produces a sentence greater than necessary to achieve the purposes of 18 U.S.C. § 3553(a).") ("[T]he Guidelines give a district court a measure of national practice to use as a starting point . . . , but when Congress ignores the recommendations and studies of the Sentencing Commission and imposes a mandatory minimum sentence, the rationale and vaunted expertise of the Commission is otiose, in the sense that it produces no useful result.") (citation omitted); *see* United States v. Salyer, No. 2:20cr43, 2021 U.S. Dist. LEXIS 222717, at *4–5 (E.D. Va. 2021) ("There is no excuse for his behavior as a recipient of child pornography. However, it must be considered that this behavior did not include the physical abuse of children, nor did Defendant distribute or transfer any of the child pornography. Moreover, he is not a pedophile or a producer of child pornography.") ("The Sentencing Guidelines covering the nonproduction of child pornography seem to be solely concerned with the seriousness of the offense and the need for deterrence. However, this appears to be at the expense of differentiating between prototypical non-production child pornography offenses and more egregious offenses involving production of child pornography."); United States v. Jones, No. 7:20-CR-00002-BR, 2021 U.S. Dist. LEXIS 153202, at *18 (E.D.N.C. 2021) ("Based on my policy disagreements with the relevant guidelines and on the § 3553(a) factors discussed above, a downward variance below the applicable guideline range is warranted in this case, as a guideline sentence is greater than necessary to achieve the goals of sentencing.").

11. *See* EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN, *supra* note 1, at 114; Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 865 (2011). *But see* Michael L. Bourke & Andres E. Hernandez, *The 'Butner Study' Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 189–90 (2009); Thomas H. Cohen & Michelle C. Spidell, *How*

sentences neither rehabilitate offenders nor assist their return to society, only unnecessarily increasing prison costs and recidivism rates.¹²

Instead of imposing a Guidelines sentence, judges on both sides of the aisle often devise their own formulas to grant less severe sentences.¹³ Although some judges calculate more proportionate sentences, increasing judicial discretion threatens the uniformity and fairness of the criminal justice system.¹⁴ Today, offenders that commit the same offense in the same way receive drastically different sentences based on their defense attorney, the judge, and where they live.¹⁵ Congress sought to avoid this wild west sentencing mess when it directed the United States Sentencing Commission (“the Commission”) to write the Guidelines in the first place.¹⁶

Dangerous are They? An Analysis of Sex Offenders Under Federal Post-Conviction Supervision, 80 FED. PROB. 21, 29 (2016), https://www.uscourts.gov/sites/default/files/80_2_4_0.pdf; Gary Craig, *RIT Study: More than Half of Child Pornography Probationers had Sexual Contact with Kids*, DEMOCRAT & CHRON. (Jan. 4, 2019, 12:11 PM), <https://www.democratandchronicle.com/story/news/2019/01/04/rit-study-many-child-porn-probationers-had-sexual-contact-kids/2385951002/>.

12. See generally Charles Fain Lehman, *Modernize the Criminal Justice System: An Agenda for the New Congress*, MANHATTAN INST. (Apr. 4, 2023), <https://media4.manhattan-institute.org/wp-content/uploads/modernize-the-criminal-justice-system-an-agenda-for-the-new-congress.pdf>.

13. See Ariane de Vogue & Tierney Sneed, *Retired Federal Judges Defend Ketanji Brown Jackson’s Record on Child Porn Cases as ‘Entirely Consistent’*, CNN (Mar. 21, 2022, 9:19 PM), <https://www.cnn.com/2022/03/21/politics/retired-federal-judges-defend-ketanji-brown-jackson-sentencing-record/index.html>.

14. See U.S. SENT’G COMM’N, FEDERAL SENTENCING OF CHILD PORNOGRAPHY NON-PRODUCTION OFFENSES 69 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210629_Non-Production-CP.pdf [hereinafter U.S. SENT’G COMM’N 2021 REPORT] (“The analysis shows pervasive sentencing disparities not only between similarly situated offenders convicted of possession and offenders convicted of receipt, but also among similarly situated possession offenders as a distinct group and similarly situated receipt offenders as a distinct group.”).

15. See *id.*

16. See U.S. SENT’G COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 2 (2009), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_

Despite extreme party polarization, both the Commission and Congress must fix section 2G2.2, the Guideline provision for non-production child pornography offenses. Child pornography offenses only continue to grow both in number and as a percentage of the total federal criminal caseload.¹⁷ The volume and accessibility of child pornography has increased dramatically due to the rising use of computers and Internet-based technology.¹⁸ The prevalence of child pornography will only worsen if public officials refuse to act.¹⁹ Congress can no longer afford to ignore arbitrary sentencing practices and only attack social media tycoons for allowing child pornography to run rampant.²⁰ Congress created the unworkable section 2G2.2, and now it is time to fix it.

This Comment proceeds in four parts. Part I provides background information on child pornography and the federal sentencing structure, focusing on section 2G2.2 and new data from the Commission's 2021 report.²¹ Part II analyzes the weaknesses of the current sentencing structure. Part III proposes solutions to revise section 2G2.2 by eliminating the "use of a computer" enhancement, revising the "number of images" enhancement, and focusing on offender rehabilitation efforts. This Comment concludes that the Commission's recommendations should be complemented by the proposed recommendations and implemented to reform non-production child pornography sentencing.

Child_Pornography_Guidelines.pdf [hereinafter U.S. SENT'G COMM'N GUIDELINES HISTORY].

17. U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 1.

18. *Id.* The COVID-19 pandemic has likely only aggravated this trend.

19. *See id.*

20. *See* Ben Goggin, *Sen. Dick Durbin Urges DOJ to Review Twitter's Handling of Child Exploitation*, NBC NEWS (Jan. 31, 2023, 3:55 PM), <https://www.nbcnews.com/tech/social-media/twitter-musk-elon-child-exploitation-csam-letter-durbin-rcna68441>.

21. *See generally* U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14. The 2021 report included data on offenders sentenced between fiscal years 2005 and 2019 under a Guidelines Manual effective November 1, 2004, or later. *Id.* at 16.

I. BACKGROUND ON FEDERAL SENTENCING OF NON-PRODUCTION CHILD PORNOGRAPHY OFFENSES

For more than forty years, Congress has expanded the scope of child pornography offenses and increased offender sentences.²² In enacting these changes, Congress has done little to delineate fact from fiction. Background information is necessary to understand the current weaknesses of the sentencing scheme. This Part begins by defining non-production child pornography offenses and then proceeds by providing the legislative history of child pornography criminalization. From there, it presents data on today's child pornography offenses to clarify who offenders are—information that informs how Congress should punish them for their crimes.

A. *Defining Non-Production Child Pornography Offenses*

Federally,²³ child pornography²⁴ is defined as any visual depiction that involves a minor engaging in sexually explicit

22. See U.S. SENT'G COMM'N GUIDELINES HISTORY, *supra* note 16, at 6. In the 1960s and 1970s, the production and distribution of child pornography became an international commercial industry. CHARLES PATRICK EWING, JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY, AND PUBLIC POLICY 119 (2011). To combat this resurgence, Congress criminalized the production and distribution of child pornography. *Id.* Congress did not criminalize the mere possession of child pornography until 1991. *Id.* at 124.

23. All fifty states, including the District of Columbia, have developed their own child pornography criminalization statutes. EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN, *supra* note 1, at 101. Today, however, federal law extends to most child pornography offenses because child pornography is predominantly created and stored on media that traveled in interstate or foreign commerce, including on the Internet. EWING, JUSTICE PERVERTED, *supra* note 22, at 125.

24. Outside of the legal system, stakeholders primarily refer to child pornography as “child sexual abuse material” (CSAM). NAT'L CTR. FOR MISSING & EXPLOITED CHILD., *supra* note 1. This Comment acknowledges the movement to replace the term “child pornography” with CSAM to better reflect the sexual abuse and exploitation of children depicted in these images. This Comment, however, continues to refer to these images as child pornography based on the current federal definition.

conduct.²⁵ The material, however, does not need to depict an actual minor.²⁶ Computer-generated images of fictitious minors qualify as child pornography so long as the subject is “indistinguishable” from an actual minor.²⁷

There are two categories of child pornography offenses: (1) non-production offenses and (2) production offenses.²⁸ This Comment only focuses on non-production offenses, which include the distribution, receipt, and possession of child pornography.²⁹ For each offense, the individual must “knowingly” access or intend to access the pornographic material,³⁰ but the individual does not need to actually view the material.³¹

B. Legislative History

The PROTECT Act of 2003 (“the PROTECT Act”)³² established the current statutory penalties for non-production child pornography offenses.³³ It sets out

25. 18 U.S.C. § 2256(8).

26. See Martin Kwan, *The Crime of Possessing or Viewing Child Pornography: Cannot Always Agree on Who is Harmed?*, CRIM. L. BLOG (Jan. 14, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165166; *Citizen’s Guide to U.S. Federal Law on Obscenity*, U.S. DEPT OF JUST., <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity> (last updated Nov. 9, 2021); see generally PROTECT Act of 2003, Pub L. No. 108-21, §§ 501–05, 117 Stat. 650, <https://www.congress.gov/108/plaws/publ21/PLAW-108publ21.htm>.

27. See PROTECT Act of 2003, Pub L. No. 108-21, § 501, 117 Stat. 650, <https://www.congress.gov/108/plaws/publ21/PLAW-108publ21.htm>.

28. See U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 1.

29. *Id.* The relevant sections of the federal criminal code are: 18 U.S.C. §§ 1466A, 2252, and 2252A. *Citizen’s Guide to U.S. Federal Law on Child Pornography*, U.S. DEPT OF JUST., <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography> (last updated May 28, 2020); see also U.S. SENT’G GUIDELINES MANUAL § 2G2.2 (U.S. SENT’G COMM’N 2021).

30. See U.S. SENT’G GUIDELINES MANUAL § 2G2.2 (U.S. SENT’G COMM’N 2021); *Citizen’s Guide to U.S. Federal Law on Obscenity*, *supra* note 26.

31. See Kwan, *supra* note 26.

32. PROTECT Act of 2003, Pub L. No. 108-21, §§ 501–05, 117 Stat. 650, <https://www.congress.gov/108/plaws/publ21/PLAW-108publ21.htm>.

33. U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 12.

mandatory minimum penalties for receipt and distribution offenses as well as maximum penalties for certain offenses.³⁴ Distribution and receipt offenses carry a mandatory minimum term of five years' incarceration and a maximum term of twenty years' incarceration.³⁵ In comparison, possession offenses trigger a statutory maximum term of ten years' incarceration.³⁶ Prior sex offenses³⁷ or pornography depicting a prepubescent minor can increase the statutory penalties.³⁸

The statutory penalties provide guard rails for a prison sentence, while the Federal Sentencing Guidelines provide judges with specific instructions on how to sentence individuals.³⁹ Congress originally directed the United States Sentencing Commission, an independent, bipartisan agency of the judicial branch,⁴⁰ to promulgate and regularly amend the Guidelines.⁴¹ In doing so, the Guidelines would “establish

34. *Id.*

35. *Id.*

36. *Id.*

37. If a defendant has a prior federal or state conviction for one or more qualifying sex offenses, the penalty range increases to a mandatory minimum term of fifteen years' incarceration and a maximum term of forty years' incarceration. *Id.* Additionally, offenders convicted of possession with a prior federal or state conviction for a qualifying sex offense face a statutory imprisonment range of ten to twenty years. *Id.*

38. The maximum term increases to twenty years' incarceration if the offender possessed child pornography depicting a prepubescent minor or a minor under the age of twelve. *Id.*

39. See U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 20–22 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf.

40. 28 U.S.C. § 991(a). By statute, the Commission consists of seven voting members appointed by the president by and with the advice of the Senate as well as one non-voting member. See *id.*; FEDERAL SENTENCING: THE BASICS, *supra* note 39, at 2. The Commission also has a staff of over 100 attorneys, social scientists, and other professionals with criminal justice expertise. *Organization*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about/who-we-are/organization> (last visited May 19, 2023).

41. FEDERAL SENTENCING: THE BASICS, *supra* note 39, at 2.

a rational sentencing system” that “provide[d] for certainty, uniformity, and proportionality in criminal sentencing.”⁴²

Specifically, the Guidelines compute a sentencing range for a given offender based on their criminal history and the underlying facts of their crime.⁴³ A sentencing judge must consider the Guidelines range; however, the judge may impose a sentence outside that range so long as the sentence is reasonable.⁴⁴ Ultimately, the sentence must be “sufficient, but not greater than necessary,” to reflect the basic goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation.⁴⁵

The sentencing judge calculates the Guidelines range through a series of steps.⁴⁶ The judge must (1) calculate the defendant’s base offense level, (2) apply qualifying adjustments (or “specific offense characteristics”) that either increase or decrease their base offense level, (3) calculate the defendant’s criminal history category, (4) determine the applicable sentencing range from the sentencing table, and (5) determine whether a specific departure and/or variance from the sentencing range applies.⁴⁷ An individual’s final

42. U.S. SENT’G COMM’N GUIDELINES HISTORY, *supra* note 16, at 2.

43. FEDERAL SENTENCING: THE BASICS, *supra* note 39 at 17–18. The Guidelines range is typically calculated by the U.S. Probation Office in the Presentence Report, not by the judge directly. *See id.* at 10.

44. *Id.* at 6. Originally, sentencing judges were mandated to impose sentences that strictly abided by the Guidelines. *Id.* at 5–6. In 2005, however, the Supreme Court in *United States v. Booker* revoked the mandatory nature of the Guidelines. 543 U.S. 220, 245, 261–62 (2005) (holding that mandatory sentencing guidelines violated the Sixth Amendment right to a jury trial) (establishing the advisory nature of the Guidelines and the reasonableness standard of appellate review for sentencing decisions). Additionally, in *Kimbrough v. United States*, the Supreme Court held that district court judges could vary from the drug guidelines for policy reasons without inviting a “closer review” on appeal. 552 U.S. 85, 109 (2007); *see* Dawinder S. Sidhu & Kelsey Robinson, *Child Pornography and Criminal Justice Reform*, 43 CARDOZO L. REV. 2157, 2163–64 (2022). Six federal appeals courts are evenly split as to whether *Kimbrough* applies to the child pornography guidelines. *Id.* at 2164.

45. 18 U.S.C. § 3553(a)(2); FEDERAL SENTENCING: THE BASICS, *supra* note 39, at 29.

46. *See* FEDERAL SENTENCING: THE BASICS, *supra* note 39, at 20–22.

47. *Id.*

sentence will include a combination of incarceration and supervised release.⁴⁸

Section 2G2.2 calculates sentencing ranges for non-production child pornography offenses.⁴⁹ Today's version of section 2G2.2 reflects nine revisions made collectively by the Commission and Congress.⁵⁰ Specifically in the PROTECT Act, Congress, for the first and only time, directly amended a Guidelines provision by adding specific offense characteristics to section 2G2.2.⁵¹ Previously, however, Congress directed the Commission to increase Guidelines ranges for child pornography offenses on multiple occasions.⁵²

Currently, section 2G2.2 has six specific offense characteristic categories, or “enhancements,” that increase the defendant’s base offense level by two to seven levels.⁵³ The enhancements pertain to (1) the age of the individuals depicted in the child pornography material;⁵⁴ (2) whether the defendant distributed child pornography and what

48. *See id.* at 12, 30. The sentence will also include mandatory sex offender registration as well as potential fines, victim restitution, and asset forfeiture. EWING, JUSTICE PERVERTED, *supra* note 22, at 136–38.

49. U.S. SENT’G GUIDELINES MANUAL § 2G2.2 (U.S. SENT’G COMM’N 2021).

50. U.S. SENT’G COMM’N GUIDELINES HISTORY, *supra* note 16, at 1–2.

51. *Id.* at 38–39; *see* U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 12.

52. U.S. SENT’G COMM’N GUIDELINES HISTORY, *supra* note 16, at 23. Prior to the PROTECT Act, Congress directed the Commission in 1991 to increase base offense levels, reorganize receipt offenses, and add a new specific offense characteristic. *Id.* Then, in 1995, Congress directed the Commission to increase all base offense levels by another two levels as well as an additional two levels if the offender used a computer to commit the offense. *Id.* at 26. Expressing concern, Congress instructed the Commission again in 1998 to “ensure that the sentences, guidelines, and policy statements for offenders convicted of [child pornography offenses] are appropriately severe.” *Id.* at 32 (quoting the Protection of Children From Sexual Predators Act of 1998, Pub. L. No. 105–314, § 502, 112 Stat. 2974 (1998)). Specifically, Congress directed the Commission to promulgate amendments to increase the base offense levels if the offender used a computer with the intent to persuade, induce, entice, coerce, or facilitate the transport of a child as well as engaged in a pattern of activity. *Id.* at 33.

53. U.S. SENT’G GUIDELINES MANUAL §§ 2G2.2(b)(1)–(7) (U.S. SENT’G COMM’N 2021).

54. *Id.* § 2G2.2(b)(2).

distribution method they used;⁵⁵ (3) whether the material depicts sadistic or masochistic acts of violence⁵⁶ or the exploitation of an infant or toddler;⁵⁷ (4) whether the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor;⁵⁸ (5) whether the defendant used a computer to commit the offense;⁵⁹ and (6) the number of images and videos contained in the child pornography material.⁶⁰ Table 1 shows how section 2G2.2 functions.

55. *Id.* §§ 2G2.2(b)(3)(A)–(F).

56. Congress added this specific offense characteristic in the PROTECT Act. U.S. SENT’G COMM’N GUIDELINES HISTORY, *supra* note 16, at 39.

57. U.S. SENT’G GUIDELINES MANUAL § 2G2.2(b)(4) (U.S. SENT’G COMM’N 2021).

58. *Id.* § 2G2.2(b)(5). In the commentary section of section 2G2.2, “pattern of activity involving the sexual abuse or exploitation of a minor” is defined as “any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, whether or not the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct.” *Id.* § 2G2.2 cmt.

59. *Id.* § 2G2.2(b)(6). In 1995, Congress passed the Sex Crimes Against Children Prevention Act of 1995 (SCACPA), which directed the Commission to adopt the use of a computer enhancement. U.S. SENT’G COMM’N GUIDELINES HISTORY, *supra* note 16, at 26.

60. U.S. SENT’G GUIDELINES MANUAL § 2G2.2(b)(7) (U.S. SENT’G COMM’N 2021). In section 401 of the PROTECT Act, Congress directly amended section 2G2.2 by adding this enhancement for the number of child pornography images (i.e., the “image table”). U.S. SENT’G COMM’N GUIDELINES HISTORY, *supra* note 16, at 39. The Commission, however, adopted its own definition of “video,” which contains seventy-five images. *Id.* at 43. Additionally, the Commission stated that an upward departure from the Guidelines may be warranted if the video is more than five minutes long. *Id.* at 44.

TABLE 1. Calculating a Sentence Under Section 2G2.2.⁶¹

Step One Base Offense Level (##)	Possession (18) ↓	Receipt (22) ↓	Distribution (22) ↓
Step Two Calculate Adjustments to Base Offense Level	Specific Offense Characteristics/Enhancements (##)		
	Child pornography portrayed: A prepubescent minor or minor less than twelve years old (+2); sadistic or masochistic conduct or other depictions of violence, or sexual abuse or exploitation of an infant or toddler (+4). ↓ ↓ ↓		
	Offense involved: A pattern of activity involving sexual abuse or exploitation of a minor (+5); use of a computer or interactive computer service (+2); 10-150 images (+2); 150-300 images (+3); 300-600 images (+4); 600 or more images (+5). One video = 75 images. ↓ ↓ ↓		
	↓	If conduct was limited to receipt or solicitation of child pornography and there was no intent to traffic in or distribute child pornography (-2).	Child pornography was distributed: for pecuniary gain (+5 or more - increase by retail value of material); for valuable consideration, but not pecuniary gain or to a minor (+5); to a minor and intended to persuade, induce, entice, or coerce into illegal activity (+6); to a minor and intended to persuade, induce, entice, or coerce into prohibited sexual conduct (+7). If knowingly engaged in another distribution type (+2). Apply the greatest adjustment.
	↓ ↓ ↓ Additional Adjustments (if any): Most commonly that the defendant accepted responsibility (up to -3).		

61. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS, *supra* note 39, at 20-22; *see generally* U.S. SENT'G GUIDELINES MANUAL § 2G2.2 (U.S. SENT'G COMM'N 2021).

TABLE 1 (CONT'D). Calculating a Sentence Under Section 2G2.2.

<p>Step Three Calculate Criminal History Category</p>	<p>(+3): For each prior sentence > one year and one month; (+2): For each prior sentence of at least sixty days not counted above; (+1): For each prior sentence not counted above up to +4; (+2): If offense was committed while serving a criminal justice sentence; (+1): For each prior sentence from a conviction of a crime of violence not receiving points above up to +3.</p> <p>Criminal History Category I = (0 or +1) II = (+2 or +3) III = (+4, +5, or +6) IV = (+7, +8, or +9) V = (+10, +11, or +12) VI = (+13 or more)</p>																																																																																																																																																																																																																															
<p>Step Four Consult Sentencing Table (numbers represent months of imprisonment)</p>	<table border="1"> <thead> <tr> <th rowspan="2">Offense Level</th> <th colspan="6">Criminal History Category (Criminal History Points)</th> </tr> <tr> <th>I (0 or 1)</th> <th>II (2 or 3)</th> <th>III (4, 5, 6)</th> <th>IV (7, 8, 9)</th> <th>V (10, 11, 12)</th> <th>VI (13 or more)</th> </tr> </thead> <tbody> <tr><td>14</td><td>15-21</td><td>18-24</td><td>21-27</td><td>27-33</td><td>33-41</td><td>37-46</td></tr> <tr><td>15</td><td>18-24</td><td>21-27</td><td>24-30</td><td>30-37</td><td>37-46</td><td>41-51</td></tr> <tr><td>16</td><td>21-27</td><td>24-30</td><td>27-33</td><td>33-41</td><td>41-51</td><td>46-57</td></tr> <tr><td>17</td><td>24-30</td><td>27-33</td><td>30-37</td><td>37-46</td><td>46-57</td><td>51-63</td></tr> <tr><td>18</td><td>27-33</td><td>30-37</td><td>33-41</td><td>41-51</td><td>51-63</td><td>57-71</td></tr> 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<p>Step Five Apply Departure and/or Variance (if any)</p>	<p>Departure: Most commonly that the defendant provided the prosecution with substantial assistance in the investigation or prosecution of another person.</p> <p>Variance: Judge considers 18 U.S.C. § 3553(a) factors: 1. Nature and circumstances of offense, and the history and characteristics of the defendant; 2. Need for sentence imposed to reflect primary purposes of sentencing: retribution, deterrence, incapacitation, rehabilitation; 3. Types of sentences available; 4. Sentencing range established through application of the Guidelines, and types of sentences available under the Guidelines; 5. Relevant policy statements promulgated by the Commission; 6. Need to avoid unwarranted sentencing disparities among similarly situated defendants; and 7. Need to provide restitution to any victims.</p>																																																																																																																																																																																																																															

C. Snapshot of Today's Offenses

Today, non-production child pornography offenders represent a relatively small percentage of the overall federal offender population⁶² and have unique demographic characteristics not shared by other federal offenders.⁶³ Based on the Commission's 2021 report, non-production child pornography offenders are older,⁶⁴ have higher levels of education,⁶⁵ and have limited or no criminal histories.⁶⁶ Additionally, offenders primarily use technology to access thousands of images and videos with just one click.⁶⁷ Offenders specifically use peer-to-peer (P2P) file sharing

62. As reported by the Commission, “[o]f the 70,537 federal offenders sentenced in fiscal year 2019 with complete case documentation sent to the Commission, 1.9 percent (1,340 offenders) were sentenced under § 2G2.2 as their primary guideline.” U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 16.

63. *See id.* at 18.

64. In fiscal year 2019, the average age of non-production child pornography offenders was forty-one years old, while the average age of all other federal offenders was thirty-six years old. *Id.*

65. In fiscal year 2019, over half of non-production child pornography offenders attended college compared to one-fifth (20.5%) of all other offenders. *Id.*

66. In fiscal year 2019, three-quarters (75.9%) of non-production child pornography offenders were assigned to the lowest criminal history category (i.e., CHC I). *Id.* By contrast, less than half (43.8%) of all other federal offenders were assigned to CHC I. *Id.* Non-production child pornography offenders also tend to be more racially homogeneous. *Id.* In fiscal year 2019, most non-production child pornography offenders were White (80.3%) compared to all other federal offenders who were 19.1% White. *Id.* Lastly, non-production child pornography offenders are more likely to be U.S. citizens (96.3%), compared to all other federal offenders (55.9%). *Id.*

67. *See id.* at 4. According to the Commission's 2021 report, most offenders have well above the 600 images needed to qualify for the maximum five-level enhancement under section 2G2.2(b)(7). *Id.* at 30. In fiscal year 2019, the maximum number of images for possession and distribution offenders numbered in the millions. *Id.* Distribution offenders had the highest median number of images (6,300), followed by receipt (4,674) and possession offenders (2,350). *Id.*

networks, websites,⁶⁸ and social media platforms to obtain child pornography.⁶⁹

Today, the average non-production child pornography offender qualifies for at least four of the six section 2G2.2 enhancements,⁷⁰ specifically the use of a computer enhancement (95%) and 600 or more images in the number of images enhancement (77.2%).⁷¹ As a result, the average offender's base offense level increases by a combined thirteen offense levels, which substantially increases their Guidelines range and ultimate prison sentence.⁷² The average prison sentence imposed has increased to 103 months (approximately 8.5 years).⁷³ Distribution offenders receive the longest sentences,⁷⁴ followed by receipt⁷⁵ and possession offenders.

With this background information, the weaknesses of the existing sentencing paradigm already appear: (1) most individuals qualify for enhancements intended to distinguish between more and less culpable offenders, and (2) most individuals receive long prison sentences for just accessing images and videos. This backdrop sets the stage for a full

68. Most child pornography is hosted on the anonymous part of the Internet, or the "darknet." Roderic Broadhurst & Matthew Ball, *How the World's Biggest Dark Web Platform Spreads Millions of Items of Child Sex Abuse Material — and Why It's Hard to Stop* (Sept. 2, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4364472. Popular platforms offering anonymous Internet access are i2P, FreeNet, and Tor. *Id.*

69. U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 32.

70. *Id.* at 4. The frequency with which these enhancements apply is consistent between the offense types (i.e., possession, receipt, and distribution). *See id.* at 17.

71. *Id.* at 4. Most offenders also received enhancements for images depicting victims under twelve years old (over 95%) as well as for images depicting sadistic or masochistic conduct or abuse of an infant or toddler (84%). *Id.*

72. *Id.* at 68.

73. *Id.* at 20.

74. *Id.* On average, distribution offenders received the longest prison sentences at 135 months (approximately eleven years). *Id.*

75. *Id.* On average, receipt offenders received ninety-six months' (eight years') incarceration. *Id.*

discussion of the weaknesses of the current sentencing structure under section 2G2.2.

II. ANALYSIS OF THE WEAKNESSES OF SENTENCING UNDER GUIDELINE SECTION 2G2.2

This Part identifies the weaknesses of current non-production child pornography sentencing under section 2G2.2. First, section 2G2.2 is not based on the Commission's sentencing expertise, but rather congressional directives based on public misconceptions.⁷⁶ As a result, section 2G2.2 has become the most criticized and least followed provision of the Guidelines.⁷⁷ Second, the typical offender qualifies for most of section 2G2.2's enhancements that do not, and never did, distinguish between more and less culpable offenders.⁷⁸ Third, because most offenders qualify for the enhancements, Guidelines sentencing ranges have skyrocketed, leading to longer, more costly prison sentences that fail to rehabilitate offenders.⁷⁹ Lastly, the unworkable section 2G2.2 encourages judges to disregard the Guidelines altogether, which has created pervasive sentencing disparities.⁸⁰ Consequently, Congress must finally revise section 2G2.2.

A. *Structure Based on Public Misconceptions Endorsed by Congress*

Based on public perception, Congress concluded that possession of child pornography constitutes a form of child sexual abuse and offenders deserve strict punishment.⁸¹ As a result, Congress overrode the Commission's sentencing

76. See generally U.S. SENT'G COMM'N GUIDELINES HISTORY, *supra* note 16, at 17–39.

77. U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 23. Section 2G2.2 produces “one of the lowest rates of within-[G]uidelines range sentences each year.” *Id.*

78. See *id.* at 68.

79. See *id.* at 5.

80. *Id.* at 69.

81. EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN, *supra* note 1, at 11.

expertise and undermined its own directive that the Commission independently create guidelines based on sentencing data, public comments, public hearings, and the literature.⁸² Today, section 2G2.2 is unworkable, and the public perceptions that Congress once relied upon are defective.⁸³

1. Non-Production Child Pornography Offenders as a Class Are Not More Likely to Abuse Children

The first public misconception is that non-production child pornography offenders have sexually abused, or will sexually abuse, children.⁸⁴ According to the very definition of the crime of conviction, non-production child pornography offenders have *not* sexually abused a child.⁸⁵ In some cases, the offender may not have even viewed the child

82. See U.S. SENT'G COMM'N GUIDELINES HISTORY, *supra* note 16, at 5; see also Ronald F. Wright, *The United States Sentencing Commission as an Administrative Agency*, 4 FED. SENT'G REP. 134, 135–136 (1991) (“[T]he use of an administrative agency to coordinate sentencing policy should induce Congress to take fewer initiatives in the sentencing area. Congress turned to an administrative agency because anti-crime sentiment had routinely led legislators to vote for increased prison terms without paying enough attention to prison capacity, or the actual influence of different sanctions on different offenders. An administrative agency, they thought, would be better able to assimilate empirical information, monitor the system in operation, and account for the system wide effects of any changes to sentences for one crime. [However,] Congress has consistently undermined the Commission’s capacity to coordinate sentencing policy and to respond to the most reliable types of information available.”).

83. See generally Chad M. S. Steel et al., *Public Perceptions of Child Pornography and Child Pornography Consumers*, 51 ARCHIVES OF SEXUAL BEHAV. 1173 (2022).

84. EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN, *supra* note 1, at 108. According to Professor Ewing, this is called the “hands-on argument.” See *id.* at 110. Generally, however, individuals who at least possess child pornography have a low risk of committing a hands-on offense against children. *Id.* at 110–11. Professor Ewing also presents an additional public misconception of child pornography offenders: “child sexual abusers use child pornography to help groom their victims for abuse” (i.e., the “grooming argument”). *Id.* at 108. Because child pornography offenders have a low risk of committing hands-on offenses against children, it seems unlikely that child pornography would be used as a grooming tool. *Id.* at 114.

85. See 18 U.S.C. §§ 1466A, 2252, 2252A; see also *Citizen’s Guide to U.S. Federal Law on Child Pornography*, *supra* note 29.

pornography.⁸⁶ They only knowingly possessed, received, or distributed child pornography, which may include computer-generated material.⁸⁷

Additionally, empirical research does not show a reliable correlation between child pornography and child sexual abuse.⁸⁸ The academic community has widely rejected self-reported studies concluding that child pornography offenders have sexually abused children.⁸⁹ Specifically, scholars and courts have attacked the infamous Butner study for its poor research design and biased data.⁹⁰ Published in 2008, the Butner Study compared two groups of child pornography

86. See Kwan, *supra* note 26.

87. See 18 U.S.C. §§ 1466A, 2252, 2252A; see also *Citizen's Guide to U.S. Federal Law on Child Pornography*, *supra* note 29.

88. See Thanh Ly et al., *Characteristics and Treatment of Internet Child Pornography Offenders*, 36 BEHAV. SCI. L. 216, 217–18 (2018) (“Current research has found significant differences among men who possess child pornography [and] men who engage in sexual in-person contact with children.”) (finding that “it is not possible to discern whether individuals who use child pornography . . . are attracted to prepubescent children, pubescent children, or both”); Hessick, *supra* note 11, at 865 (“Ultimately, the claim that child pornography is equivalent to or worse than child abuse appears to be simply an example of hyperbole used by interest groups and political actors to draw attention to the issue, rather than a serious assertion of principle.”); Steel et al., *supra* note 83, at 1180 (finding that the public “overestimates [] contact offending, recidivism, and the presence of pedophilia . . .”).

89. See, e.g., Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G REP. 108, 115 (2011); Scott A. Johnson, *A Clarification Concerning the Butner Study*, 6 FORENSIC RSCH. & CRIMINOLOGY INT'L J. 261, 261 (2018); Sandy Rozek, *Butner Study Redux: “They used us. They lied.”*, NAT'L ASS'N FOR RATIONAL SEXUAL OFFENSE L. (Apr. 6, 2022), <https://narsol.org/2022/04/butner-study-redux-they-used-us-they-lied/>.

90. Stabenow, *supra* note 89, at 115; *United States v. Johnson*, 588 F. Supp. 2d 997, 1006 (S.D. Iowa 2008) (“[T]he Butner Study is not credible. The Butner Study’s sample population consisted of incarcerated individuals participating in a sexual offender treatment program at a federal correctional institution. . . . [T]he program is ‘highly coercive.’ Unless offenders continue to admit to further sexual crimes, whether or not they actually committed those crimes, the offenders are discharged from the program. Consequently, the subjects in this Study had an incentive to lie, despite the fact that participation in the program would not shorten their sentences.”).

offenders participating in a voluntary treatment program.⁹¹ The study concluded that the participants “were significantly more likely than not to have sexually abused a child via a hands-on act” based on individual admissions that they committed at least one hands-on sexual offense in their lifetime.⁹² Study participants later disclosed, however, that they fabricated or distorted their criminal histories to stay enrolled in the treatment program and to avoid forced reentry into the general prison population.⁹³ Additionally, participants recalled that the staff lied to them, failing to mention that they were conducting a study and would be collecting information that would leak outside their “therapeutic community” and “safe place.”⁹⁴ As a result, scholars caution individuals from citing the Butner Study for any purpose.⁹⁵

Although research has not proven that individuals who possess, receive, or distribute child pornography have abused or will abuse a child, these offenders still fuel perpetual victim harm.⁹⁶ Victims suffer not only from the sexual abuse inflicted upon them to produce the child pornography but also from knowing that their images are traded and repeatedly viewed worldwide in perpetuity.⁹⁷ As a result, non-production child pornography offenders deserve punishment. Offenders like Mr. Smith, however, do not deserve stricter prison sentences than actual hands-on abusers.⁹⁸

91. Bourke & Hernandez, *supra* note 11, at 183.

92. *Id.*

93. Stabenow, *supra* note 89, at 115.

94. Rozek, *supra* note 89.

95. *See* Stabenow, *supra* note 89, at 115; Johnson, *supra* note 89, at 261.

96. *See* EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN, *supra* note 1, at 11–12.

97. *Id.*; *Child Pornography*, U.S. DEP'T OF JUST., <https://www.justice.gov/criminal-ceos/child-pornography> (last updated May 28, 2020). An image uploaded to the Internet is essentially irretrievable. *Id.*

98. Hessick, *supra* note 11, at 865 (“[T]he fact that possessors of child pornography are—at least in some cases—garnering longer sentences than those

As the Court of Appeals for the Second Circuit has observed, if a child pornography defendant had “actually engaged in sexual conduct with a minor, his applicable Guidelines range could have been considerably lower” than for mere possession.⁹⁹ Additionally, in the Sixth Circuit, individuals who possessed child pornography faced higher sentencing ranges than individuals who raped a minor, committed armed robbery of a bank, committed a violent offense with a weapon, and committed a violent offense that resulted in permanent bodily injury.¹⁰⁰ As Professor Douglas Berman stated, the “failure to distinguish between people who look at these dirty pictures and people who commit contact offenses lacks the nuance and proportionality . . . [that] our law demands.”¹⁰¹ Public misconceptions incorrectly inflate sentences and devastatingly impact child pornography offenders already shunned by society.¹⁰²

2. Stricter Punishments Do Not Decrease the Child Pornography Market

The second public misconception is that stricter punishments decrease the market for child pornography.¹⁰³

who sexually abuse children should be troubling to even the most passionate of anti-child pornography advocates.”).

99. *United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010); *see also* Hessick, *supra* note 11, at 879 (stating that the disproportionate sentences received by individuals convicted of possession of child pornography “raise odd deterrence problems because a rational actor deciding between whether to collect child pornography or sexually abuse children would have an incentive to choose the latter”).

100. Sidhu & Robinson, *supra* note 44, at 2186–87.

101. Erica Goode, *Life Sentence for Possession of Child Pornography Spurs Debate Over Severity*, N.Y. TIMES (Nov. 4, 2011), <https://www.nytimes.com/2011/11/05/us/life-sentence-for-possession-of-child-pornography-spurs-debate.html>.

102. Steel et al., *supra* note 83, at 1173–74; Lisa Hagen, *Jackson Responds to GOP Attacks on Child Pornography Sentencing, Guantánamo Bay Detainee Representation*, U.S. NEWS (Mar. 22, 2022), <https://www.usnews.com/news/politics/articles/2022-03-22/jackson-responds-to-gop-attacks-on-child-pornography-sentencing-guantanamo-bay-detainee-representation> (quoting Supreme Court Justice Ketanji Brown Jackson).

103. *See* EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN, *supra* note 1, at 108.

This child pornography market is worldwide and will not reduce in size by severely punishing domestic offenders who obtain child pornography from roughly 4.2 million websites¹⁰⁴ housed on foreign servers.¹⁰⁵ Additionally, the demand for child pornography does not appear to fuel its production¹⁰⁶ as many child pornography sources simply recycle old images available elsewhere on the Internet.¹⁰⁷

Illegal drug offenses are similar to child pornography offenses in the way that harsh American drug sentences have failed to reduce the global market for illegal drugs.¹⁰⁸ Today, Congress has backpedaled from the “War on Drugs,” and individuals now receive more proportionate sentences to the actual drug crime committed.¹⁰⁹ Those who play minor roles in drug activity (i.e., users and low-level distributors) receive lesser sentences than those who produce or traffic large quantities of drugs.¹¹⁰

Congress, however, has yet to retreat from the excessive, retributive-based sentences for child pornography offenses. As explained, individuals who play minor roles in child pornography activity (i.e., possessors and recipients) may

104. Ly et al., *supra* note 88, at 216.

105. See EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN, *supra* note 1, at 108–10 (stating that many child pornography websites run from servers in Eastern Europe where they are beyond the reach of American law).

106. See *id.* at 109.

107. Stabenow, *supra* note 89, at 130 (citing U.S. DEP’T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION—A REPORT TO CONGRESS 27 (2010), <https://www.justice.gov/psc/docs/natstrategyreport.pdf>).

108. *On Behalf of the Federal Public and Community Defenders*, Public Hearing on Child Pornography Sentencing 47 (2012) (written statement of Deidre D. von Dornum, Deputy Att’y-in-Charge for the Fed. Defs. of N.Y., E.D.N.Y.), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215/Testimony_15_vonDornum.pdf.

109. See Sidhu & Robinson, *supra* note 44, at 2185.

110. *On Behalf of the Federal Public and Community Defenders*, *supra* note 108, at 49.

receive greater sentences than producers or other child sexual abusers.¹¹¹ This calls for revision.

Public misconceptions also created section 2G2.2's enhancements, instead of empirical evidence and the Commission's sentencing expertise.

B. Most Offenders Qualify for Section 2G2.2 Enhancements that Do Not Reflect Dangerousness

Congress directed the Commission to “independently develop” the Guidelines to target more dangerous and more culpable offenders.¹¹² However, today's use of a computer and number of images enhancements are not the product of the Commission's independent analysis.¹¹³ Rather, Congress forced the Commission to adopt these enhancements to increase all sentences.¹¹⁴ In doing so, Congress relied on public misconceptions that offenders who use technology and collect a randomly selected number of images are more dangerous.

Empirical data never supported the use of a computer enhancement.¹¹⁵ In 1996, the Commission criticized this enhancement on the grounds that “it fails to distinguish serious commercial distributors of online pornography from more run-of-the-mill users.”¹¹⁶ Instead, evidence suggests

111. See Hessick, *supra* note 11, at 865; Sidhu & Robinson, *supra* note 44, at 27.

112. U.S. SENT'G COMM'N GUIDELINES HISTORY, *supra* note 16, at 3 (citing 28 U.S.C. § 994(m)).

113. *Id.*; United States v. Dorvee, 616 F.3d 174, 186 (2d Cir. 2010). In its report to Congress, the Commission stated that “a person's culpability depends on *how* they use a computer,” not on whether they use a computer. U.S. SENT'G COMM'N, SEX OFFENSES AGAINST CHILDREN 29 (1996), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/199606-rtc-sex-crimes-against-children/199606_RtC_SCAC.pdf.

114. *Id.*

115. See *Dorvee*, 616 F.3d at 186; Stabenow, *supra* note 89, at 122 (“Empirical data does not show that using a computer as a means to possess and view pornography is a more serious or culpable offense than viewing the same images if they had been received by another medium such as through the mail.”).

116. See *Dorvee*, 616 F.3d at 186.

that non-computer access of child pornography may be a greater indicator of culpability and danger.¹¹⁷

Empirical evidence, the Commission, the courts, and the scientific community also did not support the number of images enhancement.¹¹⁸ Because today's typical offender uses a computer to access child pornography, the offender amasses a large collection of child pornography with little to no effort.¹¹⁹ One click may produce thousands of unintended pictures and videos of extremely graphic content.¹²⁰ As the data demonstrates, non-production child pornography offenses involve a median number of 4,265 images, with some offenders possessing and distributing millions of images and videos.¹²¹

Additionally, evidence shows that offenders with fewer images may actually be more morally culpable or dangerous.¹²² Generally, these offenders plan their activities, take efforts to conceal their Internet use, and routinely cleanse their computer's hard drive and browser cache.¹²³

The use of a computer and number of images enhancements only serve to increase all offenders' prison sentences, which, as discussed next, ignores the basic sentencing goals. Exorbitant costs from long prison sentences outweigh any potential retributive and deterrent

117. Stabenow, *supra* note 89, at 122 (“[I]t may be that acquiring hard copies of child pornography requires much greater forethought and intentionality, and demonstrates a commitment to use systems, such as the mail, that are less susceptible to government detection. . . . Alternatively, it could be that offenders who only engage in activities on the Internet somehow view their Internet use as mere fantasy that is separable from their real (vs. online) lives, and are thus less likely to engage in misconduct offline.”).

118. *Id.* at 123 (“Neither the Commission, the courts, nor the scientific community were behind the number of images enhancement when it became a law. Now, eight years later, no studies have been done to demonstrate that this enhancement either effectively predicts risk or danger going forward.”).

119. *Id.* at 124 (“[I]t takes only marginally more effort to collect 10,000 images than it does to collect ten.”).

120. *See id.* 124–25.

121. U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 4.

122. *See* Stabenow, *supra* note 89, at 125.

123. *See id.*

benefits.¹²⁴ Additionally, long prison sentences fail to rehabilitate offenders and prepare them for reentry into society.¹²⁵

C. Offenders Receive Unjustifiably Long Prison Sentences

Because the majority of offenders qualify for most of section 2G2.2's enhancements, Guidelines ranges and ultimate sentences have substantially increased.¹²⁶ The average Guidelines minimum for non-production child pornography offenders increased from ninety-eight months' (approximately eight years') incarceration in fiscal year 2005 to 136 months' (approximately eleven years') incarceration in fiscal year 2019.¹²⁷ Additionally, the average prison sentence increased from ninety-one months (approximately 7.5 years) in fiscal year 2005 to 103 months (approximately 8.5 years) in fiscal year 2019.¹²⁸

Today, nearly all non-production child pornography offenders are sentenced to a term of imprisonment, with an average sentence of 103 months (approximately 8.5 years).¹²⁹ As discussed previously, harsh prison sentences overstate the seriousness of child pornography offenses. Additionally, as portrayed below, harsh prison sentences do not provide offenders with necessary treatment that deters future conduct and assists societal reentry. Society only suffers from astronomical prison costs,¹³⁰ requiring Congress to act.

124. Annual Determination of Average Cost of Incarceration Fee, *supra* note 5.

125. Lehman, *supra* note 12, at 7.

126. See U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 5.

127. *Id.*

128. *Id.*

129. *Id.* at 20.

130. Stabenow, *supra* note 89, at 123 (“[T]housands of inmates are each receiving years longer to their terms of confinement, at great expense to the American taxpayer, because a Congressional aide had a wild hare of an idea.”).

1. Sky High Prison Costs Outweigh Potential Benefits

The average annual societal cost to incarcerate an individual is \$39,158 (\$120.59 per day).¹³¹ Given approximately 350,543 individuals in federal custody,¹³² the total cost of incarceration is over \$13 billion. The annual cost of incarcerating adults convicted of child sex crimes, including non-production child pornography offenses, is \$5.4 billion.¹³³ As prisons age, costs will likely only increase.

At the same time, living in prison may actually increase an individual's criminal behavior.¹³⁴ Prisons have become increasingly violent,¹³⁵ and incarcerated individuals must conform to criminogenic behaviors just to survive.¹³⁶

Child pornography offenders particularly struggle to survive such dangerous prison environments.¹³⁷ Incarcerated individuals and prison officers view child sexual offenses "as a separate, unacceptable category of offen[s]e."¹³⁸ As a result, child pornography offenders often become targets of violence, victimization, and bullying.¹³⁹

Additionally, the longer an incarcerated individual stays in prison, the harder functioning in society becomes. Long

131. Annual Determination of Average Cost of Incarceration Fee, *supra* note 5. Slightly lower, the average annual cost of residency for a federal inmate in a residential reentry center was \$35,663 (\$97.44 per day). *Id.*

132. U.S. DEPT. OF JUST., FEDERAL JUSTICE STATISTICS 2021 (Dec. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fjs21.pdf>.

133. *New Study Estimates Annual Cost of Incarcerating Adults Convicted of Child Sex Crimes Topped \$5.4 Billion in 2021*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUB. HEALTH (Mar. 25, 2022), <https://publichealth.jhu.edu/2022/new-study-estimates-annual-cost-of-incarcerating-adults-convicted-of-child-sex-crimes-topped-5-4-billion-in-2021>.

134. Lehman, *supra* note 12, at 6–7.

135. *Id.* at 20. Mortality rates have also steadily risen in prisons, driven by suicide, homicide, and drug overdose. *Id.* at 6.

136. *Id.* at 7.

137. Nick de Viggiani, *Trying to be Something You Are Not: Masculine Performances Within a Prison Setting*, 15 MEN & MASCULINITIES 272, 281–82 (2012).

138. *Id.* at 281.

139. *See id.* at 274.

prison sentences ruin personal relationships and support systems, as loved ones struggle to travel to distant prisons and care for such stigmatized individuals. Long prison sentences also destroy an individual's mental health, even if treatment becomes available.¹⁴⁰

Lengthy prison sentences do more harm than good, calling for a greater focus on offender rehabilitation. Current prison rehabilitation efforts, however, are inadequate.

2. Current Prison Sentences Do Not Rehabilitate Individuals

As part of an offender's prison sentence, the sentencing judge generally mandates that the offender complete a Sex Offender Treatment Program (SOTP).¹⁴¹ Current Bureau of Prison (BOP) programs,¹⁴² however, are chronically

140. See *infra* Section III.B.

141. U.S. SENT'G COMM'N, FEDERAL CHILD PORNOGRAPHY OFFENSES 277 (2012), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf [hereinafter U.S. SENT'G COMM'N 2012 REPORT] ("Psycho-sexual treatment is a recommended condition of supervision for all child pornography offenders. Many offenders also receive treatment in federal prison before being released on supervision."). Offenders can also volunteer to participate in a treatment program. *Custody & Care: Sex Offenders*, *supra* note 6. If BOP does not originally place the offender in a facility that has a sex offender treatment program, however, the offender must be transferred at some point to a different facility. At sentencing, the judge can recommend that BOP place the individual in a specific facility, but BOP makes the ultimate decision.

142. As required by the Adam Walsh Child Protection and Safety Act of 2006, a specialized sex offender program is offered in each BOP region. U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at 282. Sex offender treatment programs are currently offered at FMC Carswell, FMC Devens, FCI Elkton, FCI Englewood, FCI Marianna, USP Marion, FCI Petersburg Medium, FCI Seagoville, and USP Tucson. *Custody & Care: Sex Offenders*, *supra* note 6; see generally FED. BUREAU OF PRISONS, SEX OFFENDER PROGRAMS (2013), https://www.bop.gov/policy/progstat/5324_010.pdf. Incarcerated individuals with a history of sexual offenses may be designated to the Sex Offender Management program (SOMP) at one of six BOP institutions. U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at 282–83. Assignment is made based on the individual's security level. *Id.* at 283. An individual amenable to treatment is offered participation in the Sex Offender Treatment Program (SOTP-NR) offered at all SOMP institutions. *Id.* This program offers individualized nonresidential treatment, which typically involves six to eight hours of programming per week

overbooked, underfunded, and only offered in a handful of facilities.¹⁴³ Additionally, most programs rely on old research and use low-quality designs.¹⁴⁴ Therefore, individuals do not receive necessary treatment and reenter society ill-equipped.

Since its inception in 2005, only 1,490 incarcerated individuals have completed a SOTP.¹⁴⁵ Currently, over 3,000 incarcerated individuals await placement.¹⁴⁶ These individuals already waited to at least three years prior to their release date to even become eligible for treatment.¹⁴⁷

Allegedly, America is a nation of second chances.¹⁴⁸ Child pornography offenders, however, never receive a true second chance as society continues to shun them.¹⁴⁹ Recently, the White House released a strategic plan to support rehabilitation during incarceration and to facilitate

over a six-month period. *Id.* Although all SOMP institutions offer SOTP-NRs, programs are currently only offered at eight male institutions and one female institution. U.S. DEP'T OF JUST., FEDERAL PRISON SYSTEM: FY2020 PERFORMANCE BUDGET 37, <https://www.justice.gov/jmd/page/file/1143931/download>. BOP also has a residential treatment program for sex offenders. U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at 283. Individuals may choose to volunteer for an intensive residential sex offender treatment program (SOTP-R) offered at FMC Devens. *Id.* SOTP-R is a therapeutic community housed in a 112-bed specialized unit. *Id.* Individuals typically complete the program in twelve to eighteen months. *Id.*

143. *See generally* U.S. DEP'T OF JUSTICE, FEDERAL PRISON SYSTEM: FY2020 PERFORMANCE BUDGET, *supra* note 142.

144. Lehman, *supra* note 12, at 7 (stating that “there has been exactly one serious evaluation of a federal Bureau of Prisons (BOP) program”).

145. FEDERAL PRISON SYSTEM: FY2020 PERFORMANCE BUDGET, *supra* note 142, at 37.

146. Currently, 270 incarcerated individuals participate in treatment and 3,007 await placement in treatment. *Id.*

147. *Custody & Care: Sex Offenders*, *supra* note 6.

148. *FACT SHEET: Biden-Harris Administration Takes Action During Second Chance Month to Strengthen Public Safety, Improve Rehabilitation in Jails and Prisons, and Support Successful Reentry*, THE WHITE HOUSE (Apr. 28, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/28/fact-sheet-biden-harris-administration-takes-action-during-second-chance-month-to-strengthen-public-safety-improve-rehabilitation-in-jails-and-prisons-and-support-successful-reentry/>[hereinafter FACT SHEET].

149. Hagen, *supra* note 102; Steel et al., *supra* note 83, at 1173–74.

successful reentry.¹⁵⁰ Nowhere in “more than 100 concrete policy actions” did the report mention child pornography offenses, or child sexual abuse generally.¹⁵¹ Child pornography is not part of the conversation for criminal justice reform,¹⁵² and it is about time that people start talking.

The only hope for a justified sentence lies in the individual sentencing judge’s hands. Although judges increasingly impose more sensible, non-Guidelines sentences, not all offenders receive a compassionate judge. Instead, similarly situated offenders receive drastically different sentences, undermining the predictability and fairness of the criminal justice system.

D. *Judges Increasingly Impose Below-Guidelines Sentences and Increase Sentencing Disparities*

Judges have responded to harsh Guidelines ranges by varying altogether from the Guidelines and imposing their own sentences.¹⁵³ As a result, sentencing disparities have increased,¹⁵⁴ and judges have received extreme political backlash for using their discretion to fix the broken system.¹⁵⁵

In fiscal year 2019, approximately seventy percent of non-production child pornography offenders received a sentence outside the Guidelines range.¹⁵⁶ Although some

150. See generally DOMESTIC POL’Y COUNCIL, THE WHITE HOUSE ALTERNATIVES, REHABILITATION, AND REENTRY STRATEGIC PLAN (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/04/The-White-House-Alternatives-Rehabilitation-and-Reentry-Strategic-Plan.pdf>.

151. *FACT SHEET*, *supra* note 148, at 1.

152. Sidhu & Robinson, *supra* note 44, at 2161.

153. See U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 5.

154. See *id.* at 7.

155. See Hagen, *supra* note 102.

156. See U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 5. Among the individual offense types, receipt offenders were sentenced within the Guidelines range at the highest rate (41.8%), followed by possession (32.2%) and distribution (25.3%) offenders. *Id.* at 23.

judges have calculated more proportionate sentences, increased judicial discretion has caused pervasive sentencing disparities amongst similarly situated offenders.¹⁵⁷ For example, in fiscal year 2019, the sentences for 119 similarly situated possession offenders ranged from probation to 228 months' (nineteen years') incarceration, even though these offenders had the same Guidelines calculation through the application of the same specific offense characteristics and criminal history category.¹⁵⁸

Prosecutor charging practices have also contributed to offender sentencing disparities.¹⁵⁹ Prosecutors have the power to charge receipt over possession, or use the threat of a receipt charge to force a plea agreement, even though "the underlying offense conduct in the typical receipt case [is] indistinguishable from the typical possession case."¹⁶⁰ Receipt also carries a mandatory minimum of five years' incarceration.¹⁶¹ Therefore, the prosecutor can effectively determine the offender's sentence. The judge can vary from the Guidelines range but not below a mandatory minimum imposed by the prosecutor.

The sole congressional intent of the Guidelines is to avoid nationwide sentencing disparities.¹⁶² Today, however,

157. *See id.* at 7.

158. *Id.* Additionally, the sentences for fifty-two similarly situated receipt offenders ranged from 37 to 180 months' incarceration, even though these offenders had the same Guidelines calculation through the application of the same specific offense characteristics and criminal history category. *Id.* Lastly, the sentences for 190 similarly situated distribution offenders ranged from less than one month to 240 months' incarceration, even though these offenders also had the same Guidelines calculation through the application of the same specific offense characteristics and criminal history category. *Id.*

159. *Id.*

160. *Id.* at 2.

161. *Id.* at 12.

162. *See* U.S. SENT'G COMM'N GUIDELINES HISTORY, *supra* note 16, at 2. As Dawinder S. Sidhu and Kelsey Robinson highlight, federal appellate courts also differ in their review of child pornography sentences, causing sentencing disparities. Sidhu & Robinson, *supra* note 44, at 2183–84 ("The Second, Third, and Ninth Circuits hold that the child pornography guidelines did not stem from the Commission's independent expertise, and therefore, as in *Kimbrough*, a variance based on a policy disagreement with those guidelines does not merit

congressional action has fueled child pornography sentencing disparities. In response, Congress has attacked sentencing judges for using their discretion to fix the broken system.¹⁶³ Recently, Republican senators attacked Justice Ketanji Brown Jackson during her Supreme Court nomination hearings for imposing below-Guidelines sentences.¹⁶⁴ Prior to taking the bench, Justice Jackson served as Vice Chair of the Commission and advocated to revise section 2G2.2.¹⁶⁵

Given the numerous, widely accepted weaknesses of the current non-production child pornography sentencing paradigm, the Commission and Congress must act and implement evidence-based solutions.

III. PROPOSED RECOMMENDATIONS

The proposed recommendations in this Part focus on revising section 2G2.2 and increasing offender rehabilitation efforts. Specifically, this Part recommends eliminating the use of the computer enhancement and revising the number

'closer review.' By contrast, the Sixth Circuit contends that USSG Section 2G2.2 is the product of the Commission's considered judgment, and therefore that any variance based on a disagreement with these guidelines must be subject to heightened scrutiny. Likewise, the Eleventh Circuit en banc has held that a variance to the guidelines for the production of child pornography necessitates the 'closer review' contemplated in *Kimbrough*. For its part, the Fifth Circuit completely foreclosed a district court from varying due to a policy disagreement.") (citations omitted).

163. See, e.g., Hagen, *supra* note 102; Emily Bazelon, *What Message Did Republicans Send to Judges in Their Attack on Ketanji Brown Jackson?*, N.Y. TIMES (Mar. 30, 2022), <https://www.nytimes.com/2022/03/30/opinion/jackson-supreme-court-pornography.html>.

164. *Id.* When she served on the District Court for the District of Columbia, Justice Jackson sentenced an eighteen-year-old charged with possession of child pornography for only three months in prison. *Id.*; see also Eugene Kelly & Saranac Hale Spencer, *The Facts on Judge Jackson's Sentencing in Child Porn Cases*, FACTCHECK.ORG (Mar. 23, 2022), <https://www.factcheck.org/2022/03/the-facts-on-judge-jacksons-sentencing-in-child-porn-cases/>; *Contextualizing Judge Jackson's Mainstream Sentencing Record in Federal Child Porn Cases*, SENT'G L. & POL'Y (Mar. 17, 2022), https://sentencing.typepad.com/sentencing_law_and_policy/2022/03/contextualizing-judge-jacksons-mainstream-sentencing-record-in-federal-child-porn-cases.html.

165. Hagen, *supra* note 102.

of images enhancement, replacing it with an enhancement based on child pornography content and offender conduct. Because these enhancement revisions would effectively lower some offender sentences, the prison cost savings would fund promising rehabilitation programs and research.

A. *Revise Section 2G2.2 Enhancements*

The Commission, judges, and stakeholders recognize that the use of a computer and number of images enhancements do not distinguish between more and less culpable offenders.¹⁶⁶ Instead, these enhancements unnecessarily increase the offender's sentencing range and ultimate prison sentence. As a result, judges increasingly vary from the Guidelines when these enhancements apply. By eliminating these enhancements, judges would vary from the Guidelines less often, impose more consistent sentences, and reduce current sentencing disparities, resolving the current section 2G2.2 issue.

1. Eliminate the Use of a Computer Enhancement

First, the use of a computer enhancement in section 2G2.2(b)(6) must be eliminated. Today, use of a computer or other electronic device is the nearly universal way to access child pornography.¹⁶⁷ If every offender uses a computer or electronic device, the enhancement will apply in all cases, only serving to disproportionately increase all prison sentences. In the child pornography context, the exorbitant costs of long prison sentences to society and individual offenders do not outweigh their potential benefits. The use of a computer enhancement was never supported by the Commission, courts, or stakeholders,¹⁶⁸ and it must finally

166. See U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 19.

167. *Id.* at 4.

168. United States v. Dorvee, 616 F.3d 174, 186 (2d Cir. 2010).

be eliminated. In doing so, section 2G2.2 would reflect the broad range of today's offenders.¹⁶⁹

2. Revise the Number of Images Enhancement

Second, the number of images enhancement in section 2G2.2(b)(7) must be eliminated and replaced with an enhancement that focuses on child pornography content and offender conduct. Because most offenders access more than 600 images using a computer,¹⁷⁰ the current enhancement only serves to unnecessarily increase offender prison sentences.

There are several ways to revise the number of images enhancement. A new enhancement, however, must not double count conduct already included in section 2G2.2, such as possessing material involving a prepubescent minor, possessing material portraying sadistic or masochistic conduct or abuse of an infant or toddler, and engaging in a pattern of activity involving the sexual abuse or exploitation of a minor.¹⁷¹

First, the new enhancement could increase an offender's base offense level if the child pornography included actual minors or identified victims rather than computer-generated subjects. The National Center for Missing & Exploited Children (NCMEC) already uses a hash value and facial recognition system to identify child victims from material obtained by law enforcement.¹⁷² This existing system could

169. Brent Evan Newton, *A Partial Fix of a Broken Guideline: A Proposed Amendment to Section 2G2.2 of the United States Sentencing Guidelines*, 70 CASE W. RES. L. REV. 53, 66 (2019).

170. U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 4; Stabenow, *supra* note 89, at 124 (“[T]echnology has made it ‘easier to amass more sentencing enhancements’ with less effort and less intentionality.”).

171. U.S. SENT'G GUIDELINES MANUAL §§ 2G2.2(b)(2), (b)(4), (b)(6) (U.S. SENT'G COMM'N 2021).

172. U.S. DEP'T OF JUST., THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION 68 (2016), <https://www.justice.gov/psc/file/842411/download>. NCMEC is a private, non-profit organization designated by Congress to serve as the national clearinghouse on issues related to missing and exploited children. *Id.*

assist with deploying the enhancement and distinguishing between more and less culpable offenders.

Second, the new enhancement could focus on the offender's sexual activity. The offense level could increase if the offender discussed committing sexual acts or if the evidence suggests that the offender committed child sexual abuse. This revision would also distinguish between more dangerous offenders who may actually abuse children and less dangerous offenders who suffer from addiction.

Revising section 2G2.2's enhancements would decrease sentences for less dangerous offenders and decrease prison spending. Congress could then use these cost savings to fund offender rehabilitation efforts.

B. *Increase Offender Rehabilitation Efforts*

Rehabilitation is an essential goal of federal sentencing,¹⁷³ and it works.¹⁷⁴ Offender rehabilitation prevents recidivism, addresses criminogenic needs, reduces or eliminates distorted beliefs about sexuality, fosters acceptance of responsibility by offenders, and encourages the development of victim empathy.¹⁷⁵

A combination of cognitive behavioral therapy and other treatments has effectively treated child pornography offenders.¹⁷⁶ Treatment success, however, depends on

173. See 18 U.S.C. § 3553(a)(2); U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS, *supra* note 39, at 29.

174. U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at 278 (“[T]reatment is an essential component of a comprehensive sex offender management system.”) (citation omitted); U.S. DEP'T OF JUST.: OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, THE EFFECTIVE OF TREATMENT FOR ADULT SEXUAL OFFENDERS 1 (2015), <https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/theeffectivenessoftreatmentforadultsexualoffenders.pdf> (“Therapeutic interventions aimed at reducing the likelihood of reoffending are a staple of contemporary sex offender management practice.”).

175. U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at 279.

176. *Id.* at 280–81. Cognitive behavioral therapy (CBT) often involves both individual and group therapy. *Id.* Specifically, CBT “combines elements of behavioral therapy, which focuses on external offender behaviors, with cognitive

adequate resources and proper professional training.¹⁷⁷ Congress must allocate funding to modernize the SOTP program in current facilities as well as expand programming in other facilities. The BOP must also increase the number of program slots available and allow offenders to receive treatment sooner.

Although therapy has proven successful, limited research exists on specifically treating non-production child pornography offenders.¹⁷⁸ The research, however, does show that child pornography offenders differ from other sex offenders and require targeted treatment.¹⁷⁹ As previously discussed, non-production child pornography offenders may not have committed, and may not have an increased risk of committing, child sexual abuse.¹⁸⁰ As a result, Congress must allocate specific funding to research child pornography rehabilitation techniques during and after incarceration.¹⁸¹

therapy, which focuses on internal thought processes. The individualized CBT for child pornography offenders relies on . . . an offender’s motivations for using child pornography, sexual interests, participation in an online community of offenders, and predilection for contact offenses or other sexually dangerous behavior According to some clinical practitioners, CBT in conjunction with additional relapse prevention support, including polygraph testing . . . appears to be effective for most child pornography offenders. In addition to CBT, treating psychiatrists also may prescribe medication (i.e., serotonin-specific reuptake inhibitor drugs or, in some cases, anti-androgenic medication).” (citations omitted).

177. *Id.* at 285.

178. Lehman, *supra* note 12, at 20–21.

179. *See* Ly et al., *supra* note 88, at 230.

180. *See* EWING, PREVENTING THE SEXUAL VICTIMIZATION OF CHILDREN, *supra* note 1, at 108–09.

181. *See, e.g.*, Allen Azizian, *From Research to Practice: Designing a Treatment Program for Individuals Convicted of Child Sexual Exploitation Material*, 5 J. MENTAL HEALTH & CLINICAL PSYCH. 8, 9 (2021) (implementing an evidence-based treatment program for individuals convicted of child pornography offenses); Circles of Support and Accountability (CoSA), COUNCIL OF STATE GOV'TS, <https://csgjusticecenter.org/publications/circles-of-support-and-accountability/#frequently-asked-questions-4> (last visited May 18, 2023). The CoSA model specifically focuses on reintegrating offenders back into society. *Id.* Community professionals run the “circles” and meet with high-risk, high-needs individuals weekly to discuss the various challenges of reentry, providing resources that the U.S. Probation Office cannot. *Id.* These “circles” are volunteer-driven, but have recently received federal funding. *Id.*

The proposed recommendations focus on modernizing section 2G2.2 to reflect offender conduct as well as on increasing offender rehabilitation. The Commission has also repeatedly urged Congress to revise section 2G2.2.¹⁸² The Commission's recommendations, however, neither provide a complete nor clear fix to non-production pornography sentencing. Additionally, despite its new appointments, public hearings, and public comment periods, the Commission has not even mentioned child pornography since it released its 2021 report.¹⁸³

C. *Build from the Commission's Incomplete Recommendations*

In its 2021 report, the Commission reiterated its recommendations from 2012: sentencing under section 2G2.2 needs to be revised and should focus instead on the *content* of the child pornography material, the offender's *community*, and the offender's *conduct*.¹⁸⁴ The Commission, however, did

182. See generally U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141; U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 1–3.

183. In October 2022, the Commission published policy priorities that failed to mention child pornography generally and section 2G2.2. U.S. SENT'G COMM'N, FINAL PRIORITIES FOR AMENDMENT CYCLE (Oct. 2022), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20221028_fr_final-priorities.pdf. The Commission continued to ignore section 2G2.2 in its 2023 proposed and adopted amendments. U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES (Feb. 2, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20230201_RF-proposed.pdf; U.S. SENT'G COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES, (Apr. 27, 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/202305_RF.pdf. Most recently, the Commission, yet again, failed to confront section 2G2.2 in its 2023-2024 policy priorities. U.S. SENT'G COMM'N, FINAL PRIORITIES FOR AMENDMENT CYCLE (Aug. 2023), https://www.ussc.gov/sites/default/files/pdf/amendment-process/federal-register-notices/20230824_fr_final-priorities.pdf.

184. U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 28. The Commission also recommended that Congress align the statutory penalty schemes for receipt offenses (requiring a five-year mandatory minimum sentence) and possession offenses (requiring no mandatory minimum sentence) because the underlying offense conduct in the typical receipt case is indistinguishable from the typical possession case. U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at E-2 n.7. Additionally, the Commission noted that Congress may wish to revise the penalty

not specify how these three “areas of focus” would fix section 2G2.2. Would these factors create new specific offense characteristics housed in section 2G2.2(b) and/or replace the current specific offense characteristics? Would these factors instead provide guidance to judges in section 2G2.2’s commentary section? There are more questions than answers.¹⁸⁵

Meanwhile, this Comment shows how the Commission’s “content” and “conduct” factors could be incorporated directly into section 2G2.2. Specifically, the number of images enhancement could be eliminated and replaced with an enhancement that focuses on the content of the images: whether the image contains an actual minor as well as an identified victim. Additionally, the number of images enhancement could be eliminated and replaced with an enhancement that focuses on the offender’s sexual activity: whether the offender discussed committing sexual acts or if the evidence suggests that the offender committed child sexual abuse. These recommendations would distinguish between more and less culpable offenders as well as lead to more proportionate sentences.

Another weakness of the Commission’s recommendations is that rehabilitation is not addressed, which is a basic sentencing goal and “an essential component of a comprehensive sex offender management system.”¹⁸⁶ The Commission only performed a recidivism analysis, finding that 4.3% of offenders were rearrested for a sex offense within three years of their release.¹⁸⁷

structure for distribution offenses to reflect the evolution of technologies used to distribute child pornography. *Id.* at 311.

185. In its 2021 report, the Commission only provided data on the three factors. U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 3. In fiscal year 2019, more than forty percent (43.7%) of non-production child pornography offenders participated in an online child pornography community, and nearly half (48.0%) of non-production child pornography offenders engaged in aggravating sexual conduct prior to, or concurrently with, the instant non-production child pornography offense. *Id.* at 6.

186. U.S. SENT’G COMM’N 2012 REPORT, *supra* note 141, at 278.

187. U.S. SENT’G COMM’N 2021 REPORT, *supra* note 14, at 7. For its recidivism analysis, the Commission tracked 1,093 non-production child pornography

Lastly, the Commission relied solely on Congress to fix section 2G2.2.¹⁸⁸ Specifically, the Commission requested that Congress enact legislation to give the Commission express authority to amend section 2G2.2.¹⁸⁹ As Brent Evan Newton highlighted, however, Congress does not need to authorize the Commission to revise the Guidelines.¹⁹⁰ The Commission may amend a number of section 2G2.2 provisions that it promulgated on its own without congressional directive or direct statutory amendment.¹⁹¹ Specifically, the base offense level for trafficking and receipt, the base offense level for possession, the simple receipt two-level decrease, and the prepubescent minor or minor under twelve years old two-level increase.¹⁹²

Using the Commission's revisions of the illegal reentry Guideline (section 2L2.3) as a model,¹⁹³ Newton proposed a

offenders released from incarceration or placed on probation in 2015. *Id.* Of the 1,093 offenders, 4.3% (forty-seven offenders) were rearrested for a sex offense within three years. *Id.* More offenders were arrested for a non-contact sex offense (3.3%) than a contact sex offense (1.3%). *Id.* at 65.

188. *See id.* at 2.

189. *Id.* As the Commission stated, if Congress enacted legislation that gave the Commission express authority to amend section 2G2.2, "the Commission would proceed to draft a comprehensive revision of the child pornography guidelines according to the Commission's regular procedures for amendment pursuant to U.S.C. § 994(o). Public comment would be sought, a public hearing would be held, and the proposed revision would be submitted for congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p)." U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at 322.

190. *See* Newton, *supra* note 169, at 63; *see also* U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at 322 (stating in 2012 that the Commission could amend the Guidelines without Congress under certain circumstances) ("Without congressional action, the Commission is able nevertheless to amend the child pornography guidelines in a more limited manner that better reflects the three sentencing factors . . . a number of [its] [§ 2G2.2] provisions were promulgated on the Commission's own initiative—not as a result of a specific congressional directive or by direct statutory amendment—and, thus, could be amended pursuant to 28 U.S.C. § 994(o) (subject to congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p)).").

191. *See* Newton, *supra* note 169, at 63.

192. U.S. SENT'G COMM'N 2012 REPORT, *supra* note 141, at E-1; U.S. SENT'G GUIDELINES MANUAL §§ 2G2.2(a)(1)–(2), (b)(1)–(2) (U.S. SENT'G COMM'N 2021).

193. In 2016, the Commission acted independently to revise section 2L1.2 for illegal reentry. Newton, *supra* note 169, at 63. The Commission substantially

series of revisions to section 2G2.2 base offense levels and specific offense characteristics.¹⁹⁴ In general, his proposal would lower penalty levels for many offenders, but it would still produce relatively severe sentencing ranges for the worst offenders.¹⁹⁵ Given current political gridlock, the Commission cannot wait for congressional action and must make similar revisions.

Even if Congress acted, the Commission would likely only receive more directives to increase the draconian child pornography sentences.¹⁹⁶ Congressional members focus on the political capital gained from introducing or supporting legislation. Because a majority of the public mistakenly believes that all child pornography offenders have committed, or will commit, child sexual abuse,¹⁹⁷ congressional members will not likely support measures that

recalibrated the provision's enhancements based on data that sentencing judges varied below the Guidelines ranges at high frequencies in cases with the most severe enhancements. *Id.*

194. *Id.* at 66–72.

195. *Id.* at 64. Congress has not implemented the Commission's recommendations in either the 2012 report or the recent 2021 report. U.S. SENT'G COMM'N 2021 REPORT, *supra* note 14, at 3.

196. See *Confirmation Hearing for Supreme Court Nominee Judge Ketanji Brown Jackson (Day 2)*, C-SPAN, at 8:55:54–8:56:06 (Mar. 22, 2022), <https://www.youtube.com/watch?v=q8TZsBTzJ5o> (Chairman of the Senate Judiciary Committee, Senator Dick Durbin (D-IL) stating “but I will tell you that there isn't a long line of people waiting to cosponsor this controversial issue. If we are going to tackle it, we should, but we should concede in the meantime that we've left judges in the lurch in many of these situations.”). Following Justice Jackson's nomination hearings, Senator Josh Hawley (R-MO) introduced the PROTECT Act of 2022, which would enhance the penalties for possessing child pornography and prevent judges from sentencing offenders below the Guidelines range. Josh Hawley, *Hawley Leads Bill to Protect Children, Toughen Sentences for Child Porn Offenders*, JOSH HAWLEY UNITED STATES SENATOR FOR MISSOURI (Mar. 29, 2022), <https://www.hawley.senate.gov/hawley-leads-bill-protect-children-toughen-sentences-child-porn-offenders>; see also Li Zhou, *The Republican Party is Still Fractured on Criminal Justice Reform*, VOX (Mar. 31, 2022, 8:00 AM), <https://www.vox.com/23003734/jackson-supreme-court-hearing-republicans-crime>. Senator Hawley's bill is likely unconstitutional and against the advisory nature of the Guidelines. See generally *United States v. Booker*, 543 U.S. 220 (2005).

197. See, e.g., Steel et al., *supra* note 83, at 1180; Hessick, *supra* note 11, at 875.

would allow the Commission to decrease certain offender sentences.

When the Commission published its 2021 report, it was experiencing a three-year-long failure to obtain a voting quorum.¹⁹⁸ It only had one voting member, and it needed an affirmative vote of at least four voting members to amend the Guidelines.¹⁹⁹ Today, however, the Commission has a full slate of voting members and both the power and the expertise to improve federal sentencing of non-production child pornography offenses.²⁰⁰ Any action the Commission takes must eliminate the use of a computer enhancement, revise the number of images enhancement, and focus on offender rehabilitation.

CONCLUSION

As displayed by Mr. Smith, Mr. Doe, and the Commission itself, the current sentencing structure for non-production child pornography offenses is outdated and ineffective. Section 2G2.2 fails to identify and distinguish offender culpability and actual danger to society. Instead, it fuels what has become an unsustainable, expensive system of incarceration based on the incorrect belief that all non-production child pornography offenders sexually abuse

198. See *About*, U.S. SENT'G COMM'N, <https://www.ussc.gov/about-page> (last visited Mar. 5, 2022); Ames Grawert et al., *Criminal Legal Reform One Year into the Biden Administration*, BRENNAN CENTER FOR JUSTICE (Jan. 24, 2022), <https://www.brennancenter.org/our-work/research-reports/criminal-legal-reform-one-year-biden-administration>; Ariane de Vogue, *Justices Sotomayor and Barrett Question the State of Federal Sentencing Commission*, CNN (Jan. 10, 2022, 1:52 PM EST), <https://www.cnn.com/2022/01/10/politics/sotomayor-barrett-federal-sentencing-commission/index.html>; Press Release, Hon. Charles R. Breyer, *Comment of Honorable Charles R. Breyer Acting Chair, U.S. Sentencing Commission, on Statement of Justices Sotomayor and Barrett*, U.S. SENT'G COMM'N (Jan. 12, 2022), <https://www.ussc.gov/about/news/press-releases/january-12-2022>.

199. U.S. SENT'G COMM'N GUIDELINES HISTORY, *supra* note 16, at 5.

200. *President Biden Nominates Bipartisan Slate for the United States Sentencing Commission*, THE WHITE HOUSE (May 11, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/11/president-biden-nominates-bipartisan-slate-for-the-united-states-sentencing-commission/>.

children. Additionally, it spurs future offender conduct based on inadequate resources for offender rehabilitation.

The broken section 2G2.2 relies heavily on judicial discretion to achieve some level of sentencing fairness.²⁰¹ Congress, however, sought to remove judicial sentencing discretion when it passed the Sentencing Reform Act of 1984.²⁰² Today, members of Congress criticize judges for using their discretionary power and fail to acknowledge that probation officers and even prosecutors encourage these same judges to vary from the unworkable Guidelines.²⁰³ Additionally, members fail to admit responsibility for creating the broken sentencing system, detrimentally overriding the Commission's expertise and, frankly, avoiding the issue.²⁰⁴ Congress must finally address non-production child pornography sentencing.²⁰⁵

Unfortunately, there is no single solution to fixing section 2G2.2. There is also no single solution to eradicating

201. See C-SPAN, *supra* note 196, at 8:54:03–8:55:14 (Mar. 22, 2022), <https://www.youtube.com/watch?v=q8TZsBTzJ5o> (Chairman of the Senate Judiciary Committee, Senator Dick Durbin (D-IL) stating “Congress doesn’t have clean hands in this conversation. We haven’t touched this now for fifteen, sixteen, or seventeen years We have created a situation because of our inattention and unwillingness to tackle an extremely controversial area in Congress and left it to the judges. I think we have to accept some responsibility for that”).

202. U.S. SENT’G COMM’N GUIDELINES HISTORY, *supra* note 16, at 1–2.

203. See Ariane de Vogue & Tierney Sneed, *Retired Federal Judges Defend Ketanji Brown Jackson’s Record on Child Porn Cases as ‘Entirely Consistent’*, CNN (Mar. 21, 2022, 9:19 PM), <https://www.cnn.com/2022/03/21/politics/retired-federal-judges-defend-ketanji-brown-jackson-sentencing-record/index.html>.

204. See generally Michael H. Keller & Gabriel J.X. Dance, *The Internet Is Overrun with Images of Child Sexual Abuse. What Went Wrong?*, N.Y. TIMES (Sept. 29, 2019), <https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html>.

205. See C-SPAN, *supra* note 196, at 8:55:48–8:56:20 (Chairman of the Senate Judiciary Committee, Senator Dick Durbin (D-IL) stating “I would just say that I don’t know if you have sponsored a bill to change this. I will be looking for it. But I will tell you that there isn’t a long line of people waiting to cosponsor this controversial issue. If we are going to tackle it, we should, but we should concede in the meantime that we’ve left judges in the lurch in many of these situations. There is no clarity in this situation, and I think to hold this judge responsible for the overall situation is to ignore our nonfeasance, malfeasance, whatever it might be, and lack of responsibility in dealing with this[.]”).

the production, consumption, and existence of child pornography. Society, however, cannot afford to maintain a “tough-on-crime” perspective. Solutions for non-production child pornography sentencing rely on “smart-on-crime” philosophies and include implementing a range of evidence-based proposals that address offender incarceration *and* offender rehabilitation. In order to implement these solutions, the Commission must revise section 2G2.2 enhancements and Congress must prioritize offender rehabilitation.