

THE CONDEMNATION OF SCOPOPHILIA: HOW THE FEDERAL SENTENCING GUIDELINES PERPETUATE RATHER THAN DISCOURAGE CHILD PORNOGRAPHY OFFENSES

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In 1987, the U.S. Sentencing Commission created its first federal sentencing guideline for child pornography offenses. As Congress grappled with dynamic technological advances that changed the child pornography landscape, the Commission continually revised and amended these guidelines, creating the last significant amendment in 2009. For the past 12 years, these guidelines have been considered by federal court judges tasked with sentencing child pornography offenders, yet little has been done to determine whether or not these guidelines actually diminish the amount of children victimized by child pornography. While acknowledging that child pornography victimizes and harms children in countless ways and must be criminalized to account for these egregious harms, this Note argues that the sentencing guidelines fail to deter the production, distribution, and consumption of child pornography, and fail to fulfill congressional goals of protecting children from victimization. Rather, the guidelines have resulted in the mass incarceration of child pornography offenders and a system that punishes viewers of child pornography more severely than it does child rapists. If the government truly wants to protect children from being victimized through child pornography, then the sentencing guidelines, as written, cannot stand, and they must be replaced by a system that allows child pornography offenders to access rehabilitative resources both inside and outside of the federal prison system.

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INTRODUCTION

The issue of child pornography is not a new one. In 1874, Henry Hayler, a London photographer, narrowly escaped arrest by fleeing to Berlin right before police raided his studio and found 130,000 indecent photographs, many of which were of children.¹ Even earlier than that, photographers such as J.T. Withe and Oscar Gustav Rejlander were producing pornographic images of children.² Even beloved *Alice in Wonderland* author, Lewis Carroll, was known for photographing nude and semi-nude children.³ Although punished by criminal indecency statutes, child pornography was not the subject of the intense public vitriol we see today, partly because of its relative rarity and limited proliferation, and partially due to Victorian acceptance of such images as artwork.⁴ A century later, pivotal changes in the technology used to produce and to access child pornography have transformed both the political landscape and public consciousness.

1. ERIC BERKOWITZ, *SEX AND PUNISHMENT: FOUR THOUSAND YEARS OF JUDGING DESIRE* 361 (2012); MAX TAYLOR & ETHEL QUAYLE, *CHILD PORNOGRAPHY: AN INTERNET CRIME* 42 (2003).

2. TAYLOR & QUAYLE, *supra* note 1, at 43.

3. Penny Chavers, *Was Lewis Carroll a Pedophile?*, *CURIOUS HISTORIAN* (Oct. 9, 2019), <https://curioushistorian.com/was-lewis-carroll-a-pedophile>.

4. *Id.*; *see also* TAYLOR & QUAYLE, *supra* note 1, at 43.

When the federal government first began combatting the production, distribution, and possession of child pornography in the late 1970s and early 1980s, the majority of transactions occurred in person or through the mail, making them relatively trackable.⁵ With the emergence of the Internet a decade later—and all of the technology that followed, i.e., chatrooms, email, social media, smartphones, tablets, etc.—an entirely new battlefield emerged.⁶ Thus, while child pornography once required substantial time and money to reproduce and transmit images and videos, the advent of the Internet enabled faster and cheaper reproduction and transmission with the simple click of a mouse.⁷ This led to a vast expansion of both the production and the demand for child pornography—an expansion the federal government was not prepared to handle.⁸

With a rapidly evolving child pornography industry came increased public awareness and fundamental shifts in public opinion. The 1960s and 1970s may have been a time of sexual revolution and relaxed views on obscenity,⁹ but these new social norms did not apply to child pornography. Instead, quite the opposite occurred. The production, distribution, or possession of these images became “the most egregious and despicable of societal and criminal offenses,”¹⁰ a phenomenon that continues today. Any news story reporting child pornography now tends to immediately garner an onslaught of comments attacking the offender.¹¹

5. See *infra* Section II.B.

6. See *infra* Section II.B.

7. *History of Sexual Exploitation of Children (News)*, WOMEN AT RISK INT’L, <https://warinternational.org/us-history-of-sexual-exploitation-of-children-news/> (last visited Jan. 30, 2020).

8. See *infra* Section II.B.

9. *History of Sexual Exploitation of Children (News)*, *supra* note 7. This was not unique to the United States, though. In July 1969, Denmark legalized the production of all types of pornography. TAYLOR & QUAYLE, *supra* note 1, at 43. Even Former-Pope Benedict went as far as to blame the rise in sexual abuse within the Catholic Church on the loose morality of the 1960s sexual revolution. Philip Pullella, *Ex-Pope Says Sexual Revolution Led to Abuse Crisis, Sparking Debate*, REUTERS (Apr. 11, 2019), <https://www.reuters.com/article/us-pope-abuse-benedict/ex-pope-says-sexual-revolution-led-to-abuse-crisis-sparking-debate-idUSKCN1RN0WI>.

10. *United States v. Sarras*, 575 F.3d 1191, 1220 (11th Cir. 2009).

11. E.g., Levi Edwards, *Foley Woman Sentenced to 20 Years for Making Child Pornography*, ADVANCE LOC. (Jan. 29, 2020), <https://www.al.com/news/mobile/2020/01/foley-woman-sentenced-to-20-years-for-making-child-pornography.html> (on file with author) (including reader comments such as “Trash like this should never be allowed to return to society,” and “Best wishes in the pokey. No pun intended.”); Johnathan Hogan, *Man with Thousands of Child Porn Images Sentenced*, IDAHO STATE J. (Jan. 28, 2020), https://www.idahostatejournal.com/news/local/man-with-thousands-of-child-porn-images-sentenced/article_cf2fc9b9-ee32-5f11-bf18-0edc3f6607d8.html (on file with author) (comments include, “He should be put to death . . .”);

Death penalty for all who abuse and exploit children. Their mentality won’t change. They rob children of their innocence. They rob children of what should be their easiest, most enjoyable time in life. They completely traumatize them for their own disgusting satisfaction. There is no place on earth for them.

It is irrefutable that child pornography victimizes children. The following analysis does not advocate the complete decriminalization of child pornography. In fact, in my opinion, child pornography is rightly a punishable offense. However, a society that criminalizes certain conduct should only do so with a thorough understanding of why it chooses to punish offenders, how it chooses to punish offenders, and whether these choices are rational and just.

A survey of the field reveals that at least part of the condemnation of child pornography offenders is based on fundamental misunderstandings about the offense and the people who commit it. These false assumptions include the belief that child pornography offenders are more likely to physically sexually abuse a minor¹²—they are not¹³—as well as the belief that viewing child pornography

Jessica Nicole Graham, FACEBOOK (Sept. 22, 2019, 5:09 AM), https://m.facebook.com/story.php?story_fbid=10156903501764856&id=171821634855 (on file with author); Angie Fierro, FACEBOOK (Sept. 19, 2019, 8:42 AM), https://ktla.com/2019/09/18/pennsylvania-state-senator-charged-with-possession-of-child-pornography-attorney-general-says/?fbclid=IwAR0B4vLMJE4Nji1BDu__OZGyeCt6bM7RmtaI2RpC-IVWYfcsebQeeZIMohI (on file with author) (“Yuck! Sick people. Yesterday there was a baseball player that got caught. #Disgusting.”). In 2018, Netflix released an Argentinian film, “Desire” onto its streaming service. After viewers became aware of a sexual scene depicting two young girls, they turned to social media to express their concerns. Sasha Savitsky, *Netflix Under Fire for Film Critics Say Contains Child Pornography*, FOX NEWS (June 28, 2018), <https://www.foxnews.com/entertainment/netflix-under-fire-for-film-critics-say-contains-child-pornography>. For example, one outraged Netflix patron turned to Twitter with her frustration: “@netflix You need to remove the film Desire from your service IMMEDIATELY. You are MAKING AVAILABLE CHILD PORN by leaving this film up. I am DISGUSTED and will be canceling my service if this is not fixed ASAP. What is wrong with you?!” Nicole (@NMChampagne), TWITTER (June 27, 2018, 8:30 AM), https://twitter.com/NMChampagne/status/1011995076950679552?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1011995076950679552&ref_url=https%3A%2F%2F

12. This was a proposition advanced by the Butner Study, which concluded that “when an opportunity arose (either incidentally or as a result of planned, predatory efforts), many offenders molested or raped children, and engaged in a variety of other sexually deviant behaviors.” 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. VIOL. 183, 189–90 (2008). Shortly after its release, the Study was exposed by other researchers and authors as being unreliable due to “poor research design and biased data.” Scott A. Johnson, *A Clarification Concerning the Butner Study*, 6 FORENSIC RSCH. & CRIMINOLOGY INT’L J. 261, 261 (2018).

13. While the production of child pornography inherently involves the physical sexual abuse of children, 90% of federal child pornography prosecutions are for either possession, receipt, or distribution, with only one out of every ten being for the production of child pornography. See Jacob Sullum, *What John Grisham Got Right About Child Pornography*, TIME (Oct. 21, 2014), <https://time.com/3528738/john-grisham-child-pornography/>. Further, as noted by the U.S. Sentencing Commission, “[m]ost current social science research suggests that viewing child pornography, in the absence of other risk factors, does not ‘cause’ individuals to commit sex offenses.” PATTY B. SARIS ET AL., U.S. SENTENCING COMM’N, EXECUTIVE SUMMARY—REPORT TO CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 102, 299–306 (Dec. 2012), <https://www.ussc.gov/sites/default/fi>

creates “a demand that encourages production”—it does not.¹⁴ These misunderstandings are largely “driven by outrage and disgust rather than reason.”¹⁵ And regardless of the immediate and visceral reaction that child pornography evokes, it is important to distinguish between individual reactions based on emotion and public policy decisions that, in the interest of justice, must be based on fact.

In addition to societal misunderstandings regarding child pornography offenders, the combination of rapid technological advancements, pronounced government unpreparedness, and misinformed societal condemnation has led to a severe disparity in federal sentencing guidelines governing child pornography versus other sexual crimes involving minors.¹⁶ It has also led to the mass incarceration of child pornography offenders and the preference of incarceration over more effective treatment options.¹⁷ The protection of children through the criminalization and punishment of child pornography is a legitimate and justifiable goal. This is precisely why the current situation invites the question: Are the federal sentencing guidelines actually effectuating this goal?¹⁸ As they are currently written, the guidelines create “a justice system in which people who look at images of child rape can be punished more severely than people who rape children.”¹⁹

This Note will address the question of whether federal child pornography sentencing laws are actually achieving their facial goal of protecting children and how these laws impact the victims, offenders, prison system, and society as a whole. It will also highlight many of the issues associated with the current federal sentencing guidelines for child pornography offenses and will make recommendations on how to better protect children. Part I will explain what child pornography is (and is not) and who child pornography offenders are. Part II will describe the current federal sentencing laws for child pornography offenses and how they developed. Part III will examine the lesser-discussed implications and controversies of these laws, including their severity in comparison to other arguably more severe crimes, the lack of rehabilitation achieved by these laws, the high rates of recidivism that exist despite these laws, and the impact they have on the federal prison system. Part IV will then make recommendations about what can and should be done to ensure that the federal sentencing guidelines are effectuating their goal of protecting children. This Note does not advocate that child pornography is a victimless crime or that child pornography offenders should not be incarcerated. It does argue, however, that the current federal sentencing guidelines for child pornography offenses actually undermine the government’s—and society’s—goal of keeping children safe.

les/pdf/news/congressional-testimony-and-reports/sex-offense-topics/201212-federal-child-pornography-offenses/Full_Report_to_Congress.pdf.

14. Sullum, *supra* note 13.

15. *Id.*

16. *See infra* Section III.A.

17. *See infra* Part III.

18. *See infra* Part III.

19. Jacob Sullum, *Looking vs. Touching: Is Possession of Child Pornography a Crime Worthy of Years in Prison?*, REASON (Feb. 12, 2014), <https://reason.com/2014/02/12/looking-vs-touching>.

I. DEFINITIONS AND DEMOGRAPHICS

It is important to begin with an understanding of not only what is considered child pornography, but also who exactly child pornography offenders are and what it is that they are accused of doing. While child pornography is illegal in the United States, the government has differentiated between what constitutes child pornography and what constitutes child erotica, the latter of which is legal to produce, possess, receive, and distribute. Federal law defines child pornography as:

[A]ny visual depiction, including any photograph, film, video, picture, or computer-generated image or picture, whether made or produced by electronic, mechanical means, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.²⁰

Child pornography includes images and videos of children under the age of 18 engaging in sexual acts,²¹ images of children playing on a beach that were specifically cropped so as to focus on the children's genitalia,²² and any other images or videos in which the child's genitals are exposed in a sexually suggestive manner.²³

“Child erotica,” on the other hand, refers to any other suggestive photos of children that are not depicting inherently sexually explicit conduct.²⁴ This typically encompasses “materials or items that are sexually arousing to persons having a sexual interest in minors but that are not, in and of themselves, obscene or that do not necessarily depict minors in sexually explicit poses or positions.”²⁵ For example, in *United States v. Edwards*, the defendant initially shared 715 images of child erotica featuring the same prepubescent girl.²⁶ These images included an image of the child “wearing ‘a pink and blue patterned leotard and sheer ballet skirt’ . . . [that] was ‘focused on the child’s genital area,’” multiple images of the child with a strand

20. 18 U.S.C. § 2256(8).

21. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 66 (1994).

22. *See United States v. Stewart*, 839 F. Supp. 2d 914, 919, 924 (E.D. Mich. 2012).

23. *See United States v. Dean*, 135 F. Supp. 2d 207, 211 (D. Me. 2001).

24. *See United States v. Vosburgh*, 602 F.3d 512, 520 n.7 (3d Cir. 2010).

25. *United States v. Edwards*, 813 F.3d 953, 957–58 (10th Cir. 2015); *see also United States v. Boles*, 914 F.3d 95, 100 (2nd Cir. 2019) (noting that child erotica encompasses pictures of children that may be sexually arousing to someone but are not sexually explicit); *United States v. Gourde*, 440 F.3d 1065, 1068 (9th Cir. 2006) (noting that child erotica constitutes “images that are not themselves child pornography but still fuel their sexual fantasies involving children.”).

26. *Edwards*, 813 F.3d at 957.

of garland wrapped around her chest and genitals, and images of the girl wearing “shiny red underwear, a red dress that was open down the front, and a red and white hat.”²⁷ Notably, all of the images labeled as child erotica were images in which the child’s genitalia remained covered.²⁸ While child erotica is not a punishable offense under 18 U.S.C. § 2256, possession of child erotica can establish sufficient probable cause to execute a search warrant for child pornography.²⁹

The majority of offenders are white males, accounting for 80.9% of all child pornography convictions.³⁰ In contrast, females account for less than 1% of convicted child pornography offenders.³¹ Child pornography offenders are primarily individuals over 40, with less than 10% of offenders being 25 or younger.³² Often child pornography offenders have no prior criminal history—approximately 78.3% of offenders have zero or one previous conviction.³³

Outside of racial and gender-specific demographics, child pornography offenders come from all walks of life, regardless of occupation or socioeconomic class. For example, Gregory Lisby, a 41-year-old male, had worked as a kindergarten teacher and as a Massachusetts priest before being sentenced to six years in federal prison and five years of supervised release on possession-of-child-pornography charges.³⁴ Jared Daily, a 34-year-old Iowa police officer, is currently facing up to 60 years in federal prison on charges of distributing, receiving, and accessing child pornography.³⁵ Jacob Riley Garner, a 22-year-old assistant manager at a comic store, was sentenced to five years in federal prison to be followed by ten years of supervised release for receiving and possessing child pornography.³⁶ Many celebrities have also faced federal child pornography charges. *Cheer* star Jerry

27. *Id.*

28. *Id.* at 957–58.

29. *Id.* at 958.

30. WILLIAM H. PRYOR JR. ET AL., U.S. SENTENCING COMM’N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 39 (Jan. 2019) [hereinafter MANDATORY MINIMUM PENALTIES], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102_Sex-Offense-Mand-Min.pdf. 12.9% were Hispanic, 3.8% were Black, and 2.4% were identified as other races. *Id.*

31. *Id.* at 40.

32. *Id.*

33. *Id.* at 41.

34. Michael Connors, *Former Holyoke Kindergarten Teacher Gets Six Years for Child Porn*, DAILY HAMPSHIRE GAZETTE (Sept. 20, 2020), <https://www.gazettenet.com/Former-Holyoke-kindergarten-teacher-Gregory-Lisby-sentenced-to-six-years-in-prison-on-federal-child-pornography-charges-36338285>.

35. Hillary Ojeda, *Iowa Police Officer Facing Child Pornography Charges Resigns*, IOWA CITY PRESS-CITIZEN (Sept. 11, 2020), <https://www.press-citizen.com/story/news/crime-and-courts/2020/09/11/belle-plaine-police-officer-jared-daily-resigns/5771109002/>.

36. Gabrielle Banks, *Spring Man Tells Judge He’s ‘Disgusted and Ashamed’ by His Child Pornography Use*, HOUS. CHRON. (Jan. 31, 2017), <https://www.chron.com/news/houston-texas/article/Spring-man-tells-judge-he-s-disgusted-and-10894909.php>.

Harris, 21, is currently facing federal charges for production of child pornography.³⁷ In 2015, Mark Salling, 35, best known for his role in *Glee*, faced federal charges for receiving and possessing child pornography.³⁸

As of 2016, 60% of child pornography offenders were convicted of offenses that carried mandatory minimum sentences.³⁹ The average sentence length for all offenders was approximately 8.5 years.⁴⁰ Nearly 75% of these offenders were convicted of distribution-related offenses, while the remaining quarter were convicted of receipt- or possession-related offenses.⁴¹

II. FEDERAL CHILD PORNOGRAPHY SENTENCING PROCEDURES

A. *The U.S. Sentencing Commission and Sentencing Guidelines*

Child pornography offenders facing charges in federal courts are sentenced pursuant to the sentencing guidelines established by the U.S. Sentencing Commission (“USSC”). The USSC was initially established by the Sentencing Reform Act of 1984 in order to address “widespread disparity [between crimes of similar social harm] in federal sentencing.”⁴² Since that time, the USSC has proliferated an extensive sentencing guideline system that advises federal courts around the nation on suggested sentences for federal crimes.⁴³ While these guidelines were initially mandatory, the Supreme Court held that the mandatory application raised significant Sixth Amendment concerns and that, in order to uphold the constitutionality of the Sentencing Reform Act of 1984, the guidelines could only be considered as advisory, leaving courts with the discretion to sentence outside of the prescribed ranges.⁴⁴ Under each guideline, the USSC also includes

37. Jason Meisner et al., *Jerry Harris, Star of Netflix Show ‘Cheer,’ Appears in Federal Court in Chicago on Charges of Producing Child Pornography*, CHI. TRIB. (Sept. 17, 2020), <https://www.chicagotribune.com/news/criminal-justice/ct-jerry-harris-cheer-child-pornography-charges-chicago-20200917-dddpvpsk7ra2hb72c67b47j6uq-story.html>.

38. Alex Dobunzinskis, *‘Glee’ Actor Mark Salling, 35, Dies Before Child Pornography Sentencing*, REUTERS (Jan. 30, 2018), <https://www.reuters.com/article/us-people-mark-salling/glee-actor-mark-salling-35-dies-before-child-pornography-sentencing-idUSKBN1FJ2QO?feedType=RSS&feedName=topNews>. Although Salling reached a plea agreement with federal prosecutors, he committed suicide while awaiting sentencing. Maria Puente, *Mark Salling Death Officially Ruled Suicide, Los Angeles Coroner Says*, USA TODAY (Feb. 1, 2018), <https://www.usatoday.com/story/life/2018/02/01/mark-salling-death-officially-ruled-suicide-los-angeles-coroner-says/1088851001/>.

39. MANDATORY MINIMUM PENALTIES, *supra* note 30, at 32. White male offenders accounted for 83% of child pornography offenses carrying mandatory minimum sentences. *Id.* at 36.

40. *Id.* at 44. The average sentence length for all child pornography offenders was 101 months. *Id.* Broken down by offense, “offenders convicted of distribution offenses had the longest average sentence (140 months), followed by receipt offenders (93 months), and possession offenders (67 months).” *Id.*

41. *Id.* at 33. The large percentage of distribution offenses is attributable to the expeditious and effortless ability to share files through the Internet and other technological mediums. *See infra* Section II.B.

42. *About*, U.S. SENTENCING COMM’N, <https://www.ussc.gov/about-page> (last visited Sept. 22, 2019).

43. *Id.*

44. *United States v. Booker*, 543 U.S. 220, 259–60 (2005).

commentaries, which explain how to apply the guideline to an individual offender and when a departure from the guideline may be warranted.⁴⁵ The USSC has also created a sentencing table to help judges and attorneys determine the appropriate sentences for individual offenders.⁴⁶ An explanation of how to use the sentencing table follows below, and a copy of the current table is provided in the Appendix to this Note.

An individual offender's sentencing range is a product of his criminal history category and the offense level for the crime(s) involved in the present case. The criminal history category, one of six represented by the columns on the sentencing table provided in the Appendix, is determined based on the sum of criminal history points accumulated by the defendant.⁴⁷ The rows represent the offense level, calculated by taking the base offense level assigned to the particular crime the defendant has committed and adjusting it by any appropriate upwards or downwards departure.⁴⁸ Additionally, the zones that are reflected in the rows "determine confinement options for each sentencing range."⁴⁹ The USSC recommends sentencing offenders who fall within Zone A to a period of confinement ranging from zero to six months, which can be "probation-only, probation with a confinement condition, a split sentence, or imprisonment."⁵⁰ Offenders who fall within Zone B are recommended a period of confinement between 1 and 15 months, at least a month of which must be spent in prison.⁵¹ Zone C recommends a period of confinement between 10 and 18 months, at least half of which must be spent in prison.⁵² The other half of the sentence may be eligible for

45. U.S. SENTENCING COMM'N, U.S. SENTENCING COMMISSION GUIDELINES MANUAL (2018) [hereinafter MANUAL], <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf>.

46. *Id.* at 12.

47. *Id.* at 379–80. In calculating which category an offender falls into, judges are instructed to add (a) three points for prior sentences longer than 13 months; (b) two points for prior sentences of at least 60 days (not to overlap with subsection (a)); (c) one point for any prior sentences not included in (a) or (b), up to four points; (d) two points if the current offense was committed while imprisoned, or while on probation, parole, supervised release, imprisonment, work release, or escape status; and (e) one point for any other crimes of violence not covered in any of the preceding subsections, up to three points. *Id.* These totals are then added up and the appropriate criminal history category is assigned. *Id.*

48. See PATTI B. SARIS, U.S. SENTENCING COMM'N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 2 (2015) [hereinafter ALTERNATIVE SENTENCING], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf. These can include, for example, a downwards departure where the defendant accepts responsibility for the alleged offense, or an upwards departure where the defendant committed the present offense while on some form of supervised release.

49. *Id.*

50. *Id.* For example, an individual without any criminal history who was convicted of assault that involved physical contact or possession of and threatened use of a dangerous weapon would fall under Zone A. See MANUAL, *supra* note 45, § 2A2.3.

51. ALTERNATIVE SENTENCING, *supra* note 48, at 2–3. An individual with no prior criminal history who has been convicted of assault that resulted in bodily injury would be sentenced under Zone B. See MANUAL, *supra* note 45, § 2A2.3.

52. ALTERNATIVE SENTENCING, *supra* note 48, at 3.

supervised release with either home or community confinement.⁵³ Offenders with higher offense levels or expansive criminal histories typically fall within Zone D, which requires a period of confinement ranging from 15 months to life.⁵⁴ These offenders are generally required to spend the entire sentence in prison.⁵⁵

B. History of Federal Child Pornography Laws

In 1978, the federal crackdown on child pornography began with the Protection of Children Against Sexual Exploitation Act (“PCASEA”).⁵⁶ The PCASEA criminalized the production and trafficking of child pornography, created a 10-year maximum sentence for first-time offenders, and required a sentencing range of 2 to 15 years for repeat offenders.⁵⁷ Almost a decade later, Congress passed the Child Abuse Victims’ Rights Act of 1986 (“CAVRA”) allowing victims to receive restitution and increasing the mandatory minimum for repeat offenders to five years.⁵⁸ In the midst of this legislation, Congress also passed the Sentencing Reform Act of 1984.⁵⁹

From 1987 to 2009, the USSC continually revised and amended the federal sentencing guidelines for child pornography offenses, adding increasingly severe enhancements and higher base offense levels.⁶⁰ However, very few meaningful changes have been made since 2009. Although little research has been done to determine why the sentencing procedures have not been revisited in over a decade, it is most likely due to the fact that, from the creation of the guidelines until the last amendment, the USSC was grappling with dynamic technological advances that inherently changed the child pornography landscape.⁶¹ By the time the USSC

53. *Id.* An offender with up to a category II criminal history who failed to register as a Tier I sex offender would be sentenced according under Zone C. *See* MANUAL, *supra* note 45, § 2A3.5.

54. ALTERNATIVE SENTENCING, *supra* note 48, at 3. An individual convicted of voluntary manslaughter would be sentenced under Zone D. *See* MANUAL, *supra* note 45, § 2A1.3.

55. ALTERNATIVE SENTENCING, *supra* note 48, at 3.

56. Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95–225, 92 Stat. 7 (1978).

57. 18 U.S.C. § 2251.

58. Child Abuse Victims’ Rights Act, Pub. L. No. 99–500, 100 Stat. 1783 (1986).

59. *See supra* Section II.A.

60. *See* Kathryn C. Seigfried-Spellar et al., *Internet Child Pornography, U.S. Sentencing Guidelines, and the Role of Internet Service Providers*, LECTURE NOTES OF THE INSTITUTE FOR COMPUTER SCIENCES, SOCIAL INFORMATICS AND TELECOMMUNICATIONS ENGINEERING (Jan. 2012), https://www.researchgate.net/publication/285975958_Internet_Child_Pornography_US_Sentencing_Guidelines_and_the_Role_of_Internet_Service_Providers.

61. The first web browser, MOSAIC, was released in 1993, and the Internet became public domain several months later. David Grossman, *On This Day 25 Years Ago, the Web Became Public Domain*, POPULAR MECHS. (Apr. 30, 2018), <https://www.popularmechanics.com/culture/web/a20104417/www-public-domain/>. It was around this same time that Outlook, AOL, and other email services became common means of online communication. Samuel Gibbs, *How Did Email Grow from Messages Between Academics to a Global Epidemic?*, GUARDIAN (Mar. 7, 2016),

created the last significant amendment in 2009, the guidelines already reflected enhancements based on the use of technology during commission of the offense.⁶² Because very few technologies have been developed after 2009 that are not already encompassed by the guidelines, further amendments have likely been considered unnecessary.

The USSC first addressed child pornography in its sentencing guidelines in 1987, with the creation of §§ 2G2.1–2.⁶³ This first set of guidelines, while silent on the topic of possession, created a base offense level of 13 for production and receipt of child pornography, along with a 2-level increase for pictures of children under 12 years of age, and a 5-level minimum increase for distribution of these images.⁶⁴ It was not until four years later, after Congress passed the Child Protection Restoration and Penalties Enhancement Act of 1990,⁶⁵ that the USSC created a guideline addressing the possession of child pornography.⁶⁶ Section 2G2.4 created

<https://www.theguardian.com/technology/2016/mar/07/email-ray-tomlinson-history>. Instant messaging services such as AOL Instant Messenger and Microsoft’s MSN Messenger became popular methods of chatting and sending images online in 1999. *See* Matt Petronzio, *A Brief History of Instant Messaging*, MASHABLE (Oct. 25, 2012), <https://mashable.com/2012/10/25/instant-messaging-history/>. By the early 2000s, over half of the homes in the United States had household computers, with the percentage increasing to 77% by 2010. *Percentage of Households with a Computer at Home in the United States from 1984 to 2010*, STATISTA (Feb. 1, 2010), <https://www.statista.com/statistics/184685/percentage-of-households-with-computer-in-the-united-states-since-1984/>. Social media also gained popularity in the early 2000s, with MySpace reaching a million monthly users in 2004 and Facebook gaining popularity in 2008. Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media>. Smartphones also started to become commonplace with the advent of the 3G network in 2003, and the first iPhones and Androids appeared on the market in 2007 and 2008. *History of Mobile Phones and the First Mobile Phone*, USWITCH (Feb. 21, 2019), <https://www.uswitch.com/mobiles/guides/history-of-mobile-phones/>. In August 2010, the Department of Justice provided a report to Congress, detailing the rise of Peer-to-Peer (“P2P”) file sharing and its impact on child pornography trafficking. U.S. DEP’T. JUST., *THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION A REPORT TO CONGRESS 19* (Aug. 2010), <https://www.justice.gov/psc/docs/natstrategyreport.pdf>. P2P networks allow users to use software rather than a browser (and thus more easily avoid detection) to download files directly from another user’s hard drive. Carmen Carmack, *How BitTorrent Works*, HOWSTUFFWORKS, <https://computer.howstuffworks.com/bittorrent.htm> (last visited Feb. 1, 2020). P2P networks have become “the most popular mechanism for the criminal acquisition and distribution of child pornography.” RYAN HURLEY ET AL., NAT’L CRIM. JUST. REFERENCE SERV., *MEASUREMENT AND ANALYSIS OF CHILD PORNOGRAPHY TRAFFICKING ON P2P NETWORKS 1* (Jan. 2015), <https://www.ncjrs.gov/pdffiles1/ojdp/grants/248597.pdf>.

62. These enhancements are discussed in detail later in this Section.

63. WILLIAM K. SESSIONS III ET AL., U.S. SENTENCING COMM’N, *THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 10* (Oct. 2009), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/2009-1030_History_Child_Pornography_Guidelines.pdf [hereinafter *THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES*].

64. *Id.*

65. Crime Control Act of 1990, Pub. L. No. 101–647, 104 Stat. 4789, tit. III, § 323(a), (b) (1990).

66. *THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES*, *supra* note 63, at 18.

a base offense level of 10 for possession of child pornography, with a 2-level increase for materials that included a minor under 12 years of age.⁶⁷

Throughout this time period, technological advancements, such as public access to the Internet and the use of email as a means of communication, continued to develop and evolve.⁶⁸ By the time the USSC added a new subsection in 1996, which allowed for a 2-level increase for the use of a computer during the commission of a child pornography offense,⁶⁹ the base offense levels for § 2G2.2 and § 2G2.4 had increased to 17 and 15 respectively.⁷⁰ Four years later, in response to the ease of file-sharing made possible by the Internet, § 2G2.2 was again amended at Congress's directive, creating five new potential enhancements for distribution-related offenses.⁷¹

In 2003, following the passage of the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act"), the sentencing guidelines were amended to allow enhancements based on the number of pornographic images that the offender was convicted of possessing, receiving, distributing, or producing.⁷² Under both § 2G2.2(b)(6) and § 2G2.4(b)(5), offenders would now face an enhancement of two levels for 10–149 images, three levels for 150–299 images, four levels for 300–599 images, and five levels for 600 or more images.⁷³ Finally, in 2004, the base levels of § 2G2.2 and § 2G2.4 were further increased to 18 and 22 respectively.⁷⁴

67. Alan Ellis & Karen L. Landau, *Child Pornography Guidelines Are Ripe for Challenge*, ALANELLIS, <https://alanellis.com/child-pornography-guidelines-are-ripe-for-challenge/> (last visited Nov. 1, 2019). Later that same year, Congress provided feedback to the Commission, stating that it did not believe the guidelines were severe enough to "specifically account for past or present abuse of children." THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 63, at 13. Based on this feedback, the USSC further amended § 2G2.2 and § 2G2.4. *Id.* at 24. These new amendments increased the base offense level prescribed by § 2G2.2 to 15, allowing for an additional 5-level increase "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor," and increased the base-offense level for § 2G2.4 to 13, permitting an additional 2-level increase for possession of 10 or more images. *Id.* at 25.

68. *See supra* note 61.

69. THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 63, at 31–32.

70. John Gabriel Woodlee, *Congressional Manipulation of the Sentencing Guideline for Child Pornography Possession: An Argument for or Against Deference?*, 60 DUKE L.J. 1015, 1028 (2011).

71. THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 63, at 36. These offenses included: (1) a minimum five-level increase for distribution for pecuniary gain; (2) a five-level increase for distribution in exchange for a "thing of value, but not for pecuniary gain;" (3) a five-level increase for distribution to a minor; (4) a seven-level increase for distribution to a minor with the intent to persuade the minor "to engage in prohibited sexual conduct;" and (5) a two-level increase for any other type of distribution. *Id.*

72. *Id.* at 40. In 2004, after further increasing the base levels of § 2G2.2 and § 2G2.4 to 18 and 22, respectively, the USSC created the first potential downward departure for defendants. *Id.* at 45–46.

73. *Id.* at 40–41.

74. *Id.* at 48–49

The last major change to federal child pornography sentencing came in 2009 after Congress created a new offense under the PROTECT Act, which made it a crime to “knowingly produce with intent to distribute, or to knowingly distribute” morphed images of child pornography.⁷⁵ Per the Act, individuals convicted of this offense faced a 15-year statutory maximum sentence.⁷⁶ The Act included morphed images, which are described as “child pornography that is an adapted or modified depiction of an identifiable minor.”⁷⁷ Pursuant to the 2009 amendment to the sentencing guidelines, § 2G2.2(a)(1) created a base offense level of 18 for producers and distributors of morphed images, allowing for a 2-level upward adjustment if a computer was used.⁷⁸

C. Current Federal Sentencing Procedures for Child Pornography

There are currently two primary guidelines that focus on child pornography offenses: § 2G2.1⁷⁹ and § 2G2.2.⁸⁰ Section 2G2.1 covers production of child pornography and sets the base offense level for production at 32.⁸¹ Furthermore, § 2G2.1 allows for various upward adjustments based on the age of the minor, whether sexual contact with the minor was involved, whether it was knowingly distributed, the defendant’s relationship to the minor, and whether the offense involved live-streaming or sadism.⁸² Accordingly, a first-time offender with no criminal history would be sentenced to a term of imprisonment of 121–151 months or, if the offense involved a minor under the age of 12, 188–235 months.

Section 2G2.2 has a much broader reach and covers possession and receipt, as well as distribution, of child pornography.⁸³ Most offenders facing child pornography charges in federal court are sentenced under § 2G2.2.⁸⁴ The base

75. *Id.* at 50.

76. *Id.*

77. PROTECT Our Children Act of 2008, Pub. L. No. 110–401, § 304. A morphed image is one in which an image of a child is combined with a sexually explicit image of an adult. Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909, 909 (2019). This usually takes the form of images featuring children’s heads superimposed on the bodies of adults engaged in sexual activities. *See, e.g.*, *Doe v. Boland*, 698 F.3d 877, 879 (6th Cir. 2012); *United States v. Hotaling*, 634 F.3d 725, 727 (2d Cir. 2011).

78. THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 63, at 51–53.

79. MANUAL, *supra* note 45, § 2G2.1.

80. MANUAL, *supra* note 45, § 2G2.2. Section 2G2.4 was consolidated with § 2G2.2 in 2004. THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 63, at 48.

81. MANUAL, *supra* note 45, § 2G2.1(a).

82. MANUAL, *supra* note 45, § 2G2.1(b). Specifically, § 2G2.1 allows for a four-level increase if the minor is less than 12 years old; a two-level increase if the minor is between the ages of 12 and 15; a two-level increase if a sexual act or contact with a minor was involved; a two-level increase if the defendant knowingly distributed it; a four-level increase if it includes sadomasochism, an infant, or a toddler; a two-level increase if the defendant was related to or otherwise in charge of caring for the minor; and a two-level increase if the minor was manipulated for the purpose of live-streaming the material.

83. MANUAL, *supra* note 45, § 2G2.2.

84. *See supra* note 41 and accompanying text.

offense level for § 2G2.2 is 18 if the defendant is convicted under 18 U.S.C. § 1466A(b),⁸⁵ § 2252(a)(4),⁸⁶ or § 2252A(a)(5)⁸⁷ or (a)(7).⁸⁸ Otherwise, the base offense level is 22.⁸⁹ Section 2G2.2(b) also allows for various upward adjustments based on the age of the minor, whether the material was distributed for pecuniary gain or to entice minors to engage in sexual conduct, the age of the recipients, whether the material involved a pattern of sexual abuse of a minor, whether the material was knowingly distributed, whether the material involved sadomasochism, and whether a computer was used during the offense.⁹⁰

The guidelines also provide for additional upward adjustments based on the amount of images involved in the offense.⁹¹ This tends to be extremely consequential to offenders, as they are often able to store massive amounts of images on hard drives or flash drives, and they can ultimately share hundreds of images within seconds through P2P filesharing.⁹² In calculating how many images an offender has in his possession, each video that is shorter than five minutes counts as 75 images, with an upward adjustment for longer videos.⁹³ Under this guideline, a first-time offender with no criminal history who was convicted of downloading two 5-minute videos depicting child pornography would face 70–87 months in prison, or 87–108 months if the images were of children younger than 12.

85. MANUAL, *supra* note 45, § 2G2.2(a). The criminal statute was created when Congress passed the PROTECT Act criminalizing possession, distribution, receipt and production of morphed images of child pornography. 18 U.S.C. § 1466A(b). Subsection (b) covers possession of such images.

86. Anyone who “knowingly possesses, or knowingly accesses with intent to view, 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction” of child pornography either in a maritime or territorial jurisdiction of the United States or that has been shipped through interstate or foreign commerce (including computer transmissions) is punishable under 18 U.S.C. § 2252(a)(4).

87. Any person who “knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography” of child pornography either in a maritime or territorial jurisdiction of the United States or that has been shipped through interstate or foreign commerce (including computer transmissions) is punishable under 18 U.S.C. § 2252A(a)(5).

88. Any person who “knowingly produces with intent to distribute, or distributes, by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor” is punishable under 18 U.S.C. § 2252A(a)(7).

89. MANUAL, *supra* note 45, § 2G2.2(a).

90. *Id.* § 2G2.2(b)(1)–(6). Section 2G2.2(b) mandates an increase of six levels if it was distributed to a minor with the intent to persuade them to engage in illegal activity or seven if the intent was to persuade the minor to travel to do so; an increase of two levels for material involving a minor under the age of 12; a minimum of five levels for distributing the material for valuable consideration such as pecuniary gain; two levels for knowing distribution; four levels for portrayals of sadomasochism, or infants or toddlers; five levels for a pattern of sexual abuse or exploitation of a minor; and two levels for use of a computer in the commission of the offense. *Id.*

91. *Id.* § 2G2.2(b)(7).

92. *See supra* note 61.

93. MANUAL, *supra* note 45, § 2G2.2, cmt. 6(B)(ii).

III. POINTS OF FAILURE WITHIN THE SENTENCING GUIDELINES FOR CHILD PORNOGRAPHY

A. The Sentencing Guidelines Mandate Much Harsher Sentences for Child Pornography Offenses Than They Do for Other Crimes with Similar Harms.

This Note focuses on the goal of child pornography legislation as being the protection of children. This goal is not an individualized concern but is instead a multifaceted goal that incorporates many different concerns and harms. Some of these concerns can be identified through legislative history. For example, in 1990, the USSC reviewed the legislative history of the federal child pornography statutes and issued a Staff Report detailing what it concluded were Congress's three main reasons for issuing the legislation:

(1) both commercial and non-commercial distribution and receipt of child pornography contribute to the molestation and abuse of children; (2) child pornography had become a highly organized, multi-million dollar industry that operates on [a] nationwide scale, but federal law enforcement efforts should not be limited to large scale distributors of child pornography; (3) child pornography causes substantial harm to both the child victim and to society as a whole since abused children tend to grow up "in an adult life of drugs and prostitution [and] become child molesters themselves, thus continuing the vicious cycle."⁹⁴

Courts have also identified an array of harms caused by child pornography, including: (1) physical or psychological harm as a result of the child's involvement in sexually explicit material; (2) because of the permanence of videos and images, especially online, "its continued existence causes the child victims of sexual abuse continuing harm by haunting those children in future years;" (3) child pornography can be used to induce other children into engaging in sexual activities with adults; (4) it can "desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer;" (5) the consumption of child pornography encourages the creation and distribution of more child pornography; and (6) it fosters "a societal perception of children as sexual objects . . . leading to further sexual abuse and exploitation."⁹⁵

Behind all of the identified concerns and harms lies one primary goal: the protection of children. Yet, in contrast to the sentencing guidelines for child pornography, many other federal crimes involving similar harms are given much lower sentencing recommendations. For example, possession of a controlled substance, such as heroin, even *with* a prior conviction, leads to a sentence of only

94. THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES, *supra* note 63, at 13 (quoting U.S. SENTENCING COMM'N, REVISED REPORT OF THE WORKING GROUP ON CHILD PORNOGRAPHY AND OBSCENITY OFFENSES AND HATE CRIME 8 (1990)).

95. *United States v. White*, 506 F.3d 635, 649–50 (8th Cir. 2007) (Riley, J., concurring).

15 days to 24 months.⁹⁶ Distributing such a substance to a child would warrant only a 12- to 36-month sentence.⁹⁷

A far more shocking discrepancy emerges when analyzing the sentencing guidelines for abusive sexual contact and criminal sexual abuse of a minor under the age of 16 years. A first-time offender convicted of abusive sexual contact with an incapacitated adult would receive a sentence of only 21–27 months.⁹⁸ Even further, a first-time offender convicted of criminal sexual abuse of a minor between the ages of 12 and 16 would receive a sentence between 27 and 33 months.⁹⁹ This means that a first-time offender who actually knowingly sexually penetrated or molested a 12-year-old child would spend, on average, less than half of the time in prison than a first-time offender who is convicted of downloading two 5-minute videos depicting child pornography would.¹⁰⁰

These discrepancies explicitly illustrate that the guidelines surrounding child pornography offenses go far beyond what is necessary to serve their purported goal of protecting children and beg the question, “If the sentences imposed for child pornography offenses far exceed those for other offenses with similar, if not worse harms, do they do more harm than good?”¹⁰¹

B. The Sentencing Guidelines for Child Pornography Create Judicial Uncertainty and Detract from the USSC’s Goal of Standardizing Sentencing Procedures.

The disparities between federal sentences for child pornography and other crimes have not escaped the notice of federal judges across the nation. In a 2010 survey of U.S. district court judges conducted by the USSC, 71% stated that the mandatory minimum sentence for receipt of child pornography was too high, 37% stated that the mandatory minimum for distribution was too high, and 23% stated

96. CHARLES DOYLE, CONG. RESEARCH SERV., MANDATORY MINIMUM SENTENCING OF FEDERAL DRUG OFFENSES IN SHORT 2 (2018), <https://fas.org/sgp/crs/misc/R45075.pdf>.

97. *Id.* at 6.

98. MANUAL, *supra* note 45, § 2A3.4.

99. *Id.* § 2A3.2; 18 U.S.C. § 2243(a).

100. *See supra* Section II.C.

101. A potential reason for this discrepancy may be the fact that although child pornography offenses inherently implicate interstate commerce, it is far less common that a federal court will have jurisdiction over a child sexual abuse case. Generally, most child sexual abuse cases are handled by the local authorities where the crime was committed, unless the child was abused on federal lands. *See Child Sexual Abuse*, DEP’T OF JUST. (May 28, 2020), <https://www.justice.gov/criminal-ceos/child-sexual-abuse>. Further, because “[m]any of the [federal] child sexual abuse offenses have seemingly overlapping elements,” federal courts prosecuting child sexual abuse cases may be bound by the lesser-included offense doctrine, in which the jury is instructed as to a lesser offense of which the defendant could be found guilty. RICHARD M. THOMPSON II, CONGRESSIONAL RSCH. SERV., SEXUAL ABUSE OF CHILDREN: FEDERAL CRIMINAL OFFENSES 11–12 (2012), https://www.everycrsreport.com/files/20120713_R42132_bbbc61b5ab8d884e6eb9f449b74d33c49b2445a4.pdf. Thus, the argument would be that providing lower sentencing ranges in the guidelines may encourage federal child sex abuse offenders to accept pleas, negating the risk of the case going to trial and resulting in a conviction for a lesser-included offense.

that the mandatory minimum for production was too high.¹⁰² By contrast, 43% of the federal judges surveyed believed the mandatory minimum for trafficking heroin was too high, and only 26% believed the same regarding mandatory minimums for other child exploitation offenses.¹⁰³ Even though extremely steep or long sentences are not a violation of the Eighth Amendment's prohibition on cruel and unusual punishments,¹⁰⁴ some federal judges have gone as far as to refuse to apply the steep guidelines recommended by the USSC.¹⁰⁵

For example, in *United States v. C.R.*, the defendant was arrested on child pornography charges when he was only 19 years old.¹⁰⁶ The defendant had a habit of downloading and viewing child pornography while he was high, and agents eventually caught him when they “selected and transferred a child pornography file from the defendant’s computer, at the agent’s initiative, through a peer-to-peer electronic file sharing program named ‘Gigatribe.’”¹⁰⁷ Because the agents were able to receive child pornography directly from the defendant’s computer, they charged him not only with possession, but with distribution as well.¹⁰⁸ The judge ultimately determined that the mandatory minimum sentence, in light of the defendant’s circumstances, was unconstitutional as applied, holding that “were there no . . . mandatory minimum sentence the court would have imposed a probationary sentence with supervised release and outpatient treatment.”¹⁰⁹

Similarly, in *United States v. Shasky*, the defendant, a Nebraska state trooper, was charged with receipt of child pornography.¹¹⁰ The judge feared that,

102. WILLIAM K. SESSIONS III ET AL., U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 7 (2010), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

103. *Id.* The survey filled out by the judges simply listed “Other Child Exploitation Offenses” as an option without specifying which offenses that category covered.

104. There is no strict proportionality requirement between the crime and the sentence. *See Ewing v. California*, 538 U.S. 11, 18, 30–31 (2003) (holding that a three-strikes sentence of 25 to life for stealing several golf clubs was not grossly disproportionate and thus did not violate the Eighth Amendment).

105. John T. Hughes, *Reacting to the Judicial Revolt: Applying Innovations in Narcotics Sentencing to Federal Non-Production Child Pornography Cases*, 47 COLUM. J.L. & SOC. PROBS. 31, 34, 41–42 (2013) (explaining that after the Court ruled in *Booker* that the sentencing guidelines were no longer mandatory, judges began to question “whether decades-long sentences in prison for first-time offenders really ma[de] for good policy,” with many concluding not only that the guidelines were outdated, reflecting “notions of relative culpability that were developed before the Internet age,” but that often the defendants who “receive the harshest sentences are frequently not those who actually pose the most significant risk to society”).

106. *United States v. C.R.*, 792 F. Supp. 2d 343, 515 (E.D.N.Y. 2011).

107. *Id.* at 352.

108. *Id.* at 353.

109. *Id.* at 519.

110. *United States v. Shasky*, 939 F. Supp. 695, 697 (D. Neb. 1996). Specifically, the court noted that the defendant was “unusually susceptible to abuse in prison” not only due to his status as law enforcement, but also because he was “a homosexual, of diminutive stature (height 5’7” and weight 130–135 pounds), who is charged in a well-publicized case, with receiving pornography involving minors.” *Id.* (internal citations omitted).

because of the circumstances surrounding the defendant's case, the defendant would be highly susceptible to abuse in prison.¹¹¹ Ultimately, the court determined that the defendant would receive better and more substantial treatment by remaining in a three-year outpatient sex offender program at the University of Minnesota Medical School, and thus sentenced him to three years of probation, a \$30,000 fine, community service, and a requirement that any future contact with minors be pre-approved.¹¹²

Nevertheless, many judges have felt compelled to sentence offenders within the USSC's recommended guidelines.¹¹³ Some judges have even upheld 20-year sentences because they were actually below the suggested guidelines, and thus were considered relatively lenient.¹¹⁴ Multiple judges have even found life sentences for child pornography offenses to be substantively reasonable and not in violation of the Eighth Amendment's proscription against cruel and unusual punishments.¹¹⁵ Some judges have even considered the high recidivism rates associated with child

111. *Id.*

112. *Id.* at 700–01.

113. *See, e.g.,* United States v. Blodgett, 872 F.3d 66, 72 (1st Cir. 2017) (explaining that the court's decision to uphold a 10-year mandatory minimum sentence for possession of child pornography was largely due to two factors: (1) the fact that it owed great judicial deference to mandatory minimums determined by Congress, and (2) the bar for a sentence to be grossly disproportionate under the Eighth Amendment is so high that it is very rarely met). Other courts have justified similar sentences by finding them reasonable under "the totality of the circumstances." *E.g.,* United States v. Chase, 695 Fed. App'x 601, 605 (2d Cir. 2017) (holding that the totality of the circumstances, including the nature of the abuse, the prolonged period of abuse, the age of the victim, and the size of the defendant's collection of child pornography, justified upholding a 50-year sentence for child pornography production); United States v. Kapordelis, 569 F.3d 1291, 1300, 1319 (11th Cir. 2009) (holding that, because the defendant had such a large cache of child pornography, including images of his 11-year-old cousin and his 14-year-old patient, the totality of the circumstances justified upholding the defendant's 35-year sentence for production, receipt, and possession of child pornography).

114. *See, e.g.,* United States v. Hester, 627 Fed. App'x 867, 871 (11th Cir. 2015). In *Hester*, the defendant was convicted for having "342 videos of child pornography, some involving very young children, children being raped, and other sadomasochistic conduct." *Id.* Furthermore, the court noted that the defendant had "not only sought out and possessed these videos, [but] he also shared them with others using a peer-to-peer file-sharing program." *Id.* On appeal, the court held that the 20-year sentence was substantively reasonable, especially because the guidelines suggested 262 to 327 months, not 240. *Id.* at 871–72.

115. *E.g.,* United States v. Betcher, 534 F.3d 820, 822, 827–28 (8th Cir. 2008) (holding that a 750-year or 9,000-month sentence for production, receipt, and possession of child pornography was effectively a life sentence and was necessary to ensure that the defendant remained incapacitated from reoffending; in explaining its decision, the court stated that "[t]he absurdity of a 750-year sentence, or even a 10,000-year sentence, should not detract from the gravity of Betcher's crimes"); United States v. Paton, 535 F.3d 829, 838 (8th Cir. 2008) (holding that a life sentence for five counts of child pornography production did not violate the Eighth Amendment, "considering the severity of [the defendant's] crimes and of his criminal history").

pornography offenses when deciding to follow the harsh sentences suggested by the guidelines.¹¹⁶

In sum, the child pornography sentencing guidelines developed by the USSC to address the “widespread disparity [between crimes of similar social harm] in federal sentencing”¹¹⁷ tend to only further widen the discrepancies they sought to negate. With many judges believing that the suggested sentences are too harsh, an offender facing child pornography charges in one district may end up serving a much different sentence than a similarly situated offender in another district. Not only do the sentencing guidelines, as written, widen the discrepancies between sentences that similarly situated offenders receive for crimes of similar social harm, but they also widen the gap between offenders and any potential rehabilitation. While offender access to mental health resources is a necessary element of combatting the supply and demand of child pornography and ultimately fulfilling congressional goals of protecting children,¹¹⁸ offenders are systematically denied access to these resources.

C. The Sentencing Guidelines Further Restrict Child Pornography Offenders’ Ability to Access Rehabilitative Resources.

Even if offenders wanted to address their proclivity for child pornography, they are unable to do so, both before and after conviction. While individuals who suffer from an array of different addictions and mental health issues—e.g., drug addictions, anger management, fetishes involving adults, delusions, etc.—can obtain mental health counseling without fear of legal consequences, those addicted to child pornography are not afforded the same resources. This barrier to access to treatment prior to arrest is largely due to mandatory reporting requirements. Federal law requires “covered professionals” such as “[p]sychologists, psychiatrists, and mental health professionals” to report any reasonable suspicion “that a child has suffered an incident of child abuse” to designated federal and nonfederal agencies.¹¹⁹ Child abuse that requires mandatory reporting encompasses any form of exploitation, including child pornography.¹²⁰ A reasonable suspicion of child abuse “requires more than a hunch but less than probable cause.”¹²¹

Reasonable grounds to report suspected child abuse is a relatively low standard that “means that if there are any facts from which one could reasonably conclude that a child had been abused, the person knowing those facts is required to

116. See *United States v. Cunningham*, 669 F.3d 723, 728 (6th Cir. 2012) (stating that the court took into consideration “concern regarding studies demonstrating an increased level of recidivism among child sex offenders who viewed child pornography”); *Betcher*, 534 F.3d at 828 (emphasizing the need to incapacitate the defendant and prevent him from reoffending in upholding a 9,000-month sentence). While both of the courts in these cases viewed the higher sentences as necessary cautionary measures to prevent further child pornography offenses from occurring, these cases both exemplify the interplay between recidivism rates and the length of the sentences child pornography offenders face.

117. See U.S. SENTENCING COMM’N, *supra* note 42.

118. See *infra* Part IV.

119. 34 U.S.C. § 20341.

120. *Id.* § 20341(c)(6).

121. *Siliven v. Ind. Dep’t of Child Servs.*, 635 F.3d 921, 928 (7th Cir. 2011).

report those facts to the appropriate authorities.”¹²² These laws effectively preclude individuals who feel sexual attraction to children or pornographic images of children from being able to ask for help. Even if an individual wanted to get preemptive help before committing further child pornography offenses, simply mentioning past consumption of child pornography would trigger the mental health professional’s legal duty of mandatory reporting.¹²³

Worse, once individuals are convicted of child pornography offenses, it is highly unlikely that they will receive any meaningful form of rehabilitation in prison, adding to rates of recidivism for child pornography offenders. Absent any form of rehabilitation, the recidivism rate for nonproduction offenses remains high at approximately 30%, as does the overall recidivism rate for all child pornography offenses, which is estimated to be around 25.4%.¹²⁴ Of the 102 federal prisons in the United States, only 9 have any form of sex-offender treatment program.¹²⁵ Only two of these programs contain a residential element that lasts 12–18 months, and the other seven only have nonresidential programs that meet several times a week for approximately 9–12 months.¹²⁶ Even though the Bureau of Prisons has found that the number of child pornography offenders in federal prisons has continued to

122. L.A.R. v. Ludwig, 821 P.2d 291, 294 (Ariz. Ct. App. 1991).

123. In contrast, an individual can enter a drug rehabilitation facility without concern that the facility will report his illicit drug use to authorities. *Can I Get in Legal Trouble for Admitting Drug Use in Rehab?*, REHAB CTR. (Feb. 28, 2019), <https://www.rehabcenter.net/can-i-get-in-legal-trouble-for-admitting-drug-use-in-rehab/>.

This is because the Health Insurance Portability and Accountability Act (“HIPPA”) and § 543 of the Public Health Service Act protect the information provided by patients from being disclosed by healthcare providers. *Id.* Because providers must know the history, extent, and details of an individual’s drug use in order to create an effective treatment plan, HIPPA mandates that providers maintain the confidentiality of the information. *Id.* Likewise, in comparison to the retrospective approach required by mandatory reporting laws for child abuse that impact child pornography offenders’ ability to access treatment, anger management providers are only required to disclose information when

necessary to prevent serious, foreseeable, and imminent harm to a client or other identifiable person. In all instances, anger management professionals should disclose the least amount of confidential information necessary to achieve the desired purpose; only information that is directly relevant to the purpose for which the disclosure is made should be revealed.

Code of Ethics, NAT’L ANGER MGMT. ASS’N § 1.07(c) (2020), <https://www.namass.org/code-of-ethics.html>.

124. SARIS ET AL., *supra* note 13, at 299–306. In contrast, the recidivism rates for drug traffickers are much lower: 15.3% recidivism rate specifically for rearrest for another drug trafficking crime, and 9.2% for rearrest for drug possession. WILLIAM H. PRYOR, JR. ET AL., U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL DRUG TRAFFICKING OFFENDERS 14 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170221_Recidivism-Drugs.pdf#page=20.

125. *Sex Offenders*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/sex_offenders.jsp (last visited Sept. 27, 2019).

126. *Id.*

increase every year,¹²⁷ none of the nine sex-offender treatment programs specifically focuses on child pornography offenses.¹²⁸

In addition to not receiving proper mental health and rehabilitation services in prison, child pornography offenders often face a heightened level of abuse and traumatization while incarcerated.¹²⁹ Individuals imprisoned for child pornography or other sexual offenses against children are considered the bottom rung in prisons and are often collectively referred to as “chomos.”¹³⁰ These men and women “are often considered ‘fair game’ for mistreatment and violence, and all too often prison personnel appear to turn a blind eye to this.”¹³¹ Examples of this mistreatment are prevalent in mainstream media. For example, Christian Maire, convicted of leading an online child pornography ring, was beaten to death in a federal prison within a month of arriving.¹³² Larry Nassar, whose case made national headlines after he was accused of molesting hundreds of underage patients, is currently serving a 60-year sentence for a child pornography conviction and had to be transferred to a different prison after getting violently assaulted.¹³³ Child pornography offenders, unable to receive any meaningful rehabilitative treatment both before and after they are convicted, often leave prison in an even worse mental state than before,¹³⁴ assuming they get to leave at all.

The child pornography offenders who are fortunate enough to escape death in prison face an additional hurdle to their release. In 2010, the Supreme Court upheld 18 U.S.C. § 4248, which allows the civil commitment of “mentally ill, sexually dangerous” federal prisoners after the date when they would have been released from prison.¹³⁵ This section was passed as part of the Adam Walsh Child

127. See *infra* Section III.D.

128. See U.S. DEP’T OF JUST., FED. BUREAU OF PRISONS, SEX OFFENDER PROGRAMS (Feb. 15, 2013), https://www.bop.gov/policy/progstat/5324_010.pdf.

129. See generally, e.g., Kseniya Katsman, *An Analysis of Self-Reported Suicide Attempts and Ideation in a National Sample of Incarcerated Sex Offenders*, CUNY ACADEMIC WORKS (2018), https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1052&context=jj_etds.

130. Seth Ferranti, *We Asked Prison Inmates How Jared Fogle Will Get Treated Behind Bars*, VICE (Aug. 20, 2015), <https://www.vice.com/en/article/jmajby/how-jared-fogle-will-get-treated-in-prison-820>; Shelly Stow, *Is Prison Abuse Just Part of a Sex Offender’s Sentence?*, NARSOL (Nov. 25, 2017), <https://narsol.org/2017/11/is-prison-abuse-just-part-of-a-sex-offenders-sentence/>.

131. Stow, *supra* note 130.

132. Gus Burns, *Man Convicted in Online Child Porn Ring Beaten to Death in Prison*, MLIVE (Jan. 4, 2019), <https://www.mlive.com/news/2019/01/man-convicted-in-online-child-porn-ring-beaten-to-death-in-prison.html>.

133. *Convicted Child Molester Larry Nassar Moved from Federal Prison in Tucson*, KTAR NEWS (Aug. 19, 2018), <https://ktar.com/story/2183529/convicted-child-molester-larry-nassar-moved-from-tucson-prison/>. Nassar was first moved to a facility in Oklahoma City before being transferred to USP Coleman II in Florida, where he remains today. Alabba Vaglanos, *Larry Nassar Moved to Prison for High-Profile Inmates After Alleged Assault*, HUFFPOST (Aug. 28, 2018), https://www.huffpost.com/entry/larry-nassar-moved-to-safer-prison-after-alleged-assault_n_5b859fc8e4b0cf7b002fbaa4.

134. See Katsman, *supra* note 129, at 9.

135. *United States v. Comstock*, 560 U.S. 126, 143 (2010).

Protection and Safety Act of 2006 (“Walsh Act”).¹³⁶ In addition to creating the national sex offender registry, the Walsh Act “allows the commitment of any ‘sexually dangerous’ person ‘in the custody’ of the Bureau of Prisons.”¹³⁷

The process for the civil commitment of a sexually dangerous person is simple: “[T]he Attorney General or any individual authorized by the Attorney General or the Director of the Bureau of Prisons may certify that the person is a sexually dangerous person, and transmit the certificate to the clerk of the court for the district in which the person is confined.”¹³⁸ While the court may order a psychiatric or psychological examination of the individual, this is not statutorily required in order for a person to be committed.¹³⁹ The term “sexually dangerous” has also been interpreted broadly. A “sexually dangerous person” is statutorily defined as “a person who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others.”¹⁴⁰ The statute further clarifies that a person is considered sexually dangerous to others if the person “suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released.”¹⁴¹ Under the Walsh Act, any sex offender incarcerated in the Bureau of Prisons is considered a sexually dangerous person who is eligible for civil commitment.¹⁴² If the Attorney General proves that the individual falls within these definitions by clear and convincing evidence, the individual will be committed for an indeterminate period of time in a state facility upon completion of the prison sentence.¹⁴³

In practice, this means that the Attorney General or a prison official authorized by the Attorney General can (and often does) authorize civil commitment of child pornography offenders instead of granting their release at the end of their sentence.¹⁴⁴ Yet despite being involuntarily forced into rehabilitation-type settings through civil commitment, child pornography offenders still do not receive

136. J. Jason Buckland & Richard L. Frierson, *Constitutionality of the Federal Sex-Offender Commitment Law*, 37 J. AM. ACAD. PSYCHIATRY & L. 556, 556 (2009), <http://jaapl.org/content/37/4/556>.

137. *Id.*

138. 18 U.S.C. § 4248(a).

139. *Id.* § 4248(b).

140. *Id.* § 4247(a)(5).

141. *Id.* § 4247(a)(6).

142. John Fabian, *The Adam Walsh Child Protection and Safety Act: Legal and Psychological Aspects of the New Civil Commitment Law for Federal Sex Offenders*, 60 CLEV. ST. L. REV. 307, 352 (2012).

143. See George Steptoe & Antoine Goldet, *Why Some Young Sex Offenders Are Held Indefinitely*, MARSHALL PROJECT (Jan. 27, 2016), <https://www.themarshallproject.org/2016/01/27/why-some-young-sex-offenders-are-held-indefinitely>. While incarceration in prison is subject to determinate sentencing, civil commitment does not provide a set release date. *Id.* Yet, similar to being in prison, individuals who have been subjected to civil commitment are “locked in their rooms (all have their own) for count twice a day. They are subject to the same visitation hours and served the same food as East Jersey inmates, and the guards come from the same correctional department.” *Id.*

144. As of 2016, approximately 5,400 sex offenders had been civilly committed across 20 states and the Federal Bureau of Prisons. *Id.*

appropriate levels of treatment. The involuntary civil commitment of sex offenders serves more to keep these offenders locked up and away from the general public rather than to provide them with much needed rehabilitative resources.¹⁴⁵ Once committed to a state facility, individuals may not even be evaluated for well over a decade.¹⁴⁶ Even after being evaluated, patients in these facilities cannot be forced into participating in a treatment program.¹⁴⁷

While there are many reasons a person may refuse to participate in a treatment program, the primary reason is that completion of most treatment programs requires individuals to admit to past crimes without being afforded any form of immunity.¹⁴⁸ If, as required by the treatment program, an offender admits to a previous crime for which he may not have been tried, he risks starting the process all over again with a new prison sentence and potential recommitment afterwards.¹⁴⁹ This catch-22 reaffirms the sentiment that the purpose of commitment is less about treatment and more about keeping offenders from being released. Furthermore, it bolsters the argument that “[i]f the government were really interested in treating, they would start the treatment from day one in the prison,” not once the prisoner’s sentence expires (or longer, if the individual faces an extended delay for an evaluation once committed).¹⁵⁰

For those offenders who do escape civil commitment, the odds of success and reformation are still low. Once child pornography offenders are released on supervised release, they are required to register as sex offenders under the Sex Offender Registration and Notification Act (“SORNA”).¹⁵¹ Under SORNA, those convicted of producing or distributing child pornography are considered “Tier II offenders”¹⁵² and are required to maintain their registrations for 25 years.¹⁵³ Those convicted of receipt of child pornography are considered “Tier I offenders”¹⁵⁴ and

145. Mark Moran, *Govt. Can Commit Sex Offenders to Mental Hospitals*, *Court Rules*, PSYCHIATRIC NEWS (June 18, 2010), https://psychnews.psychiatryonline.org/doi/full/10.1176/pn.45.12.psychnews_45_12_004.

146. See Natasha Vargas-Cooper, *Confined at Coalinga: California Sex Offenders Face Indefinite Detention*, AL JAZEERA AM. (Feb. 22, 2016), <http://america.aljazeera.com/articles/2016/2/22/california.html>. Looking at the case of Kevin Michael Reilly, who was involuntarily committed after prison and forced to wait 14 years for evaluation, Vargas-Cooper concludes that through civil commitment, “due process, rule of law and proportionate punishment are set aside, as hundreds of [sexually violent predators] and potential [sexually violent predators] remain incarcerated for years beyond their original sentences in a state-run purgatory.” *Id.*

147. *Id.*

148. *See id.*

149. *See id.*

150. Moran, *supra* note 145. Further, completion of a treatment program does not automatically warrant release from civil commitment. *See* Steptoe & Goldet, *supra* note 143. Rather, the therapists must determine that the offender “sufficiently mitigated his risk of reoffending to be released back into society.” *Id.*

151. SARIS ET AL., *supra* note 13, at 288.

152. 34 U.S.C. § 20911(3)(B)(iii).

153. *Id.* § 20915(a)(2).

154. *See id.* § 20911(2), (7).

are required to keep their registration current for 15 years.¹⁵⁵ If they fail to keep their registration current, they will return to prison.¹⁵⁶ While the Walsh Act and SORNA do not create federal restrictions on where registered sex offenders are allowed to live, work, or attend school, most states have created their own jurisdictional restrictions.¹⁵⁷

Given a prison rehabilitative system focused on containment rather than treatment, child pornography offenders are systemically denied access to rehabilitative resources. The extreme sentences mandated by the guidelines do little more than keep offenders behind bars.¹⁵⁸ With very few rehabilitative resources available for child pornography offenders within the federal prison system, their sentences do little to address the actual supply and demand of child pornography,¹⁵⁹ and recidivism rates remain high.¹⁶⁰ If the federal government's and the USSC's ultimate goal through these sentencing guidelines is to protect children, then more needs to be done to actually decrease the supply and demand for child pornography. One of the most effective ways of doing this would be to allow offenders to access rehabilitative options both prior to and after prison.

D. Impact on the Prison System

As treatment options for offenders remain sparse, child pornography convictions have steadily increased over the years, having “nearly septupled since 2004,” with most offenders serving sentences of at least five years, primarily for noncontact offenses.¹⁶¹ In federal prisons alone, “[t]he percentage of child pornography offenders convicted of an offense carrying a mandatory minimum penalty . . . has generally increased, from 50.2 percent in fiscal year 2010 to a high of 61.2 percent in 2014.”¹⁶² In 2004, there were 1,259 offenders serving sentences

155. *Id.* § 20915(a)(2).

156. SARIS ET AL., *supra* note 13, at 288.

157. *Residency Restrictions FAQs*, OFF. JUST. PROGRAMS, https://www.smart.gov/faqs/faq_residency.htm (last visited Jan. 26, 2020). For example, Arizona restricts certain registered sex offenders from living within 1,000 feet of a school or former victim. ARIZ. REV. STAT. ANN. § 13-3727 (2018). Similarly, Texas creates “child safety zones” in which registered sex offenders are not allowed to approach or reside. *Criminal History Records FAQs*, TEX. DEP’T PUB. SAFETY, <https://www.dps.texas.gov/section/crime-records-service/faq/criminal-history-records-faqs> (last visited Jan. 26, 2020). Some jurisdictions, such as California, even ban registered sex offenders from certain types of employment in which “the registrant would be working directly and in an unaccompanied setting with minor children.” CAL. DEP’T JUST., ADDITIONAL LAWS PERTAINING TO REGISTERED SEX OFFENDERS IN CALIFORNIA 1–2 (2016), https://www.meganslaw.ca.gov/Docs/additional_laws.pdf. Those wishing to have a fresh start by pursuing higher education are also commonly required to register with the university or college campus’s police. *Id.* at 1.

158. *See infra* Part IV.

159. *See infra* Part IV.

160. SARIS ET AL., *supra* note 13, at 299–306.

161. Jacob Sullum, *The Number of Men in Federal Prison for Viewing or Sharing Child Pornography Has Nearly Septupled Since 2004*, REASON (Jan. 2, 2019), <https://reason.com/2019/01/02/the-number-of-men-in-federal-prison-for/>.

162. MANDATORY MINIMUM PENALTIES, *supra* note 30, at 4.

for child-pornography-related offenses in federal prison, and by 2016, that number had increased nearly seven times to 8,508.¹⁶³

This rapid increase in inmates serving sentences for child pornography offenses has a monetary impact on the federal prison system. In 2016, the average cost of incarceration for federal inmates was \$94.82 per day, or \$34,704.12 per year.¹⁶⁴ If the 8,508 child pornography offenders from 2016 were each sentenced to a mandatory minimum of five years, the total cost of their federal incarceration during those five years would be \$1,476,313,264.80. In 2004, the average cost of incarcerating a federal inmate was \$63.57 per day, or \$23,267 per year.¹⁶⁵ Assuming that all of the 1,259 offenders in 2004 were sentenced to a mandatory minimum of five years as well, the total cost of incarceration would have been \$146,465,765. This means that, not only has the number of federal prisoners serving mandatory minimum sentences for child pornography offenses dramatically increased between 2004 and 2016, but that the monetary impact on the federal prison system has increased by over \$1.3 billion.¹⁶⁶

These numbers are even more troubling considering that many of the mandatory minimum sentences were at least 15–20 years, and that the average cost of incarceration continues to increase each year.¹⁶⁷ As of 2018, the average cost of incarcerating an inmate in a Federal Bureau of Prisons facility was \$102.60 per day, or \$37,449 per year.¹⁶⁸ The cost for federal inmates in Community Corrections Centers was \$94.50 per day, or \$34,492.50 per year.¹⁶⁹

By contrast, in 2016, there were 1,148 federal prisoners who were convicted of a sexual abuse offense, nearly triple the 458 that were convicted of sexual abuse offenses in 2004.¹⁷⁰ Of those sentenced to a mandatory minimum sentence in 2016, over half were sentenced to a mandatory minimum of 15 years, nearly 40% were sentenced to 10-year mandatory minimums, and only around 8%

163. *Id.* at 6.

164. Annual Determination of Average Cost of Incarceration, 83 Fed. Reg. 18,863 (Apr. 30, 2018).

165. Annual Determination of Average Cost of Incarceration, 70 Fed. Reg. 66,853 (Nov. 3, 2005).

166. *See supra* text accompanying notes 164–165 (reflecting total cost increase would be \$1,329,847,499.80).

167. *See* Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63,891, 63,891–92 (Nov. 19, 2019).

168. *Id.*

169. *Id.* Community Corrections Centers are facilities that, unlike regular federal prison facilities, allow inmates to leave the facilities during approved hours for employment and “other community programming activities.” LARRY D. THOMPSON, U.S. DEP’T OF JUST., COMMUNITY CORRECTIONS CENTER PLACEMENT OF OFFENDERS SENTENCED TO TERMS OF IMPRISONMENT UNDER FEDERAL SENTENCING GUIDELINES (2002), <https://www.justice.gov/archives/dag/community-corrections-center-placement-offenders-sentenced-terms-imprisonment-under-federal>.

170. MANDATORY MINIMUM PENALTIES, *supra* note 30, at 18. Four hundred and ten of these offenders were convicted for transportation of a minor to participate in a commercial sex act, 142 were for criminal sexual abuse or rape, 34 were for abusive sexual contact, and 33 were for statutory rape. *Id.* at 19.

were sentenced to 20 years or more.¹⁷¹ Even if all 1,148 prisoners were sentenced to a mandatory minimum of 15 years, their incarceration would have cost the federal prison system \$597,604,946.40 in 2016, approximately \$437 million more than what they were paying for sexual abuse offenders in 2004.¹⁷² While this seems like a tremendous expense, it is dwarfed by the cost of incarceration of child pornography offenders: in 2016, the Federal Bureau of Prisons was paying nearly three times as much money to incarcerate the mass influx of child pornography offenders as it was for all sexual abuse offenders.¹⁷³

Despite this mass incarceration of child pornography offenders over the past 17 years, the presence of child pornography has continued to rise. In 1998, there were over 3,000 reports of child pornography found online.¹⁷⁴ This number rose to over 100,000 reports by 2008, 1 million in 2014, and 18.4 million in 2018.¹⁷⁵ Webpages containing child pornography increased by 1,006% between 2013 and 2019.¹⁷⁶

As the above numbers show, the sentencing guidelines for child pornography offenses have not deterred the occurrence of such offenses; in fact, despite the harshness of the sentences, the number of convicted child pornography offenders has outpaced convicted offenders of other sexual crimes nearly two to one. As more and more child pornography offenders enter the federal prison system each year, it becomes evident that the sentencing guidelines mandating their mass incarceration have had little impact on the growth of the child pornography market. Rather than protecting children from harm and discouraging the continued production and use of child pornography, the sentencing guidelines end up subjecting the Federal Bureau of Prisons, and taxpayers,¹⁷⁷ to exorbitant extra costs every year.

IV. RECOMMENDATIONS

As evidenced by the points of failure enumerated in Part III, the USSC's sentencing guidelines for child pornography offenses ultimately fail to serve their intended goal of protecting children from harm, as they merely result in the mass-incarceration of offenders and do little to diminish the actual supply and demand of

171. *Id.* at 20.

172. *See supra* text accompanying notes 164–165 (reflecting a total cost of \$159,844,290 for sexual abuse offenders in 2004).

173. *See, e.g.,* MANDATORY MINIMUM PENALTIES, *supra* note 30, at 20; *see also supra* text accompanying notes 165, 172 (dividing the \$1.47 billion for child pornography offenders from the \$597 million for sexual abuse offenders).

174. 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>.

175. *Id.*

176. ECPAT INT'L, SUMMARY PAPER ON ONLINE CHILD SEXUAL EXPLOITATION 3 (2020), <https://www.ecpat.org/wp-content/uploads/2020/12/ECPAT-Summary-paper-on-Online-Child-Sexual-Exploitation-2020.pdf>.

177. Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration>.

child pornography from which the harm stems. This Part will discuss what needs to be changed to reach this goal.

Despite the stark unavailability of mental health and rehabilitative resources, there is a general consensus in the psychiatric community that child pornography offenders suffer from various treatable mental illnesses.¹⁷⁸ While some of the individuals suffer from pedophilic disorder,¹⁷⁹ which is considered a sexual disorder, a large portion are suffering from “compulsive sexual behavior” or “sex addiction.”¹⁸⁰ These diagnoses are consistent with the explanations that offenders proffer as to why they turn to child pornography.¹⁸¹ Some have reported sexual explanations consistent with pedophilic disorder, and others were consistent with sex addiction and compulsive sexual behavior diagnoses.¹⁸² Offenders experiencing sex addiction and compulsive sexual behavior describe their use of child pornography as a progression from legal materials to which they became desensitized.¹⁸³ Even further, some offenders reported more emotional explanations for why they began using child pornography, stating that their actions were caused by loneliness, a desire to detach from real life, or the need for a “source of relief and a means to escape negativity, resulting from depression.”¹⁸⁴

Cognitive-behavioral therapy (“CBT”) has been reported as being one of the most effective means of treating these conditions.¹⁸⁵ Through CBT, offenders are able to understand the impact of their offenses on the victims, learn about “emotional needs,” “relationship skills,” “healthy emotional and physical intimacy,” and “prosocial behaviors.”¹⁸⁶ In addition, medications involving androgen

178. Mental health professionals have even petitioned courts to refrain from sentencing child pornography offenders to prison and instead recommended sex-offender treatment programs. *See* *United States v. D.M.*, 942 F. Supp. 2d 327, 337–41 (E.D.N.Y. 2013).

179. The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (2013) changed the term “pedophilia” to “pedophilic disorder” to acknowledge its status as a paraphilic disorder (rather than a paraphilia) because it “cause[s] distress and dysfunction in an area of life” and recurs over a period of at least six months. Thanh Ly et al., *Characteristics and Treatment of Internet Child Pornography Offenders*, 36 *BEHAV. SCI. L.* 216, 223–24 (2018).

180. Samantha Smithstein, *Who’s Looking at Child Porn Now (and Why)?*, *PSYCHOL. TODAY* (Sept. 6, 2010), <https://www.psychologytoday.com/us/blog/what-the-wild-things-are/201009/whos-looking-child-porn-now-and-why>.

181. *See* Hannah L. Merdian et al., “*So Why Did You Do It?*”: *Explanations Provided by Child Pornography Offenders*, 8 *SEXUAL OFFENDER TREATMENT* 1, 8–9 (2013), <https://researchcommons.waikato.ac.nz/bitstream/handle/10289/7976/So%20why%20did%20you%20do%20it.pdf?sequence=1&isAllowed=y>.

182. *Id.* For example, one offender explained that he was motivated by a “[l]ack of sexual experience and the belief that children because of their own lack of experience wouldn’t reject me.” *Id.* at 9. Other such offenders expressly admitted sexual attraction towards children. *Id.*

183. *Id.*

184. *Id.*

185. Ly et al., *supra* note 179, at 225.

186. *Id.* at 226.

deprivation therapy (“ADT”),¹⁸⁷ luteinizing hormone-releasing hormone (“LHRH”) agonists,¹⁸⁸ and selective serotonin reuptake inhibitors (“SSRIs”)¹⁸⁹ have proven effective in helping reform child pornography offenders.¹⁹⁰ Community-based group therapy programs, such as Internet Sex Offender Treatment, teach offenders about “cognitive distortions, victim empathy, problem-solving strategies, developing healthy relationships, and developing a prosocial lifestyle.”¹⁹¹ These programs have proven to be an effective tool in helping offenders to have better self-esteem while reducing loneliness and impulsivity.¹⁹² Increased self-esteem, as well as decreased loneliness and impulsivity, not only allows the offenders to have hopes for a better quality of life, but also enables them to more effectively exercise “self-regulation skills.”¹⁹³ In turn, expectations of a better future, combined with the empowerment

187. ADT involves the use of antiandrogen drugs to decrease the patient’s level of testosterone. Kirsten Jordan et al., *Changed Processing of Visual Sexual Stimuli Under GnRH-Therapy—A Single Case Study in Pedophilia Using Eye Tracking and fMRI*, 14 BMC PSYCHIATRY 142, 143 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4036749/pdf/1471-244X-14-142.pdf>. While colloquially referred to as “chemical castration,” ADT is intended to create a “reduction in sexual drive and, in consequence, a reduced risk of recidivism in paraphilic patients and sexual offenders.” *Id.* Sexual offenders treated with ADT have reported a decrease in both autonomic sexual functions—e.g., erection and ejaculation—and cognitive sexual functions—e.g., fantasies and sexual interest. *Id.*

188. LHRH agonists are another form of hormone therapy, originally developed as a treatment for prostate cancer, the use of which “ultimately leads to serum testosterone concentrations below castration level.” Daniel Turner & Peer Briken, *Treatment of Paraphilic Disorders in Sexual Offenders or Men with a Risk of Sexual Offending with Luteinizing Hormone-Releasing Hormone Agonists: An Updated Systematic Review*, 15 J. SEXUAL MED. 77, 79 (2018), [https://www.jsm.jsexmed.org/article/S1743-6095\(17\)31635-1/pdf](https://www.jsm.jsexmed.org/article/S1743-6095(17)31635-1/pdf). Recent studies have pointed to the conclusion that LHRH agonists are exceptionally effective at minimizing paraphilic “fantasies, urges, and behaviors.” *Id.* at 89.

189. SSRIs prevent neurons from reabsorbing serotonin, resulting in increased levels of serotonin in the brain. *Selective Serotonin Reuptake Inhibitors (SSRIs)*, MAYO CLINIC (Sept. 17, 2019), <https://www.mayoclinic.org/diseases-conditions/depression/in-depth/ssris/art-20044825>. These increased levels of serotonin allow for quicker and more effective communication between neurons. *Id.* While SSRIs allow for ease of communication between neurotransmitters, the side effects of the medication include decreased libido and sexual arousal, as well as shorter and less intense orgasms. Y. Adi et. al, *Clinical Effectiveness and Cost-Consequences of Selective Serotonin Reuptake Inhibitors in the Treatment of Sex Offenders*, 6 HEALTH TECH. ASSESSMENT 1, 10 (2002), https://www.researchgate.net/publication/10902697_Clinical_effectiveness_and_cost-consequences_of_selective_Serotonin_Reuptake_Inhibitors_in_the_treatment_of_sex_offenders. Sex offenders treated with SSRIs reported decreased sexual fantasy, decreased “average time spent in unconventional desires,” and decreased sexual conduct overall. *Id.* at 16–18.

190. Ly et al., *supra* note 179, at 226.

191. *Id.* at 228.

192. *Id.* at 226.

193. *Id.* at 229.

of self-regulation, minimize the chances that an offender will reoffend.¹⁹⁴ Behavioral therapy, on the other hand, has a much lower success rate.¹⁹⁵

Despite this research from the medical community, child pornography offenders are systematically denied any access to these mental health or rehabilitative resources, though these resources could prove to be the most effective means of preventing these offenses. Child pornography offenders are barred from independently seeking treatment by federal mandatory reporting laws, and once they are convicted, very few have access to rehabilitative treatments.¹⁹⁶ While only nine federal prisons offer any form of sex-offender treatment program, these programs are neither specific-enough to child pornography offenses nor extensive enough to have a meaningful impact on participants who are imprisoned on child pornography-related offenses.¹⁹⁷ Yet, mental health professionals have diagnosed these individuals with specific mental illnesses and have studied and determined which treatment methods are the most effective,¹⁹⁸ disproving many of the false assumptions regarding child pornography offenders. This lack of rehabilitation, both prior to and during incarceration, in turn contributes to many offenders being involuntarily committed far beyond their prison sentence or, for those who are released, high rates of recidivism.¹⁹⁹

Looking forward, the USSC's sentencing guidelines must be adjusted to shift the focus from mere incapacitation of child pornography offenders to actual rehabilitation in order to reduce the source of harm these laws are intended to protect children against. Section 5B1.3 of the sentencing guidelines is instructive in this regard. In enumerating the mandatory conditions for probation to be granted, the USSC states that "[f]or a domestic violence crime as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a public, private, or nonprofit offender rehabilitation program that has been approved by the court"²⁰⁰ Further, the USSC authorizes the court to impose discretionary conditions of probation, such as "provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."²⁰¹ Similar conditions must be incorporated into the sentencing guidelines for child pornography offenses, either requiring first time offenders to participate in a court-approved inpatient rehabilitative program in lieu of incarceration, or by drastically reducing the base offense levels for child pornography offenses upon agreement by the offender to participate in a directed treatment program while incarcerated.

194. *Id.*

195. In 2009, a study was conducted in which the authors had the patient, a man who had been convicted for a child pornography offense, smell ammonia salts whenever he had a "deviant fantasy" to replace that fantasy with a non-deviant one. *Id.* at 225. Nevertheless, the patient continued to masturbate to deviant fantasies throughout the course of the study. *Id.*

196. *See supra* Section III.C.

197. *See supra* Section III.C.

198. *See, e.g.,* Ly et al., *supra* note 179, at 225–29; Smithstein, *supra* note 180.

199. *See supra* Section III.C.

200. MANUAL, *supra* note 45, § 5B1.3(a)(4).

201. *Id.* § 5B1.3(b).

To further these changes, any federal facility that houses child pornography offenders needs to have an offense-specific treatment program in place that incorporates these findings in order to rehabilitate offenders prior to release. These programs need to incorporate CBT and community-based programs such as SOPT, as well having the option for medicinal treatments such as ADT, LHRH agonists, and SSRIs. Not only will this assist in decreasing the overall demand for child pornography and reduce chances of recidivism among individual offenders, but it will also negate the perceived need for civil commitment of these offenders. Further, the implementation of these programs would help to diminish some of the financial burden associated with the mass incarceration of child pornography offenders. For example, in 2018, the Bureau of Prisons spent approximately \$1,258,160,000 on substance abuse programs and treatment.²⁰² This pales in comparison to the nearly \$1.5 trillion that the Bureau of Prisons would have paid if all 8,508 child pornography offenders in 2016 were sentenced to a mandatory minimum of five years.²⁰³

Lastly, mandatory reporting laws need to be altered to allow offenders to seek medical intervention prior to arrest or incarceration. With the technological advances of the past 50 years, child pornography has become much more accessible, and there is no doubt that many offenders are never caught. If rehabilitative resources are only made available in prisons, many other offenders will slip through the cracks every year, allowing for the child pornography market to maintain its success and permanence.

In sum, while the possession, receipt, distribution, and production of child pornography must remain punishable offenses, the excessive sentences currently imposed by the guidelines need to be reduced to allow offenders to spend more time in mandatory inpatient rehabilitation facilities. The federal government needs to desist from using an antiquated and draconian sentencing scheme to address a contemporary and continually evolving problem. In addition to facilitating actual rehabilitation and reducing the additional risks and traumatization that these offenders face while imprisoned, these reductions in prison sentences will help to alleviate the substantial financial burden that the mass incarceration of child pornography offenders has had on the federal prison system.

CONCLUSION

Child pornography has been around for over a century, yet the federal government has consistently struggled to keep up with the technological advances that proliferate its supply and demand.²⁰⁴ Rather than continuing to address the changing technological landscape, the federal government, through the USSC, has developed a system of mass incarceration of those who produce, distribute, receive,

202. U.S. DEP'T OF JUSTICE, REVIEWS OF THE ANNUAL ACCOUNTING OF DRUG CONTROL FUNDS AND RELATED PERFORMANCE FISCAL YEAR 2018, at 57 (2019), <https://oig.justice.gov/reports/2019/a1910.pdf#page=1>.

203. *See supra* Section III.D.

204. *See supra* Section II.B.

and possess child pornography.²⁰⁵ This mass incarceration, in turn, has done little to address the actual root of, and harms caused by, child pornography.²⁰⁶

Justice is hardly accomplished by a system that punishes viewers of child pornography more severely than it does child rapists. If the true objective of child pornography laws is to protect children from abuse, then more must be done than merely locking up offenders for excessive amounts of time. A vast amount of research into the characteristics of child pornography offenders and the impact of incarceration has since revealed further shortcomings of the guidelines. The federal prison system spends a disparate amount more on the mass incarceration of child pornography offenders than it does for offenders who have actually physically, sexually abused children.²⁰⁷ With increasingly high rates of recidivism and a severe lack of rehabilitation opportunities available to offenders, the child pornography market continues to thrive.²⁰⁸ In order to effectuate change, more needs to be done to allow child pornography offenders to access rehabilitative resources both inside and outside of the federal prison systems. The sentencing guidelines, as written, deprive offenders of those resources and prevent meaningful change from occurring. If the government truly wants to protect children from being victimized through child pornography, then the sentencing guidelines, as written, cannot stand. As the adage goes, we cannot continue doing the same thing over and over again and expect different results.²⁰⁹

205. *See supra* Section III.D.

206. *See supra* Part III.

207. *See supra* Section III.D.

208. *See supra* Section III.C.

209. Christina Sterbenz, *12 Famous Quotes That Always Get Misattributed*, BUS. INSIDER (Oct. 7, 2013), <https://www.businessinsider.com/misattributed-quotes-2013-10>.

APPENDIX

Table 1. Sentencing Table Created by the USSC

Offense Level	Criminal History Category (Criminal History Points)					
	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life