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## Sentencing Adjudication: Lessons from Child Pornography Policy Nullification

Melissa Hamilton

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# SENTENCING ADJUDICATION: LESSONS FROM CHILD PORNOGRAPHY POLICY NULLIFICATION

**Melissa Hamilton\***

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## INTRODUCTION

Federal sentencing is facing a crisis—and it is not for the usual reasons, i.e., the severity of drug sentences and racial disparities. Instead, there is a raging public debate about sentencing for the crime of child pornography. Child pornography is virtually the new crack cocaine in the sentencing world.<sup>1</sup> Judges, congressmen, academics, and the media are loudly and heatedly arguing about the status of child pornography sentencing for novel reasons, though the central issues are familiar: severity and disparity.

One may wonder how we got to this point. Twenty-five years ago, federal sentencing moved from an indeterminate sentencing system regime to a guidelines-based system operating under the auspices of the newly created United States Sentencing Commission (the Commission).<sup>2</sup> The benefit of guidelines is their normative value, which can foster certainty, fairness, and national uniformity.<sup>3</sup> Congress tried to reach those goals by making the guidelines mandatory on the federal judiciary.<sup>4</sup> Yet two lodestar decisions from the United States Supreme Court are at the core of current legal and policy debates. In *United States v. Booker* in 2005, the Court rendered the federal guidelines merely advisory, permitting sentencing judges to vary from guidelines' recommendations based on the individual characteristics of the defendant or the circumstances of the offense.<sup>5</sup> Then in *Kimbrough v. United States* in 2007, the Court, in a case involving crack cocaine trafficking, extended discretion to permit a categorical rejection to a guideline for policy reasons, even if the rejection applies to a whole class of offenders.<sup>6</sup> Many judges have interpreted *Kimbrough* as not being limited to crack cocaine and have applied its rationale to reject

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1. Michael J. Pelgro, *Child Pornography: The New Crack Cocaine?*, BOS. B.J., Summer 2012, at xxiv.

2. *Mistretta v. United States*, 488 U.S. 361, 362–63 (1989).

3. 28 U.S.C. § 991(b)(1) (2006); *United States v. McElheney*, 630 F. Supp. 2d 886, 890–91 (E.D. Tenn. 2009).

4. *Mistretta*, 488 U.S. at 367.

5. *United States v. Booker*, 543 U.S. 220, 245 (2005).

6. *See Kimbrough v. United States*, 552 U.S. 85, 108–10 (2007).

guidelines for other offenses, including the child pornography guideline.<sup>7</sup> But there is disagreement on this issue, and a circuit split has developed as to whether judges can lawfully disregard the child pornography guideline based on policy differences.

The *Booker/Kimbrough* combination has resulted in an increasing rate of variances from guidelines-recommended sentences overall, but the level of dissension is at its zenith with child pornography crimes. As in any debate, there are two sides. On one side are critics who contend that the child pornography guideline suffers many fundamental flaws, such as the lack of any empirical foundation, the failure to represent the Commission's institutional judgment, and disproportionality.<sup>8</sup> Because of these flaws, many judges are rejecting the child pornography guideline on policy grounds, arguing that it produces sentencing ranges that fail to distinguish between more and less culpable offenders and generally are reasonable only for the most heinous sexual predators.<sup>9</sup> On the other side are those who believe that child pornography offending is an extremely serious crime because children are necessarily being sexually exploited by the production and viewing of the material and, as a result, the guidelines' tendency toward very long sentences is justified.<sup>10</sup> They contend an important reason that the guideline does not entirely represent the Commission's independent work is that Congress has expressly directed certain of the child pornography guidelines' contents.<sup>11</sup> Such action by Congress is entirely appropriate, it is argued, because Congress is representative of the people, it can better assess systemic needs for punishment, and it properly holds ultimate authority over sentencing judgments.<sup>12</sup>

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7. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, pt. A, at 37–43 (2012) [hereinafter BOOKER REPORT], available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Booker\\_Reports/2012\\_Booker/index.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/index.cfm).

8. Carol S. Steiker, *Lessons From Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 LAW & CONTEMP. PROBS. 27, 41–42 (2013).

9. *Id.*

10. *Id.* at 44.

11. See *United States v. Stone*, 575 F.3d 83, 87 (1st Cir. 2009); Steiker, *supra* note 8, at 44.

12. *Stone*, 575 F.3d at 87.

The Commission appears frustrated with both Congress and the federal judiciary.<sup>13</sup> Child pornography has emerged, in metaphorical terms, as the Commission's Achilles' heel. In a lengthy, formal report to Congress on the state of affairs post-*Booker*, the Commission recently singled out child pornography as the leading source of controversy and nonuniformity in federal sentencing.<sup>14</sup> At the same time, as Congress continues to dictate longer sentences for child pornography crimes, district judges are increasingly varying below-guideline recommendations.<sup>15</sup> In fiscal year 2012, almost one-third of child pornography sentences were within-guideline range while more than half were below-range,<sup>16</sup> a situation unique to this category of federal crime.<sup>17</sup> The Commission bemoans this situation, worrying the influence of this particular guideline has become too attenuated.<sup>18</sup> In its report to Congress, the Commission also expressed significant concern about intercourt disparities, observing that circuit courts are reaching different outcomes for similarly situated child pornography defendants.<sup>19</sup>

The issues raised herein are not limited to the child pornography context. Rather, the rhetoric and drama underlying policy and constitutional debates about this crime make it distinctly suited as an avenue to address larger questions.<sup>20</sup> These debates underscore that

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13. BOOKER REPORT, *supra* note 7, pt. A, at 1, 3–4.

14. *Id.*, pt. A, at 73 (noting child pornography sentencing is “markedly different from any other offense type” in that the rate of nongovernment-sponsored below-range sentences was higher than within-range sentences).

15. *Id.*

16. U.S. SENTENCING COMM’N, 2012 SOURCEBOOK OF FED. SENTENCING STATISTICS tbl.27A (2012) [hereinafter 2012 SOURCEBOOK], available at [www.usc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/sbtoc12.htm](http://www.usc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm); see also *infra* text following Table 2 (18% of which were government-sponsored below-guideline departures).

17. BOOKER REPORT, *supra* note 7, pt. A, at 91.

18. See *id.*, pt. C, at 10–12.

19. *Id.*, pt. A, at 79–80, 106 & n.438; U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: FED. CHILD PORNOGRAPHY OFFENSES 245 (2013) [hereinafter FED. CHILD PORNOGRAPHY OFFENSES], available at [http://www.usc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Sex\\_Offense\\_Topics/201212\\_Federal\\_Child\\_Pornography\\_Offenses/index.cfm](http://www.usc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/index.cfm); accord *United States v. Rothwell*, 847 F. Supp. 2d 1048, 1050 (E.D. Tenn. 2012) (“An examination of appellate decisions reviewing child pornography sentences yield widely disparate results in the outcome and reasoning that makes it difficult to discern why in one case a particular result is affirmed and in another case with seemingly similar facts the case is reversed.”).

20. Steiker, *supra* note 8, at 28 (contemplating child pornography guideline as emblematic of deeper

three strong institutions are waged in a sort of war, each vying for dominant power in sentencing federal offenders. The situation also offers rich perspectives on the adjudication of sentencing policy, including policy nullification, and the potential relevance of empirical study.

The Article proceeds as follows. Section I outlines basic principles underlying the operation of modern federal sentencing.<sup>21</sup> Section II explores how the debate has engaged public discourses in Congress, the federal judiciary, legal publications, and the media.<sup>22</sup> It also reviews discourses from district judges on the reasons the child pornography guideline is fundamentally flawed.<sup>23</sup> Section III fleshes out a circuit split on the issue of whether, as a matter of law, district judges may reject the child pornography guideline for policy-based reasons.<sup>24</sup> Section III also theorizes the best answer to this issue.<sup>25</sup> In sum, it submits that the child pornography guideline is, indeed, flawed and that not only is a policy rejection reasonable, but also precluding district judges from rejecting it would be unconstitutional.<sup>26</sup> Section IV provides statistical analyses based on the Commission's fiscal year 2011 datasets.<sup>27</sup> It provides information to explain the length of sentences as well as sentencing variations.<sup>28</sup> The Section also addresses implications from the circuit split for inconsistent sentencing outcomes.<sup>29</sup> The Article ends with a series of conclusions.<sup>30</sup>

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institutional failures on both internal and normative levels, compounded by resistance to amelioration despite reasonable criticism).

21. See discussion *infra* Section I.

22. See discussion *infra* Section II.A.

23. See discussion *infra* Section II.B.

24. See discussion *infra* Section III.A.

25. See discussion *infra* Section III.B.1–2.

26. See discussion *infra* Section III.B.3.

27. See discussion *infra* Section IV.

28. See discussion *infra* Section IV.A.

29. See discussion *infra* Section IV.B.

30. See discussion *infra* CONCLUSIONS.

## I. SENTENCING BASICS

For most of the twentieth century, federal sentencing was an indeterminate system in which district judges were primarily responsible for determining punishment for convicted defendants.<sup>31</sup> Indeterminate sentencing, though, yielded great diversity in sentences across the country for similarly situated offenders.<sup>32</sup> A concerned Congress responded by enacting the Sentencing Reform Act of 1984, establishing the United States Sentencing Commission.<sup>33</sup> Congress charged the Commission with promulgating presumptive sentence guidelines.<sup>34</sup> Commission-instituted guidelines were binding on the courts, though a judge was granted limited discretion to depart if there was an aggravating or mitigating factor in the case that the Commission had not adequately considered when formulating the guidelines.<sup>35</sup> At the same time, Congress outlined certain factors that should be considered in determining a reasonable sentence for a convicted defendant.<sup>36</sup> These factors, codified at 18 U.S.C. § 3553(a), include the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed considering the seriousness of the offense, retribution, deterrence, and protecting the public; the range set by the sentencing guidelines and Commission policy statements; and the need to avoid unwarranted sentencing disparities among similarly situated offenders (hereinafter § 3553(a) factors).<sup>37</sup>

Despite the guidelines initially being presumptive, the United States Supreme Court rendered them advisory in nature in the 2005 seminal case of *United States v. Booker*.<sup>38</sup> In that case, the Court found the federal determinative sentencing system operated in an

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31. *Mistretta v. United States*, 488 U.S. 361, 363–66 (1989).

32. *Id.* at 366.

33. Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 211–39, 98 Stat. 1837 (1984).

34. *Mistretta*, 488 U.S. at 367.

35. *Id.* This occurs pursuant to U.S. SENTENCING GUIDELINES MANUAL § 5K2.0.

36. 18 U.S.C. § 3553(a) (2012).

37. *Id.*

38. *United States v. Booker*, 543 U.S. 220, 245 (2005).

unconstitutional manner.<sup>39</sup> Bestowing advisory status was the Supreme Court's remedial fix for the constitutional violation, while it also permitted the federal guideline system to at least survive.<sup>40</sup> Yet the *Booker* fix did not return to the judiciary the wide discretion that existed preguidelines. In a series of cases since then, the Supreme Court has reaffirmed that federal judges are significantly circumscribed by the Commission's guidelines and policies, albeit guided by the statutory § 3553(a) sentencing factors.<sup>41</sup>

Based on *Booker* and its progeny, the current process of selecting a particular punishment generally involves a series of steps. The sentencing judge first calculates the base offense level from the applicable offense guideline.<sup>42</sup> She does this by determining the initial base offense level and then making appropriate adjustments provided by relevant guidelines to reach a final base offense level.<sup>43</sup> These adjustments are generally facts related to the offense, which are called specific offense characteristics, or characteristics related to the offender that the Commission perceives as aggravating or mitigating culpability.<sup>44</sup> Specific offense characteristics for the child pornography guideline, for example, include the number of images possessed, the nature of the images' content, the young age of the children depicted, and distribution activity.<sup>45</sup> Second, the final base offense level together with a criminal history score are translated through the principle guidelines grid into a sentencing range, such as twenty-four to thirty months.<sup>46</sup> Third, the judge considers whether any of the general departure standards apply, such as use of a dangerous weapon or diminished capacity, and, if so, makes a final

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39. *Id.* at 226–27. The Court ruled that the mandatory sentencing system violated defendants' Sixth Amendment rights to a jury trial by requiring judges, rather than juries, to make determinations of fact that would enhance the punishment for defendants' crimes. *Id.* at 244.

40. *See id.* at 245.

41. *Peugh v. United States*, 133 S. Ct. 2072, 2080 (2013).

42. *Gall v. United States*, 552 U.S. 38, 49 (2007); U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(1) (2013).

43. U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1(a)(2), 1B1.2.

44. *See id.* § 1B1.3 cmt. n.1.

45. *Id.* § 2G2.2(b).

46. *Id.* § 1B1.1(a)(6)–(8).

guideline-sentencing determination.<sup>47</sup> Thus, the guidelines provide a framework, or starting point, for any sentencing decision.<sup>48</sup> According to the Supreme Court, sentencing ranges of correctly calculated guidelines normally provide “a rough approximation of sentences that might achieve § 3553(a)’s objectives” in a mine-run case.<sup>49</sup> This is because the ranges generally represent decisions by the Commission’s “professional staff with appropriate expertise”<sup>50</sup> after “careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions” nationwide.<sup>51</sup>

However, the *Booker* remedy means that, while the court must give thoughtful consideration to the guidelines, it must also be mindful of whether a guidelines-based sentence properly reflects § 3553(a) statutory sentencing factors.<sup>52</sup> Thus, the fourth step is for the judge to reflect upon these statutory sentencing factors in determining whether a within-guideline or, alternatively, a non-guideline sentence is proper.<sup>53</sup> In the final decision, the sentencer sets a parsimonious punishment, i.e., one that is “sufficient, but not greater than necessary” to accomplish the statutory sentencing goals.<sup>54</sup>

As noted above, one of the presumptions underlying the Supreme Court’s respect for the guidelines, and its insistence that they remain a benchmark for a proper sentence, concerns the idea that the Commission formulates guidelines using its institutional strengths and after considering extensive empirical study.<sup>55</sup> The Supreme Court addressed the issue of whether a judge could reject a

47. *Id.* §§ 1B1.1(b), 1B1.4, 5K2.0.

48. *Gall v. United States*, 552 U.S. 38, 49 (2007).

49. *Rita v. United States*, 551 U.S. 338, 350 (2007). “The term ‘mine-run’ deserves to be Googled and then forgotten. Think run-of-the-mill.” *United States v. Grober (Grober I)*, 595 F. Supp. 2d 382, 403 & n.12 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010).

50. *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (quoting *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring), *vacated*, 552 U.S. 1306 (2008)).

51. *Gall*, 552 U.S. at 46 (citing *Rita*, 551 U.S. at 349).

52. *Rita*, 551 U.S. at 351; *see also id.* at 358 (A sentencer’s reasoned sentencing judgment rests “upon an effort to filter the Guidelines’ general advice through § 3553(a)’s list of factors.”).

53. *Gall*, 552 U.S. at 49–50; U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(c) (2013).

54. *Gall*, 552 U.S. at 50 n.6 (quoting 18 U.S.C. § 3553(a)).

55. *Rita*, 551 U.S. at 349.

Commission-issued guideline if it was not so formulated in the case of *Kimbrough v. United States*.<sup>56</sup> The district judge in *Kimbrough* refused to comply with the guideline governing crack cocaine offenses because its ranges were based on a 100:1 ratio in which a trafficker of crack cocaine was subject to the same sentence as a trafficker of 100 times as much of powder cocaine.<sup>57</sup> The district judge objected to the policy since it created an unwarranted disparity between crack and powder cocaine offenders and yielded unreasonably high sentences for crack cocaine defendants.<sup>58</sup> The judge instead issued a sentence that represented a significant downward variance from the recommended guideline range.<sup>59</sup> On appeal, the Supreme Court considered the history of the crack cocaine guideline and the 100:1 ratio.<sup>60</sup> It determined that the Commission had not used its normal empirical approach in establishing the ratio.<sup>61</sup> Instead, the Commission had simply borrowed that same ratio from Congress, which had used it to set certain statutory mandatory minimum sentences for crack and powder cocaine crimes.<sup>62</sup> However, Congress had not explicitly ordered relevant guidelines to use that ratio in developing incremental ranges between statutory minimums and maximums, and the Supreme Court declined to recognize any implicit direction.<sup>63</sup> The Supreme Court further noted that the Commission had formally objected to the 100:1 ratio, arguing that it was not compliant with § 3553(a) objectives because it overstated the degree of higher risk for crack cocaine offenders and failed to adequately distinguish among culpable offenders.<sup>64</sup> In sum, the *Kimbrough* Court approved the ability of a court to vary from the cocaine guideline based on a categorical or policy disagreement.<sup>65</sup>

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

57. *Id.* at 92–93.

58. *Id.*

59. *Id.* at 93.

60. *Id.* at 94–100.

61. *Id.* at 96.

62. *Kimbrough*, 552 U.S. at 96–97.

63. *Id.* at 102–03.

64. *See id.* at 98–99.

65. *Spears v. United States*, 555 U.S. 261, 263–64 (2009).

Potential ambiguities in the *Kimbrough* decision have elicited debate. A threshold issue is whether the holding applies only to a policy disagreement with the crack cocaine guideline.<sup>66</sup> If not, then two other potential limitations are conceivable. These are whether a *Kimbrough*-type policy objection applies only to a Commission-inspired policy, as opposed to a policy directed by Congress, or only to a guideline not developed with the Commission's normal empirical study.<sup>67</sup> These matters are discussed in the sections that follow. For now it is important to recognize that many courts have utilized a *Kimbrough*-type policy rejection for other categories of crimes outside the context of the crack/powder cocaine genre—including child pornography—though numerous others disagree.<sup>68</sup>

To round out the basics on federal sentencing, a brief reference to appellate review is appropriate. There are two main types of appellate review: procedural and substantive reasonableness. Procedural errors include “failing to calculate . . . the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence.”<sup>69</sup> If the sentence passes the procedural reasonableness test, the appellate court reviews the sentence on substantive reasonableness grounds.<sup>70</sup> Substantive appellate review is based on an abuse of discretion standard, regardless of whether the sentence comports with the recommended range or is outside, even significantly outside, the guidelines-computed range.<sup>71</sup>

## II. DISCOURSES ON A TROUBLESOME GUIDELINE

Sentencing is a focal point in the federal system of criminal justice adjudication. Since *Booker*, over ninety-five percent of federal

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66. BOOKER REPORT, *supra* note 7, pt. A, at 37.

67. *See id.*, pt. A, at 37–40.

68. *See id.*, pt. A, at 37–41 (collecting cases).

69. *Gall v. United States*, 552 U.S. 38, 51 (2007).

70. *Id.*

71. *Id.* at 41.

defendants sentenced were the result of plea deals,<sup>72</sup> meaning that the major procedural mechanism from a formal perspective is not trial but the sentencing phase. Thus, basic concerns of stakeholders about fairness and justice are concentrated on issues involving sentencing adjudication. This Section first explores how and why the child pornography sentencing guideline has captured the public's attention. Certainly, child sexual exploitation crimes are dramatic and they invoke fear and anger. But tensions also run high in discussions about overly severe sentences and inconsistencies in punishment. The second part of this Section explores judicial discourses on why the child pornography guideline is problematic and why it deserves such diatribes as it begets, as will be noted herein, even from those judges who support it.

#### A. *Public Discourses*

One may properly wonder what all the fuss is about—considering child pornography offenders are universally reviled. The child pornography guideline is of consequence for several reasons. The significant rate of variances itself differentiates it from other crimes in the federal system.<sup>73</sup> There must be something truly unique about this guideline that so many judges single it out as deserving of little or no respect.<sup>74</sup> This situation turns what might otherwise simply be a tedious regulatory exercise into a curiosity piece, demanding attention to how it has fallen into disrepute with so many learned jurists. Before highlighting relevant statistical measures and comparisons, it should be noted that this Article addresses nonproduction child pornography offenses and their relevant guideline, designated within the Commission's guideline framework as § 2G2.2. This guideline generally comprises the noncontact crimes of transporting, distributing, receiving, and possessing child pornography.<sup>75</sup>

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72. BOOKER REPORT, *supra* note 7, pt. A, at 58.

73. *Id.*, pt. A, at 67–68, 73.

74. *See id.*, pt. A, at 105 & n.436.

75. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2013).

A few statistical measures illustrate the polemic over time. Commission data, widely published and promoted, clearly show a steep decline in conformance measures with this particular guideline.<sup>76</sup> Nationwide, rates of within-guideline sentences in child pornography cases have dropped precipitously. In the year before *Booker*, the within-guideline rate was almost 80%.<sup>77</sup> After *Kimbrough*, the rate dropped to 41%,<sup>78</sup> and it dropped further still in fiscal year 2012 to less than 33%.<sup>79</sup> While above-range sentences for child pornography exist, they are few in number and percentage (generally around 1%–3%).<sup>80</sup> Instead, the vast majority of outside-guideline punishments are below-range.<sup>81</sup> The percentage of below-range variances has tracked in the opposite direction from within-range sentences, representing about 16% of sentences issued in the year before *Booker* to 57% in the years after *Kimbrough*,<sup>82</sup> and was at 66% in fiscal year 2012.<sup>83</sup>

Both guideline minimums and sentence lengths have consistently and significantly changed over time as well. For fiscal year 1996, the average minimum and actual sentence were both about twenty months for child pornography crimes.<sup>84</sup> In fiscal year 2012, the average minimum was about 129 months while the average actual sentence was ninety-eight months.<sup>85</sup> Over a sixteen-year period, this represents a 545% increase in the average guideline minimum and an increase of 390% in actual sentences.<sup>86</sup> Comparisons to current

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76. See generally BOOKER REPORT, *supra* note 7, pt. C, at 106–45.

77. *Id.* at 114.

78. *Id.*

79. 2012 SOURCEBOOK, *supra* note 16, at tbl.28.

80. BOOKER REPORT, *supra* note 7, pt. C, at 114; see also *infra* text preceding Figure B (noting 1.5% of child pornography sentences were above range in fiscal year 2011).

81. BOOKER REPORT, *supra* note 7, pt. C, at 114–45.

82. See *id.*, pt. C, at 114. Government-sponsored below-range departures accounted for 4% and 13% of cases in the year before *Booker* and the years after *Kimbrough*, respectively. *Id.*

83. 2012 SOURCEBOOK, *supra* note 16, at tbl.28.

84. See BOOKER REPORT, *supra* note 7, pt. C, at 116.

85. Data and analyses compiled by the author and on file with the Georgia State University Law Review. See also *Commission Datafiles*, U.S. SENTENCING COMM'N, [http://www.ussc.gov/Research\\_and\\_Statistics/Datafiles/index.cfm](http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm) (data also available upon request from the University of Michigan's Inter-University Consortium for Political and Social Research (ICPSR), <http://www.icpsr.umich.edu/icpsrweb/landing.jsp>) [hereinafter *Commission Datafiles*]; 2012 SOURCEBOOK, *supra* note 16, at tbl.13.

86. See BOOKER REPORT, *supra* note 7, pt. C, at 116, 177.

average sentences for other crimes are enlightening. The ninety-eight month mean sentence was exceeded only by the primary offense categories of murder (252 months), kidnapping (197 months), and sexual abuse (127 months).<sup>87</sup> The mean nonproduction child pornography sentence is greater than other major crimes, such as robbery (77 months), arson (77 months), drug trafficking (68 months), manslaughter (60 months), and national defense (51 months).<sup>88</sup> It is also notable that the average guideline minimum of 129 months for child pornography offenses is two months more than mean sentences issued for contact sexual abuse crimes, including child molestation.<sup>89</sup>

Recognition that child pornography crimes play a central role in the federal criminal justice system is manifested with the controversies they stir in public discourses. Multiple constituencies have noticed, expressing various reactions from pragmatism to sheer outrage.<sup>90</sup> Judges have recognized that the child pornography guideline is among the most hotly contested issues within the federal judiciary.<sup>91</sup> As one jurist astutely observed, the only uncontroversial characterization of the situation is that sentencing with the child pornography guideline is controversial.<sup>92</sup> Another federal judge, who is also a former chair of the Sentencing Commission, reflected upon his years in both positions, concluding that the child pornography guideline is the primary example of judicial concern with the severity of a guideline.<sup>93</sup> He lamented that it has led to a “tug of war between

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87. 2012 SOURCEBOOK, *supra* note 16, at tbl.13. The primary offense category of sexual abuse is defined to include offenses relating to the “sexual abuse of a minor, transportation of [a] minor for sex, sexual abuse of a ward, criminal sexual abuse, and abusive sexual contact.” *Id.* at app. A.

88. 2012 SOURCEBOOK, *supra* note 16, at tbl.13.

89. *Id.*

90. *United States v. Cunningham*, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010), *aff’d*, 669 F.3d 723 (6th Cir.), *cert. denied mem.*, 133 S. Ct. 366 (2012).

91. Honorable Thomas M. Hardiman & Richard L. Heppner, Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 8 (2012); William K. Sessions III, *Federal Sentencing Policy: Changes Since the Sentencing Reform Act of 1984 and the Evolving Role of the United States Sentencing Commission*, 2012 WIS. L. REV. 85, 99–100 (2012).

92. *United States v. Rothwell*, 847 F. Supp. 2d 1048, 1054 (E.D. Tenn. 2012).

93. William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 305, 321 (2011).

the three branches [] with the Sentencing Commission in the middle.”<sup>94</sup>

Congressmen have publicly called the Commission and the federal judiciary to task for the current state of child pornography sentencing.<sup>95</sup> In a public statement before the Senate Judiciary Committee in 2011, Senator Chuck Grassley excoriated federal judges for excessive leniency in sentencing child pornography offenders.<sup>96</sup> Similarly, in prepared remarks before a House Judiciary Committee hearing that same year on the status of federal sentencing (the hearing pointedly given the moniker “Uncertain Justice”), Congressman James Sensenbrenner began the hearing by vehemently objecting to the now advisory status of the federal guidelines—blaming the Supreme Court for destroying the guidelines—and singled out child pornography crimes as the worst example of judicial leniency.<sup>97</sup> He, only somewhat, facetiously described child pornography possessors as being “in luck,” pointing to the fact that federal judges are varying downward at the highest rate for that offense.<sup>98</sup> Congressman Sensenbrenner also expressed concern about the consequence of undesirable regional disparities in sentencing.<sup>99</sup>

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94. *Id.* at 357.

95. *S. Comm. on the Judiciary Exec. Business Meeting*, 112th Cong. (May 19, 2011) (statement of Sen. Chuck Grassley, Ranking Member, S. Comm. on the Judiciary), available at [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16cbeb7&wit\\_id=e655f9e2809e5476862f735da16cbeb7-0-1](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da16cbeb7&wit_id=e655f9e2809e5476862f735da16cbeb7-0-1).

96. *Id.*

97. *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 5 (2011) (statement of F. James Sensenbrenner, Chairman, H. Subcomm. on Crime, Terrorism, & Homeland Sec.), available at [http://judiciary.house.gov/hearings/printers/112th/112-142\\_70669.pdf](http://judiciary.house.gov/hearings/printers/112th/112-142_70669.pdf).

98. *Id.* at 2. Later in the hearing, a spokesman for the American Bar Association claimed that a child pornography possessor was “not in luck to be sentenced today,” referring to the average sentence length for child pornography offending as having increased since its inception by 1,500%, “an increase in penalties unprecedented in human existence.” *Id.* at 126 (statement of James E. Felman, Liaison to U.S. Sentencing Comm’n, American Bar Association).

99. *Id.* at 2. Several years before, a Congressman had also expressed concerns specific to child pornography sentences. *Mandatory Minimum Sentencing Laws—The Issues: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 3 (2007) (statement of J. Randy Forbes, Ranking Member, H. Subcomm. on Crime, Terrorism, & Homeland Sec.), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg36343/html/CHRG-110hhrg36343.htm>. These included a concern about disparities with nongovernment-sponsored below-guideline sentences, geographic variations, and significant sentence reductions. *Id.*

As an apparent response to the congressional hearing, the next year the Commission issued a lengthy report specifically commenting on the child pornography guideline and noting its high variance rate.<sup>100</sup> Legal writers have explored the issue, often holding Congress responsible for the inconsistencies.<sup>101</sup> One commentator, channeling Congressman Sensenbrenner's imagery of a game of chance, analogized the situation to a lightning strike: "[T]he congressionally mandated harsh sentences strike some defendants but miss many others."<sup>102</sup> In reflecting on the House of Representatives' Uncertain Justice hearing, reporters with the *New York Law Journal* recognized the high rate at which sentencing judges are refusing to follow the child pornography guideline, though blaming Congress and its extreme micromanagement in forcing "drastic" increases in guideline sentences.<sup>103</sup> Similarly, a writer in the *Boston Bar Journal* references the conflict between congressional-led increases and the high rate of judicial variances as a "controversy rag[ing]" in federal courtrooms around the country.<sup>104</sup>

The cultural significance of the child pornography sentencing debacle is evident as mainstream journalists have reported on it. A *Morning Edition* segment broadcast by National Public Radio (NPR) in mid-2012 referred to the question of which player in the federal system has the ultimate power in sentencing policy as "one of the biggest questions in the criminal justice system" today.<sup>105</sup> While the discussion began on the broader issue of predictability in federal sentencing, the NPR hosts quickly turned to the debate about child pornography sentencing and its high departure rate.<sup>106</sup> Playing audio excerpts from Congressman Sensenbrenner's comments at the Uncertain Justice hearing, the NPR story described the controversy in

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100. See generally FED. CHILD PORNOGRAPHY OFFENSES, *supra* note 19.

101. See Alan Vinegrad & Jason Levine, *Guidelines Gone Awry*, N.Y.L.J., Nov. 7, 2011, at 3.

102. Loren Rigsby, Comment, *A Call for Judicial Scrutiny: How Increased Judicial Discretion Has Led to Disparity and Unpredictability in Federal Sentencings for Child Pornography*, 33 SEATTLE U. L. REV. 1319, 1319–20 (2010).

103. Vinegrad & Levine, *supra* note 101, at 1, 3–4.

104. Pelgro, *supra* note 1, at xxviii.

105. *GOP Seeks Big Changes in Federal Prison Sentences*, NAT'L PUB. RADIO (Jan. 31, 2012), <http://www.npr.org/2012/01/31/146081922/gop-seeks-big-changes-in-federal-prison-sentences>.

106. *Id.*

quite partisan terms, citing congressional Republicans as being upset over federal judges' leniency on child pornography possessors.<sup>107</sup> The issue was referred to as a "debate" in a *New York Times* article<sup>108</sup> and a "caustic conflict" in a *Boston Globe* piece.<sup>109</sup> A news reporter in a *Denver Post* article takes a different stance, expressing confusion as to why federal judges would be supporting these particular criminals: "In a nationwide series of hearings, members of the U.S. Sentencing Commission have heard from federal judges seeking reduced sentences for a group of defendants one would think unlikely to get sympathy from the bench: possessors of child pornography."<sup>110</sup>

At the same time, newspapers have run articles questioning the reasons behind disparities in sentences nationwide. A *New York Times* editorial in 2010 noticed the contrasting values.<sup>111</sup> On one hand, sentences should be consistent, citing the Justice Department's fear that variances indicate arbitrariness and a luck-of-the-draw mentality, which could breed disrespect for the federal judiciary.<sup>112</sup> On the other hand, the editorialist recognized the call by federal judges for lower guideline possibilities considering that child pornography offenders do not comprise a homogenous grouping: "As repellent as child pornography is, it does not help judges when someone found with a few photographs is held to similar standards as someone disseminating thousands of them."<sup>113</sup> An Associated Press story discussed the idiosyncratic consequences and surveys the various positions of those engaged in the child pornography sentencing debates.<sup>114</sup> In a Louisville, Kentucky paper, the enterprising reporter compiled years of statistics to compare child

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107. *Id.*

108. Erica Goode, *Life Sentence for Possession of Child Pornography Spurs Debate over Severity*, N.Y. TIMES, Nov. 5, 2011, at A9.

109. Milton J. Valencia, *US Judges Balk at Rigid Child Porn Sentences*, BOS. GLOBE, Feb. 12, 2012, at A1.

110. Felisa Cardona, *Federal Judges Argue for Reduced Sentences for Child-Porn Convicts*, DENVER POST (Nov. 29, 2009), [http://www.denverpost.com/ci\\_13887009](http://www.denverpost.com/ci_13887009).

111. Editorial, *Rethinking Criminal Sentences*, N.Y. TIMES, July 28, 2010, at A22.

112. *Id.*

113. *Id.*

114. David Cray, *Debate Rages over Child-Porn Sentences*, ASSOCIATED PRESS (Apr. 29, 2012), available at <http://www.foxnews.com/us/2012/04/29/debate-rages-over-severity-child-porn-sentences/>.

sexual abuse sentences for defendants in the local state court as compared to defendants in the federal district serving the same area.<sup>115</sup> He wrote, with evident amazement, that the 2006–2011 average sentence for child pornography offenders in the area’s federal district was ten years, an average almost four times longer than offenders received in the local court for state charges of sexually assaulting children.<sup>116</sup> He bemoaned the “mishmash of inconsistent penalties.”<sup>117</sup>

In sum, the story is perhaps the hottest topic in federal sentencing today. It certainly resonates within and outside criminal justice circles. Only history will tell if it is the catalyst that leads to the demise of the United States Sentencing Commission. For its part, the Commission is clearly aware of the debate and the dangers posed.<sup>118</sup> It has defended the creation and evolution of § 2G2.2 in a 2009 report on the history of the child pornography guideline (the History Report)<sup>119</sup> and in its 2012 special report on the state of child pornography sentencing.<sup>120</sup> But, the Commission also expresses frustration that it is being pulled in different directions by Congress and the federal judiciary.<sup>121</sup> Still, for several years the Commission has listed the reconsideration of the child pornography guideline as one of its top priorities.<sup>122</sup> A complete overhaul would likely be welcomed by many, considering the most commonly invoked policy complaints from district judges.

### *B. Judicial Policy Discourses*

The Sentencing Reform Act of 1984 attempted to bring transparency to federal sentencing by requiring judges to issue a

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115. Andrew Wolfson, *Are Child Porn Laws Unfair? Viewers’ Sentences Can Be Worse than Molesters’*, COURIER-JOURNAL (Louisville, Ky.), Mar. 24, 2012.

116. *Id.*

117. *Id.*

118. BOOKER REPORT, *supra* note 7, pt. A, at 1–9, 73, pt. C, at 106–45.

119. U.S. SENTENCING COMM’N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 2 (2009) [hereinafter CHILD PORN. HISTORY REPORT], available at [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Sex\\_Offenses/20091030\\_History\\_Child\\_Pornography\\_Guidelines.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf).

120. *See generally* FED. CHILD PORNOGRAPHY OFFENSES, *supra* note 19.

121. *See id.* at 7–54.

122. *Id.* at 1.

statement of reasons for imposing the sentence.<sup>123</sup> This obligation suggests that a judge who rejects the guideline recommendation based on a policy choice must articulate the policy at issue and her reasons for disagreement.<sup>124</sup> A comprehensive review of recent federal opinions yields a host of information about the common policy-based reasons district judges employ for disregarding the child pornography guideline. These objections are discussed below within various categories, though it will become clear that there is some theoretical overlap among them.

### 1. *Rationales*

The child pornography guideline has uniquely elicited a host of grievances. As federal judges are not likely to represent child pornography apologists, the fact that many have spent time attempting to study the background and operation of this guideline and the fact that they are willing to risk reversal by rejecting it underscore the issue's significance in the struggle over federal sentencing. Nonetheless, it is imperative to stress that these criticisms are not shared by all, and the federal judiciary remains divided on these issues.<sup>125</sup>

#### a. *Not Empirical*

This type of policy objection derives from *Kimbrough's* ideology that it might be reasonable for a sentencer to reject a guideline, even on the wholesale level, when it is not the result of the Commission's usual empirical research and analysis.<sup>126</sup> The Supreme Court's reference to an empirical approach refers to the Commission having initially based sentencing recommendations principally upon a statistical review of past sentencing practices.<sup>127</sup> A sentencing judge

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123. 18 U.S.C. § 3553(c) (2012).

124. *See id.*

125. *See Sara Sun Beale, Is Now the Time for Major Federal Sentencing Reform?*, 24 FED. SENT'G REP. 382, 383 (2012).

126. *See Kimbrough v. United States*, 552 U.S. 85, 109–10 (2007).

127. *Id.* at 96–97.

offers a helpful explanation for why guidelines that are developed through the Commission's normal institutional role and based upon studying empirical data *can* normally be relied upon.<sup>128</sup> Guidelines developed properly have descriptive, prescriptive, and normative functions.<sup>129</sup> By describing sentencing practices across the country, they play a prescriptive function in suggesting that a majority of sentences should fall within the recommended range because sentences within such range reasonably approximate the sentencing considerations embodied in § 3553(a).<sup>130</sup> Properly derived ranges also have a normative role: representing national practices in sentencing for similar offenses and offenders, uniformity is encouraged, while unwarranted disparity is reduced.<sup>131</sup>

Thus, many courts have substantively justified downward variances based on their perception that the child pornography guideline specifically lacks such empirical support and therefore fails to provide appropriate guidance.<sup>132</sup> The following general sentiment illustrates this genre: “the child pornography Guidelines are . . . not grounded in any scientific, statistical, or empirical method. The advice imparted in the Guidelines does not reflect the sort of empirical data, national experience, and independent expertise that characterize the Sentencing Commission's institutional role.”<sup>133</sup> The Commission's own History Report is often cited to support this assessment of the nonempirical nature of this guideline, even from its initial creation.<sup>134</sup> In the History Report, the Commission summarized the guideline's evolution: “Prompted by congressional

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128. *See* United States v. Hahn, No. 8:10CR60, 2011 U.S. Dist. LEXIS 577, at \*9–11 (D. Neb. Jan. 3, 2011).

129. United States v. McElheney, 630 F. Supp. 2d 886, 890 (E.D. Tenn. 2009).

130. *Id.*

131. *Id.*

132. *See, e.g.,* United States v. Schinbeckler, No. 1:09-CR-77-TLS, 2011 U.S. Dist. LEXIS 112179, at \*28 (N.D. Ind. Sept. 29, 2011); United States v. Cameron, No. 1:09-cr-00024-JAW, 2011 U.S. Dist. LEXIS 24878, at \*15–16 (D. Me. Mar. 11, 2011); United States v. Beiermann, 599 F. Supp. 2d 1087, 1101 (N.D. Iowa 2009) (deflecting prosecution's argument that § 2G2.2 exemplifies Commission's study since prosecutors provided not “one whit” of evidence of any Commission-led empirical analysis).

133. *Hahn*, 2011 U.S. Dist. LEXIS 577, at \*31–32.

134. *See, e.g.,* United States v. Faulhaber, No. 8:11CR320, 2012 U.S. Dist. LEXIS 107262, at \*8–10 (D. Neb. July 31, 2012); United States v. Stark, No. 8:10CR270, 2011 U.S. Dist. LEXIS 12500, at \*9–10 (D. Neb. Feb. 8, 2011); *Beiermann*, 599 F. Supp. 2d at 1100.

action, and on its own initiative, the Commission has reviewed and substantively revised the child pornography guidelines nine times.”<sup>135</sup> The inability to locate any evidence of the Commission’s analytical study or thoughtful consideration led one court to conclude that there appears to be no rationale for the child pornography guideline other than a general revulsion for people involved in child sexual exploitation.<sup>136</sup>

Still, some jurists remain unconvinced that the child pornography guideline has no empirical foundations. As an appellate court assessed the situation, it was not unreasonable for the lower court to conclude there was no national consensus on the child pornography guideline’s lack of empirical foundation.<sup>137</sup> A district judge in another case dismisses the claim that the child pornography guideline was unsupported by empirical evidence as simply “not accurate.”<sup>138</sup> Another judge strongly backs the Commission’s role in crafting the guidelines:

[W]hen life gives you lemons, make lemonade. In this instance, the Commission was given grandstanding politicians, but still crafted proper Guidelines. Rather than cede its responsibility, the Commission instead appears to have gone above and beyond to justify its amendments. Far from failing to rely on empirical data and its own expertise, the Commission has conducted formal studies whenever possible and has conducted extensive analyses to fulfill its statutory obligations.<sup>139</sup>

As previously noted, Congress has directly manipulated this guideline; the occurrence of which leads to the second grievance.

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135. CHILD PORN. HISTORY REPORT, *supra* note 119, at 2.

136. *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008).

137. *See United States v. Psick*, 434 F. App’x 646, 648 (9th Cir. 2011).

138. *United States v. Muhlenbruch*, 682 F.3d 1096, 1102 n.4 (8th Cir. 2012).

139. *United States v. Cunningham*, 680 F. Supp. 2d 844, 851 (N.D. Ohio 2010), *aff’d*, 669 F.3d 723 (6th Cir.), *cert. denied mem.*, 133 S. Ct. 366 (2012).

*b. Congressional Influence*

Several district judges have criticized Congress's role in directly and indirectly influencing the child pornography guideline.<sup>140</sup> Some of the complaints are rather general, such as assailing the guideline for being based on politics rather than being driven by data.<sup>141</sup> More often, the trouble seems to lie in a sort of separation of powers dispute.<sup>142</sup> These courts are critical of the fact that Congress has acted in an unprecedented manner by requiring, on numerous occasions, that the Commission make arithmetical modifications to § 2G2.2. These modifications involve increases in the base offense level and additional points for specific enhancements.<sup>143</sup> By forcing both specific offense levels and enhancements on the Commission, these congressional directives effectively undermine the Commission's independent formulation,<sup>144</sup> and otherwise tie the Commission's hands.<sup>145</sup> Courts have asserted that Congress has overridden the Commission's contrary expert judgment,<sup>146</sup> even ignoring the Commission's independent attempts to oppose the legislative dictates.<sup>147</sup> When a prosecutor argued that the congressional mandates were not a reason to disregard a guideline, the judge caustically summarized the government's perspective as meaning that "the Commission's institutional role is to do what Congress tells it to do to the child pornography guidelines."<sup>148</sup>

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140. *See* United States v. Stark, No. 8:10CR270, 2011 U.S. Dist. LEXIS 12500, at \*20 (D. Neb. Feb. 8, 2011).

141. United States v. Kelly, 868 F. Supp. 2d 1202, 1205 (D.N.M. 2012); United States v. Meillier, 650 F. Supp. 2d 887, 895 (D. Minn. 2009) (concluding guideline driven by politics, not science).

142. Benjamin J. Priester, *Apprendi Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 74 (2011).

143. *See generally* U.S. SENTENCING GUIDELINES MANUAL (2013).

144. *See* United States v. Plachy, No. 4:12CR3049, 2013 U.S. Dist. LEXIS 65561, at \*12 (D. Neb. May 8, 2013); United States v. Munoz, Criminal No. 11-167 (JRT/AJB), 2012 U.S. Dist. LEXIS 155050, at \*10 (D. Minn. Oct. 30, 2012); United States v. Brasfield, No. 11-CR-96, 2011 U.S. Dist. LEXIS 96890, at \*7 (E.D. Wis. Aug. 29, 2011).

145. *Kelly*, 868 F. Supp. 2d at 1206.

146. *Id.* at 1204–05.

147. *Munoz*, 2012 U.S. Dist. LEXIS 155050, at \*11–13; United States v. Diaz, 720 F. Supp. 2d 1039, 1042 (E.D. Wis. 2010).

148. United States v. Beiermann, 599 F. Supp. 2d 1087, 1101 (N.D. Iowa 2009); *see also* United States v. Faulhaber, No. 8:11CR320, 2012 U.S. Dist. LEXIS 107262, at \*10 (D. Neb. July 31, 2012) (citing CHILD PORN. HISTORY REPORT, *supra* note 119, at 6, for Commission's feeling bound to "bow

Several federal judges have recognized the unique role of mandatory minimum sentences in increasing child pornography guideline ranges, inasmuch as the Commission strove to avoid ranges below applicable mandatory minimums.<sup>149</sup> One judge concluded that the resulting guideline ranges appear to have been the Commission's attempt to negotiate Congress's mandatory minimums.<sup>150</sup> But while such a compromise may make sense practically, the resulting guideline does not embody thoughtful research and study.<sup>151</sup> Another noted that Congress's ostensible intent in pushing harsher sentences was to target those who sexually molest children and those who produce child pornography for a profit, yet most federal child pornography defendants do not fit in either category.<sup>152</sup> Similarly, recognizing that the guideline skews toward the most heinous offenders, a judge complained it fails to provide appropriate guidance for achieving § 3553(a)'s statutory-based objectives in typical cases involving noncontact offenders.<sup>153</sup> In sum, the position of this argument is that deference is unjustified since the child pornography guideline is a political construction of Congress forced upon an unwitting Commission and transcends the latter's otherwise independent role.

Other courts, however, find that Congress's will can and should prevail.<sup>154</sup> For example, a district court opined that "although the guideline range might be harsh, Congress ultimately had the 'right to declare the will of the people' and to promulgate guideline ranges to reflect the appropriate sentence in a particular case."<sup>155</sup> Another jurist declined a categorical policy rejection, reflecting that Congress clearly intends to punish such crimes harshly and the legislature is not required to engage in empirical research to support that

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to the specific directives of Congress").

149. *Faulhaber*, 2012 U.S. Dist. LEXIS 107262, at \*9 (citing CHILD PORN. HISTORY REPORT, *supra* note 119, at 44–48).

150. *Kelly*, 868 F. Supp. 2d at 1208.

151. *Id.*

152. *United States v. Stabell*, No. 08-CR-244, 2009 U.S. Dist. LEXIS 28185, at \*3 (E.D. Wis. Mar. 19, 2009).

153. *Faulhaber*, 2012 U.S. Dist. LEXIS 107262, at \*8.

154. *United States v. Hardy*, 454 F. App'x 132, 134 (3d Cir. 2011).

155. *United States v. Gillette*, 485 F. App'x 416, 418 (11th Cir. 2012) (per curiam).

intention.<sup>156</sup> Yet this same thought that the child pornography guideline does tend toward harsh punishments is the basis of an additional complaint.

*c. Severity of Recommended Sentences*

Policy-based opposition could conceivably characterize a problematic guideline as tending to recommend punishment that is perceived as either too heavy or too light. For the child pornography guideline, critiques have almost uniformly been in the direction of the former.<sup>157</sup> Of course, defendants in their own self-interest are wont to criticize the guidelines' recommendations as too high. Yet the language used for the child pornography guidelines tends to be particularly forthright. For instance, defendants variously describe this guideline as “eccentric,”<sup>158</sup> “overly punitive,”<sup>159</sup> “overinflated,”<sup>160</sup> or “empirically unsupported, vindictive, and excessively harsh.”<sup>161</sup> Alternative defense claims include that this guideline merely represents “Congressional hysteria”<sup>162</sup> and the Commission's acting in a “Draconian manner.”<sup>163</sup>

District judges have joined the fray, on occasion depicting the child pornography guideline as overly harsh,<sup>164</sup> draconian and extreme,<sup>165</sup> or “truly remarkable” in terms of severity.<sup>166</sup> A couple of

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156. *United States v. Jager*, No. CR 10-1531 JB, 2011 U.S. Dist. LEXIS 21203, at \*13 (D.N.M. Feb. 17, 2011) (conceding the guideline may produce harsh sentences).

157. *See, e.g., United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010).

158. *United States v. Tanzola*, 416 F. App'x 197, 203 (3d Cir. 2011).

159. *United States v. Clogston*, 662 F.3d 588, 590 (1st Cir. 2011).

160. *United States v. Black*, 670 F.3d 877, 880 (8th Cir. 2012).

161. *United States v. Garthus*, 652 F.3d 715, 721 (7th Cir. 2011), *cert. denied mem.*, 132 S. Ct. 2373 (2012); *see also United States v. Greenwell*, 483 F. App'x 305, 307 (8th Cir. 2012) (per curiam) (“unduly harsh”).

162. *United States v. Ilgen*, 417 F. App'x 728, 732 (10th Cir. 2011).

163. *Clogston*, 662 F.3d at 591; *see also Allen v. United States*, Nos. 11 C 8640, 08 CR 238-1, 2012 U.S. Dist. LEXIS 65107, at \*4 (N.D. Ill. May 9, 2012) (noting defense's “draconian” reference).

164. *United States v. Pulsifer*, 469 F. App'x 41, 44 (2d Cir. 2012); *United States v. Price*, No. 09-CR-30107, 2012 U.S. Dist. LEXIS 38397, at \*28 (C.D. Ill. March 21, 2012); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1101 (N.D. Iowa 2009).

165. *United States v. Gillette*, 485 F. App'x 416, 422 (11th Cir. 2012) (per curiam); *see also United States v. Burns*, No. 07 CR 556, 2009 U.S. Dist. LEXIS 100642, at \*40 (N.D. Ill. Oct. 27, 2009) (“duplicative and draconian”).

166. *Grober I*, 595 F. Supp. 2d 382, 383 (D.N.J. 2008), *aff'd*, 624 F.3d 592 (3d Cir. 2010).

judges wax philosophical. One referred to the guideline's tendency toward extreme punishments as representing a "'put them down the oubliette' mentality."<sup>167</sup> Another drew on a rather primitive analogy: "Am I working with a rational sentencing structure, or administering the Code of Hammurabi?"<sup>168</sup>

Appellate judges are often also not tame in their explications, adjudging the guideline as "very stern,"<sup>169</sup> "unconscionably harsh,"<sup>170</sup> and yielding "unjust and sometimes bizarre results."<sup>171</sup> Even courts deferring to the guideline have noted the sentences it produces can be extraordinarily high and harsh<sup>172</sup> or extreme.<sup>173</sup> The foregoing represents rather generic complaints about harsh punishments recommended by the child pornography guideline. Nonetheless, judges have explained some of the unfortunate reasons this guideline reaches grave levels.

*i. Guidelines Recommendations Merge with Statutory Maximums*

A common reproach is that the range produced by the child pornography guideline too often is near to or exceeds the statutory maximum, even in mine-run cases<sup>174</sup> and for first-time offenders.<sup>175</sup> As the following court so cogently expressed, "[t]he crux of the

167. *Beiermann*, 599 F. Supp. 2d at 1106.

168. *Grober I*, 595 F. Supp. 2d at 384 (referring, too, to defense lawyer's positing, "[h]ave we gone mad?").

169. *United States v. Clogston*, 662 F.3d 588, 593 (1st Cir. 2011).

170. *United States v. Overmyer*, 663 F.3d 862, 864 (6th Cir. 2011).

171. *United States v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011) (Berzon, J., concurring).

172. *United States v. Jager*, No. CR 10-1531 JB, 2011 U.S. Dist. LEXIS 21203, at \*39 (D.N.M. Feb. 17, 2011). Even the prosecution in one case conceded the guideline range was "'extremely harsh,'" though still pressed for a sentence at the lower end of the guidelines. *United States v. Stone*, 575 F.3d 83, 87 (1st Cir. 2009). In another case, a district judge firmly chastised the U.S. Attorney's Office for not imposing upon itself a duty not to consider a guideline-based sentence as presumptively reasonable. *Beiermann*, 599 F. Supp. 2d at 1101-02. The judge facetiously observed that the prosecutors, in arguing sentences before him post-*Booker*, have virtually never met a downward variance that suited them. *Id.* at 1102.

173. *United States v. Gillette*, 485 F. App'x 416, 421 (11th Cir. 2012) (per curiam).

174. *United States v. Grober (Grober II)*, 624 F.3d 592, 597 (3d Cir. 2010); *United States v. Dorvee*, 616 F.3d 174, 186 (2d Cir. 2010); *United States v. Faulhaber*, No. 8:11CR320, 2012 U.S. Dist. LEXIS 107262, at \*19-20 (D. Neb. July 31, 2012).

175. *Dorvee*, 616 F.3d at 186; *United States v. Riley*, 655 F. Supp. 2d 1298, 1305 (S.D. Fla. 2009).

critique . . . bears repeating: a series of amendments to § 2G2.2 by Congress means that an application of the Guidelines to the ‘average’ offender results in a sentence at or close to the statutory maximum, *i.e.*, twenty years.”<sup>176</sup> The trouble is not just that the recommendations huddle around the maximum; it means that the guideline effectively ignores statutory minimums. For instance, one judge protested that it is illogical for typical guideline recommendations to be near the statutory maximum of twenty years when Congress had established a broad statutory span between five and twenty years for first-time child pornography offenders.<sup>177</sup> A different judge explained that “[i]f Congress does not want the courts to sentence individual defendants throughout that range based on the facts and circumstances of each case, then Congress should amend the sentencing statute, rather than manipulate the advisory guidelines, thereby blunting the effectiveness and reliability of the work of the Sentencing Commission.”<sup>178</sup> This common occurrence highlights the “sheer unhelpfulness of the sentencing ranges for such crimes.”<sup>179</sup>

*ii. The Role of Enhancements*

The instrumental role of multiple enhancements is troublesome too. Section 2G2.2 has six categories of enhancements: (1) the material involved a minor under twelve or a prepubescent minor; (2) the offense involved the use of a computer; (3) the material contained violent or sadistic content; (4) a hierarchical series based on the number of images; (5) a series based on types of distribution; and (6) the defendant has a history of sexual abuse.<sup>180</sup> The first four

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176. *United States v. Burns*, No. 07 CR 556, 2009 U.S. Dist. LEXIS 100642, at \*23 (N.D. Ill. Oct. 27, 2009) (emphasis in original); *see also* *United States v. Stark*, No. 8:10CR270, 2011 U.S. Dist. LEXIS 12500, at \*21 (D. Neb. Feb. 8, 2011) (“In this court’s experience, there is essentially no Internet child pornography offender who could end up with a Guidelines-recommended sentence that falls at or close to the low end of the statutory range.”).

177. *United States v. Hanson*, 561 F. Supp. 2d 1004, 1011 (E.D. Wis. 2008); *accord* *Riley*, 655 F. Supp. 2d at 1305 (noting irrational recommendation exceeding maximum for first-time, mine-run offenders with no criminal history where statutory range of five to twenty years).

178. *United States v. Johnson*, 588 F. Supp. 2d 997, 1004 (S.D. Iowa 2008).

179. *United States v. Munoz*, Criminal No. 11-167 (JRT/AJB), 2012 U.S. Dist. LEXIS 155050, at \*12–13 (D. Minn. Oct. 30, 2012).

180. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b) (2013).

enhancements are almost universally applied,<sup>181</sup> while some type of distribution enhancement is applied in a majority of cases. The following is a credible factual explanation for the commonality of such enhancements:

These sentencing enhancements are almost always applicable because the Internet is now the primary vehicle for delivering or consuming pornography (legal and illegal) and the number and type of images received is frequently accidental; it is thus a poor indicator of culpability. Most obviously, this means of distribution facilitates the easy collection of a large number of images (triggering the enhancement for quantity). Moreover, because digital collections are generally built through trading images in Internet chat rooms, a defendant generally has very little control over the quantity of images he receives or the content of those images (triggering enhancements for depictions of sadistic sex acts and pictures of children under the age of twelve). The predominance of this illicit bartering also means that most defendants receive another enhancement for distributing images of child pornography.<sup>182</sup>

A more concise depiction explained that “the government unimaginatively, robotically, and with terrible consequences to this defendant, seeks application of ‘aggravating’ factors that in reality define the core of the offense—transmitting child pornography by file sharing and, on occasion, attaching it to e-mails.”<sup>183</sup> A concern is that these enhancements unfortunately signify a more passive consumer rather than an actual predator.<sup>184</sup>

Therefore, judges complain that those common enhancements are inherently too flawed to justify lengthier sentences as they apply in virtually all cases.<sup>185</sup> Still, the problem is not just always about rates.

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181. *Burns*, 2009 U.S. Dist. LEXIS 100642, at \*24.

182. *Id.* at \*24–25.

183. *Grober I*, 595 F. Supp. 2d 382, 396 (D.N.J. 2008).

184. *Id.*

185. *United States v. Marshall*, 870 F. Supp. 2d 489, 493 (N.D. Ohio 2012); *United States v. Kelly*,

As one court noted, the high frequency of the enhancements' application is not automatically suspect but is problematic here, where they tend to be inherent in the offense itself, and too often yield recommendations at or near the statutory maximum, even for first-time offenders.<sup>186</sup> Enhancements are said to “inordinately increase[]” sentencing ranges<sup>187</sup> and lead to an “extraordinarily punitive result for a first time offender of any crime under the guidelines.”<sup>188</sup> In addition, the enhancements in the child pornography guideline operate in a rather unique manner: in other guidelines, enhancements are generally independent of each other, whereas “here they are so intertwined that if one applies, the others almost invariably apply too and the result is an extremely high total offense level for most child pornography defendants.”<sup>189</sup> The guideline's recommendation for many offenders, then, violates the parsimony clause of the statutory sentencing goals.<sup>190</sup> An opinion explains this violation further:

Unlike sentencing enhancements for many other crimes, the Commission did not determine that child pornography defendants who are subject to typical child pornography enhancements, such as use of a computer, are more culpable, more dangerous, or in need of a longer prison sentence as a deterrent than those defendants who commit the same offense

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868 F. Supp. 2d 1202, 1209 (D.N.M. 2012); *United States v. Price*, No. 09-CR-30107, 2012 U.S. Dist. LEXIS 38397, at \*32 (C.D. Ill. March 21, 2012); *United States v. Brasfield*, No. 11-CR-96, 2011 U.S. Dist. LEXIS 96890, at \*8 (E.D. Wis. Aug. 29, 2011).

186. *United States v. Schinbeckler*, No. 1:09-CR-77-TLS, 2011 U.S. Dist. LEXIS 112179, at \*13 (N.D. Ind. Sept. 29, 2011).

187. *United States v. Meysenburg*, No. 8:08CR361, 2009 U.S. Dist. LEXIS 82974, at \*29 (D. Neb. Sept. 11, 2009).

188. *United States v. Cameron*, No. 1:09-cr-00024-JAW, 2011 U.S. Dist. LEXIS 24878, at \*9 (D. Me. Mar. 11, 2011).

189. *Id.* at \*8–9. Importantly, in a recent report the Commission itself admitted that several of the enhancements are outdated in terms of no longer differentiating types of offenders and should, with congressional approval, be overhauled at some point in the future. FED. CHILD PORNOGRAPHY OFFENSES, *supra* note 19, at xvii–xviii. Some courts have already embraced this admission as a reason to disregard the guideline. *United States v. Mallatt*, No. 4:13CR3005, 2013 U.S. Dist. LEXIS 168777, at \*28–29, 61 (D. Neb. Nov. 27, 2013); *United States v. Childs*, No. 2:13-cr-96, 2013 U.S. Dist. LEXIS 142550, at \*5–8 (S.D. Ohio Oct. 2, 2013).

190. *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1105 (N.D. Iowa 2009).

without those same enhancements. Therefore, the Guidelines range in the typical child pornography case fails to achieve the § 3553(a) objectives.<sup>191</sup>

Many often consider the sentencing recommendations not only too lengthy but also overly inclusive.

*d. Unwarranted Similarity*

Many jurists find that the child pornography guideline is too broad of an aggregation in combining together quite dissimilar offenses and offenders.<sup>192</sup> Thus, a frequent complaint is that the guideline fails to distinguish the worst from the least,<sup>193</sup> or put another way, between more and less culpable offenders.<sup>194</sup> Pursuant to the guideline, “the predator becomes indistinguishable from the voyeur.”<sup>195</sup> Yet, instead of leaning in the direction of the voyeur, the guideline offers ranges appropriate for the far more heinous sexual predator.<sup>196</sup>

Instead, judges often believe that palpable gradations of egregiousness in these crimes do exist.<sup>197</sup> Variations in culpability between nonproduction child pornography offense behaviors have, therefore, been posited. Examples include judgments that possession is less serious than distribution,<sup>198</sup> viewing is less serious than

191. *United States v. Munoz*, Criminal No. 11-167 (JRT/AJB), 2012 U.S. Dist. LEXIS 155050, at \*11 (D. Minn. Oct. 30, 2012).

192. *E.g.*, *United States v. Martin*, 469 F. App'x 561, 562 (9th Cir. 2012) (mem.); *United States v. Faulhaber*, No. 8:11CR320, 2012 U.S. Dist. LEXIS 107262, at \*19–20 (D. Neb. July 31, 2012); *United States v. Marshall*, 870 F. Supp. 2d 489, 495 (N.D. Ohio 2012); *United States v. Kelly*, 868 F. Supp. 2d 1202, 1207 (D.N.M. 2012).

193. *E.g.*, *Faulhaber*, 2012 U.S. Dist. LEXIS 107262, at \*19–20; *Kelly*, 868 F. Supp. 2d at 1207; *United States v. McElheney*, 630 F. Supp. 2d 886, 901–02 (E.D. Tenn. 2009).

194. *Martin*, 469 F. App'x at 562; *Marshall*, 870 F. Supp. 2d at 495; *United States v. Price*, No. 09-CR-30107, 2012 U.S. Dist. LEXIS 38397, at \*34 (C.D. Ill. Mar. 21, 2012); *United States v. Schinbeckler*, No. 1:09-CR-77-TLS, 2011 U.S. Dist. LEXIS 112179, at \*13 (N.D. Ind. Sept. 29, 2011); *United States v. Stark*, No. 8:10CR270, 2011 U.S. Dist. LEXIS 12500, at \*21 (D. Neb. Feb. 8, 2011).

195. *Grober I*, 595 F. Supp. 2d 382, 394 (D.N.J. 2008).

196. *See United States v. Meysenburg*, No. 8:08CR361, 2009 U.S. Dist. LEXIS 82974, at \*29 (D. Neb. Sept. 11, 2009).

197. *Grober II*, 624 F.3d 592, 597–98 (3d Cir. 2010).

198. *United States v. Bistline*, 665 F.3d 758, 760 (6th Cir.), *cert. denied mem.*, 133 S. Ct. 423 (2012), *sentence vacated*, 720 F.3d 631 (6th Cir. 2013); *United States v. Mood*, 741 F. Supp. 2d 821, 826 (E.D. Mich. 2010); *United States v. Baird*, 580 F. Supp. 2d 889, 893 (D. Neb. 2008) (believing a possessor “is a marginal player in the overall child exploitation scheme”).

creating and facilitating,<sup>199</sup> and file sharing is not as serious or culpable as large-scale distributing.<sup>200</sup> The overly ambitious aggregation of dissimilar offenses led to a jurist's observation that § 2G2.2 is in such a “deplorable state” in failing to adequately distinguish between individual offenders that a judge is required to engage in the unfortunate exercise “of trying ‘to pound square pegs into round holes.’”<sup>201</sup>

A sentencer in one case correctly reminded the reader that Congress has directed the Commission itself to comply with the same § 3553(a) statutory sentencing goals that are applicable to judges, such as proportionality and parsimony.<sup>202</sup> The judge asserted that, by failing to distinguish based on degrees of culpability, the Commission is incapable of fulfilling its mission under such statutory obligations.<sup>203</sup> The unfortunate over-aggregation of offenders by the child pornography guideline has led to another source of asserted error: the unintended consequence of inconsistency in punishment.

*e. Unwarranted Disparities*

A common objection to the child pornography guideline is the idea that it has led to widespread disparities in sentencing across the country. Thus, courts have varied downward in order to avoid unwarranted disparities, as well as to avoid unwarranted similarities for offenders engaging in dissimilar conduct.<sup>204</sup> The courts engaging this critique use several philosophies. For example, contending that avoiding disparities suggests a downward variance is appropriate, a

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199. *United States v. Kelly*, 868 F. Supp. 2d 1202, 1204 (D.N.M. 2012).

200. *United States v. Faulhaber*, No. 8:11CR320, 2012 U.S. Dist. LEXIS 107262, at \*8, \*17 (D. Neb. July 31, 2012).

201. *See United States v. Ilgen*, 417 F. App'x 728, 734 (10th Cir. 2011) (finding, though, within-guidelines sentence was just in the instant case).

202. *See United States v. Schinbeckler*, No. 1:09-CR-77-TLS, 2011 U.S. Dist. LEXIS 112179, at \*12–16 (N.D. Ind. Sept. 29, 2011).

203. *See id.*; *United States v. Plachy*, No. 4:12CR3049, 2013 U.S. Dist. LEXIS 65561, at \*11 (D. Neb. May 8, 2013) (opining ranges produced by § 2G2.2 fail to approximate § 3553(a) factors).

204. *E.g.*, *United States v. Munoz*, Criminal No. 11-167 (JRT/AJB), 2012 U.S. Dist. LEXIS 155050, at \*17 (D. Minn. Oct. 30, 2012); *Kelly*, 868 F. Supp. 2d at 1206; *United States v. Price*, No. 09-CR-30107, 2012 U.S. Dist. LEXIS 38397, at \*35 (C.D. Ill. Mar. 21, 2012); *United States v. Stark*, No. 8:10CR270, 2011 U.S. Dist. LEXIS 12500, at \*26–27 (D. Neb. Feb. 8, 2011); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1105 (N.D. Iowa 2009).

court concluded that Congress was concerned with online child pornography activity leading to enticing minors and with dangerous child abusers—thus, the recommended ranges are inappropriate to those who are less culpable and unlikely to try to sexually engage minors.<sup>205</sup> Courts have cited other decisions with significant downward variances<sup>206</sup> and the results of a Commission survey of federal judges indicating widespread displeasure with the child pornography guideline's severity<sup>207</sup> to justify following suit, contending doing so would reduce disparities.<sup>208</sup>

Others lean in the opposite direction, contending that a problem with issuing a non-guideline sentence is that doing so may itself lead to disparities in sentences across cases; they justify their own variances as likely being in the majority though, citing federal statistics indicating that less than half of cases are within-guideline ranges.<sup>209</sup>

It is possible that judges are not at fault for inconsistencies in sentencing nationwide. Instead, the irrationality of the guideline may be to blame for any disparity. As one jurist conjectured post-*Booker*, uniformity requires guidelines being reasonable.<sup>210</sup>

Once sentencing and appellate judges resolve that the guidelines measure the wrong things or result in improper ranges, the guidelines lose their persuasive force. The guidelines under § 2G2.2 are at risk of practical irrelevance and defendants will increasingly be left to the disparate sense of justice among federal judges, which is what led to the guidelines in the first

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205. *United States v. Meysenburg*, No. 8:08CR361, 2009 U.S. Dist. LEXIS 82974, at \*31–32 (D. Neb. Sept. 11, 2009).

206. *United States v. Marshall*, 870 F. Supp. 2d 489, 496 (N.D. Ohio 2012); *United States v. Robertson*, Criminal No. 2:10-CR-263-DCN, 2011 U.S. Dist. LEXIS 81055, at \*3–4 (D.S.C. July 25, 2011); *United States v. Riley*, 655 F. Supp. 2d 1298, 1304 (S.D. Fla. 2009).

207. *Marshall*, 870 F. Supp. 2d at 490; *Kelly*, 868 F. Supp. 2d at 1206.

208. See generally sources cited *supra* notes 206–07.

209. *Marshall*, 870 F. Supp. 2d at 491; *United States v. Rothwell*, 847 F. Supp. 2d 1048, 1050 (E.D. Tenn. 2012); *United States v. Schinbeckler*, No. 1:09-CR-77-TLS, 2011 U.S. Dist. LEXIS 112179, at \*27–28 (N.D. Ind. Sept. 29, 2011); *United States v. Brasfield*, No. 11-CR-96, 2011 U.S. Dist. LEXIS 96890, at \*12 n.5 (E.D. Wis. Aug. 29, 2011); *United States v. Cameron*, No. 1:09-cr-00024-JAW, 2011 U.S. Dist. LEXIS 24878, at \*55 n.7 (D. Me. Mar. 11, 2011).

210. *Cameron*, 2011 U.S. Dist. LEXIS 24878, at \*55.

place.<sup>211</sup>

Sentencing is expected to be about proportionality. This applies to punishment being reasonably related to the offending behavior as well as comparatively proportionate to the punishments assigned to other offenses.

*f. Comparisons to Other Crimes*

In the final category of objection, courts express frustration, even incredulity, with the tendency for the child pornography guideline to recommend sentences that are similar to, or even longer than, those for actual predators.<sup>212</sup> For example, a district court decried that the “government wants a *higher* sentence for a man who is *not accused of, and has never been found to be*, an active abuser.”<sup>213</sup> In another case, the judge noted that “[i]n an instance of troubling irony, an individual who, sitting alone, obtained images of sexually exploited children on his computer, could receive a higher sentence than the Guidelines would recommend for an offender who actually rapes a child.”<sup>214</sup> One jurist attempted to quantify the difference, commenting that the defendant in the instant case “is subject to nearly a ten-fold greater punishment for possessing images of someone else sexually abusing a minor than he would receive if he had committed the actual abuse himself [or for the] horrific crime of selling or buying a child for use in the production of pornography.”<sup>215</sup>

A similar lament is that, “[i]n effect, the Guidelines presume that those who view child pornography are indistinguishable from those who actually abuse children.”<sup>216</sup> Yet many protesting judges find that nonproduction child pornography offenders are far less culpable.<sup>217</sup>

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211. *Id.*

212. *See, e.g., Marshall*, 870 F. Supp. 2d at 491–92; *Cameron*, 2011 U.S. Dist. LEXIS 24878, at \*10–11; *United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1106 (N.D. Iowa 2009).

213. *Grober I*, 595 F. Supp. 2d 382, 396 (D.N.J. 2008) (emphasis in original).

214. *United States v. Cruikshank*, 667 F. Supp. 2d 697, 702 (S.D.W. Va. 2009).

215. *Cameron*, 2011 U.S. Dist. LEXIS 24878, at \*10–11.

216. *Marshall*, 870 F. Supp. 2d at 491–92.

217. *United States v. Faulhaber*, No. 8:11CR320, 2012 U.S. Dist. LEXIS 107262, at \*19 (D. Neb.

In one case, the government's argument that consumers need extremely severe punishment to deter them from even beginning to actually exploit children for sexual purposes was rejected by the judge as illogical considering an offender would receive a lesser sentence for abusive sexual contact with a minor or statutory rape.<sup>218</sup>

It has been surmised that prosecutors may have ulterior motives for exploiting the discrepancy. The first motive is evidentiary:

[T]his Court is frequently presented with plea deals for actual sexual assaults of minors, in which the Government agrees to less than the five years it adamantly defends for computer crimes. Computer crimes are like red light cameras for traffic offenses, as they are easily proven with virtually incontrovertible evidence, and these crimes have an obvious attraction for prosecutors.<sup>219</sup>

The second is the use of the child pornography offense as a proxy to punish child molestation.<sup>220</sup> “The high rate of variances from the Guidelines can be explained by the belief that tough sentences in these cases are punishing a defendant for something he or she has not yet done—and may never do—actual contact with children.”<sup>221</sup> The government on occasion argues that a high sentence is appropriate because of the risk the defendant either had molested or would do so

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July 31, 2012) (noting that downloading, while harmful, is not of equivalent culpability as direct sexual molestation or production); *United States v. Stark*, No. 8:10CR270, 2011 U.S. Dist. LEXIS 12500, at \*20–21 (D. Neb. Feb. 8, 2011) (downloading not equivalent to production or direct sexual molestation); *United States v. Meysenburg*, 2009 U.S. Dist. LEXIS 82974, at \*26 (D. Neb. Sept. 11, 2009) (distributing not proportional to molestation); *Grober I*, 595 F. Supp. 2d at 404 (downloading “manifestly less culpable” than actually abusing children).

218. *United States v. Kelly*, 868 F. Supp. 2d 1202, 1207 (D.N.M. 2012). *But see* *United States v. Miller*, 665 F.3d 114, 121 (5th Cir. 2011) (disputing argument that child pornography offender should not receive the same or more severe sentence than one who had actual sexual contact with a child because the former has multiple victims and striking at demand prevents future sexual abuse cases), *cert. denied mem.*, 132 S. Ct. 2773 (2012).

219. *Kelly*, 868 F. Supp. 2d at 1211 n.18; *accord Cruikshank*, 667 F. Supp. 2d at 703 (“Rarely able to catch the monsters that create the images, society reflexively nominates the consumers of this toxic material as proxies for the depraved producers and publishers.”).

220. *See Kelly*, 868 F. Supp. 2d at 1207. This leads to inappropriately punishing for hypothetical behavior. *Id.* at 1208.

221. *United States v. Marshall*, 870 F. Supp. 2d 489, 491 (N.D. Ohio 2012).

in the future.<sup>222</sup> In response, the judge in one case proclaimed such a factual premise speculative and that basing a guideline's severity on unsupported fears is likely to be unreasonable.<sup>223</sup>

Judges are not only concerned with the child pornography guideline issuing sentence recommendations that are longer than those for contact sexual abuse against children; they also mention comparisons to other serious crimes. Courts have asserted that a person who views child pornography on the Internet can receive a longer sentence than those who commit murder,<sup>224</sup> drug trafficking crimes,<sup>225</sup> assault,<sup>226</sup> and bank robbery.<sup>227</sup> In sum, the gist of this disagreement is that the child pornography guideline recommends sentences that are disproportionate within the overall scheme of federal crimes.

The foregoing represents the principle policy objections to the child pornography guideline. They are cited by judges to support outcomes that purposely are not compliant with the guidelines system, but are considered lawful pursuant to *Kimbrough*.<sup>228</sup> Nevertheless, while some judges blatantly reject the child pornography guideline for *Kimbrough*-type policy reasons, others are more reticent, as the following will attest.

## 2. *Methods of Policy Rejections*

There are some slightly different linguistic and legal ploys judges make when, in the overall context of their opinions, they are in effect categorically rejecting the child pornography guideline on policy grounds. Many courts forthrightly admit when they vary downward

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222. *Kelly*, 868 F. Supp. 2d at 1207.

223. *Id.* at 1207–08.

224. *Id.*; *United States v. Stark*, No. 8:10CR270, 2011 U.S. Dist. LEXIS 12500, at \*28 (D. Neb. Feb. 8, 2011); *United States v. Hahn*, No. 8:10CR60, 2011 U.S. Dist. LEXIS 577, at \*39–40 (D. Neb. Jan. 3, 2011).

225. *United States v. Faulhaber*, No. 8:11CR320, 2012 U.S. Dist. LEXIS 107262, at \*26 (D. Neb. July 31, 2012); *United States v. Cameron*, No. 1:09-cr-00024-JAW, 2011 U.S. Dist. LEXIS 24878, at \*9–10 (D. Me. Mar. 11, 2011); *Stark*, 2011 U.S. Dist. LEXIS 12500, at \*28; *Hahn*, 2011 U.S. Dist. LEXIS 577, at \*39–40.

226. *Stark*, 2011 U.S. Dist. LEXIS 12500, at \*28; *Hahn*, 2011 U.S. Dist. LEXIS 577, at \*39–40.

227. *Cameron*, 2011 U.S. Dist. LEXIS 24878, at \*9.

228. *See generally* *Kimbrough v. United States*, 552 U.S. 85 (2007).

that they are explicitly rejecting the child pornography guideline itself,<sup>229</sup> specific guideline enhancements therein,<sup>230</sup> or both.<sup>231</sup> For example, one judge was determined to be very clear: “I find that U.S.S.G. § 2G2.2 should be rejected on categorical, policy grounds, even in a ‘mine-run’ case, and not simply based on an individualized determination that it yields an excessive sentence in a particular case.”<sup>232</sup> Another chose to disregard those enhancements that either were duplicative of the underlying offense or failed to distinguish between less culpable offenders.<sup>233</sup> Other judges take a less blatant approach, agreeing with one or more of the flaws described in Section II.B.1 but merely indicating that such deficiencies mean they will accord the guideline little deference and thereby vary below the recommended sentences.<sup>234</sup> Several courts articulated both approaches, admitting a policy rejection and giving less deference.<sup>235</sup> In reality, “this distinction may be more semantic than practical.”<sup>236</sup>

A few methods of the step-by-step decision are employed. Most formally begin with a traditional guideline calculation before

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229. *United States v. Bistline*, 665 F.3d 758, 761 (6th Cir.) (overruling such rejection on appeal), *cert. denied mem.*, 133 S. Ct. 423 (2012), *sentence vacated*, 720 F.3d 631 (6th Cir. 2013); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1100 (N.D. Iowa 2009).

230. *United States v. Schinbeckler*, No. 1:09-CR-77-TLS, 2011 U.S. Dist. LEXIS 112179, at \*13–14 (N.D. Ind. Sept. 29, 2011); *United States v. Brasfield*, No. 11-CR-96, 2011 U.S. Dist. LEXIS 96890, at \*8–9 (E.D. Wis. Aug. 29, 2011); *United States v. Tapp*, No. 1:09-CR-123-TLS, 2010 U.S. Dist. LEXIS 115051, at \*16–17 (N.D. Ind. Oct. 28, 2010); *United States v. Raby*, Criminal Action No. 2:05-cr-00003, 2009 U.S. Dist. LEXIS 121836, at \*18–19 (S.D.W. Va. Dec. 30, 2009); *United States v. Burns*, No. 07 CR 556, 2009 U.S. Dist. LEXIS 100642, at \*25–26 (N.D. Ill. Oct. 27, 2009).

231. *See generally* sources cited *supra* notes 229–30.

232. *Beiermann*, 599 F. Supp. 2d at 1104.

233. *Burns*, 2009 U.S. Dist. LEXIS 100642, at \*26.

234. *United States v. Faulhaber*, No. 8:11CR320, 2012 U.S. Dist. LEXIS 107262, at \*19 (D. Neb. July 31, 2012); *United States v. Marshall*, 870 F. Supp. 2d 489, 495 (N.D. Ohio 2012); *Brasfield*, 2011 U.S. Dist. LEXIS 96890, at \*7; *United States v. Riley*, 655 F. Supp. 2d 1298, 1305 (S.D. Fla. 2009); *United States v. McElheney*, 630 F. Supp. 2d 886, 901 (E.D. Tenn. 2009); *United States v. Stabell*, No. 08-CR-244, 2009 U.S. Dist. LEXIS 28185, at \*7 (E.D. Wis. Mar. 19, 2009).

235. *E.g.*, *United States v. Munoz*, Criminal No. 11-167 (JRT/AJB), 2012 U.S. Dist. LEXIS 155050, at \*11–13 (D. Minn. Oct. 30, 2012); *United States v. Kelly*, 868 F. Supp. 2d 1202, 1205 (D.N.M. 2012); *Grober I*, 595 F. Supp. 2d 382, 402 (D.N.J. 2008); *United States v. Baird*, 580 F. Supp. 2d 889, 895 (D. Neb. 2008). Other courts seem to lean toward a policy rejection yet officially base their downward variance on individualized factors. *E.g.*, *United States v. Taylor*, No. 1:10CR00011, 2011 U.S. Dist. LEXIS 9336, at \*7–8 (W.D. Va. Feb. 1, 2011); *United States v. Mood*, 741 F. Supp. 2d 821, 825–26 (E.D. Mich. 2010); *United States v. Meillier*, 650 F. Supp. 2d 887, 896–97 (D. Minn. 2009).

236. *United States v. Abraham*, No. 8:12CR384, 2013 U.S. Dist. LEXIS 69151, at \*16 (D. Neb. May 15, 2013).

rejecting it and deciding to vary downward.<sup>237</sup> Two judges indicated they considered the probation department's guideline calculation, rejected it, and substituted another: one using a calculation consistent with the mandatory minimum<sup>238</sup> and the other using the Commission's original recommendation.<sup>239</sup>

This Section has set forth a variety of assaults on the integrity of the child pornography guideline and sometimes speculative observations on the roles of Congress and the Commission in crafting and modifying the guideline. Many courts have eschewed the guideline as being unhelpful and have thereby declined to defer to it, even if the defendants being sentenced were within the heartland. As a discerning judge put it, “[i]nstead it is truer to say that § 2G2.2 . . . is what falls outside of the heartland.”<sup>240</sup> Nevertheless, many disagree with such criticism, and, therefore, district courts offered disparate opinions on the matter, and case law indicates that sentences sometimes appear arbitrary. A significant failure of sentencing uniformity across the country is the likely consequence. The next relevant matter is to consider the standpoints at the circuit court level and, considering there is an evident circuit split, to ferret out the most supportable positions on the relevant issues.

### III. THE CONSTITUTIONALITY OF A POLICY REJECTION

The previous Section illustrated the conclusions of a multitude of federal district judges who have engaged in fundamental disagreements with a particular sentencing guideline. Yet it also represented that such positions are not unanimously held. The controversy becomes more evident as this Section outlines a circuit court division on the constitutionality of rejecting the child pornography guideline. After describing the various legal reasoning

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237. *E.g.*, *United States v. Bistline*, 665 F.3d 758, 760 (6th Cir.), *cert. denied mem.*, 133 S. Ct. 423 (2012), *sentence vacated*, 720 F.3d 631 (6th Cir. 2013), *Munoz*, 2012 U.S. Dist. LEXIS 155050, at \*19–20; *Grober I*, 595 F. Supp. 2d at 402.

238. *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1107 (N.D. Iowa 2009).

239. *United States v. Diaz*, 720 F. Supp. 2d 1039, 1047 (E.D. Wis. 2010).

240. *Grober I*, 595 F. Supp. 2d at 403.

underlying the split, the better position on the answer to the issue posed is offered and defended.

#### A. *Anatomy of a Circuit Court Split*

A case law review of circuit courts of appeals decisions reveals an evident circuit court split on the issue of interest.<sup>241</sup> As a matter of law, may a district court judge categorically reject the child pornography guideline based on a *Kimbrough*-style policy disagreement? I have adjudged a three-way split. The first group is in the affirmative, the second is in the negative, and the third represents a sort of middle approach. The third group is characterized by those circuits that have theoretically countenanced the idea that a sentencer could disregard the pornography guideline, but the circuits' opinions express skepticism about such a result and otherwise suggest strong limitations thereon. The rationales for these differences are often oriented around the issues addressed in the previous Section. The following discussion utilizes the three-way split as an obvious orientation. Nonetheless, sometimes circuits within each grouping do not entirely overlap in rationalizing their conclusions.

##### 1. *Accepting Policy Rejection*

It seems appropriate to start with the groundbreaking circuit level opinion that expressly, and vigorously, renounced the relevance of the child pornography guideline.<sup>242</sup> In the 2010 case of *United States v. Dorvee*, the Second Circuit reversed a twenty year sentence in a distribution case as substantively unreasonable for being disproportionately long.<sup>243</sup> The court first noted the lower court had committed reversible procedural error by improperly calculating the guideline range: the initially calculated range exceeded the statutory

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241. Compare *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010) (accepting policy rejection), with *United States v. Vanderwerff* 459 F. App'x 254 (4th Cir. 2011) (repudiating policy rejection), *cert. denied mem.*, 132 S. Ct. 1985 (2012), and *United States v. Halliday*, 672 F.3d 462 (7th Cir. 2012) (taking a neutral stance on policy rejection).

242. *Dorvee*, 616 F.3d at 181.

243. *Id.* at 176.

maximum of twenty years, which pursuant to guidelines' policy made the range the same as the maximum, here being twenty years.<sup>244</sup> Notwithstanding, the court undertook the extraordinary step of addressing an alternative issue, despite the procedural error having been sufficient to remand for resentencing on its own merit.<sup>245</sup> The *Dorvee* panel considered whether a twenty year sentence for a child pornography distribution conviction could even be upheld on substantive grounds.<sup>246</sup> The court reasoned that ruling on the substantive claim was justified, citing the interests of judicial economy and the serious flaws it found with the § 2G2.2 guideline.<sup>247</sup> The court also concluded as a matter of law that the sentence was substantively unreasonable.<sup>248</sup>

The *Dorvee* court cited three case-specific reasons for determining the sentence given was too severe. First, the district court improperly assumed the defendant was at high risk of engaging in child molestation.<sup>249</sup> The appellate court disputed this finding as not supported by any factual evidence that *Dorvee* presented such a risk.<sup>250</sup> Second, the district judge failed to explain how a sentence at the statutory maximum complied with the sentencing goal of parsimony.<sup>251</sup> Third, the lower court incorrectly presumed a below-guideline sentence would be upheld as reasonable.<sup>252</sup>

The *Dorvee* decision that the sentence was substantively unreasonable did not end with the three foregoing complaints. Instead, the court elaborated on the critical flaws in the child pornography guideline.<sup>253</sup> The decision singled out § 2G2.2 as both “fundamentally different” from other guidelines and prone to

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244. *Id.* at 181 (citing U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(a)).

245. *Id.* at 182. The district court judge had considered the recommended range was higher and thought he was giving a below-guideline sentence. *Id.* As he intended to actually deliver a downward variance, his incorrect assumption of the guideline's range meant the defendant did not get the benefit of a sentence that was in reality below the true guideline range. *Id.*

246. *Id.*

247. *Id.* at 182.

248. *Dorvee*, 616 F.3d at 183.

249. *See id.*

250. *Id.*

251. *Id.* at 184.

252. *Id.*

253. *Id.*

unreasonably long sentences.<sup>254</sup> The court cited a variety of rationales. The Commission's History Report shows the child pornography guideline fails to represent the Commission's normal empirical approach.<sup>255</sup> Rather, the increasing length of child pornography guideline ranges over time result from congressional directives, and as the court asserted, the Commission "often openly opposed."<sup>256</sup> As an example, legislative advances of multiple enhancements—applicable in virtually all cases—increase base offense levels so dramatically that they tend to yield ranges that are near to or over statutory maximums, even in mine-run cases.<sup>257</sup> The court complained this flaw means the guidelines fail to distinguish between more and less culpable offenders.<sup>258</sup> In addition, the court noted another consequence of aggregating virtually all offenders with similar ranges and statutory maximums undermines § 3553(a)'s foundation that sentencing judges should consider the particular nature and circumstances of the offense and individualized characteristics of the offender.<sup>259</sup> The *Dorvee* court recognized an alternative proportionality problem: these guidelines yield recommendations that are irrational and disproportionate whereby a typical child pornography defendant would have a lower recommended range if he had direct sexual contact with a minor.<sup>260</sup>

In reaching its conclusion, the Second Circuit in *Dorvee* cited *Kimbrough* and the foregoing analyses to justify a downward variance from the child pornography guideline.<sup>261</sup> And it did so, not just based on the individualized circumstances of the instant case, but based on its own policy disagreement about the application of the guidelines to a whole class of offenders and offenses, such as nonproduction child pornography crimes.<sup>262</sup> Broadening the scope,

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254. *Dorvee*, 616 F.3d at 184.

255. *Id.*

256. *Id.* at 185.

257. *Id.* at 186.

258. *Id.* at 187.

259. *Id.*

260. *Dorvee*, 616 F.3d at 184.

261. *See id.* at 188.

262. *Id.*

the court exhorted district courts everywhere to “take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 . . . bearing in mind that they are dealing with an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.”<sup>263</sup> Indeed, the lower court in the instant case evidently heeded such advice on remand, halving the original term of imprisonment by resentencing Dorvee to just over ten years.<sup>264</sup>

The Second Circuit’s decision in *Dorvee* is unusual in two other respects. The first is jurisdictional. Post-*Booker*, the district court typically has the discretionary ability to vary from the guideline range, with the appellate court merely reviewing such variance with a deferential, abuse of discretion standard.<sup>265</sup> Here, the district court issued what was—in reality—a within-guidelines sentence, yet it is the Second Circuit itself that rejected the guidelines based on a categorical policy disagreement.<sup>266</sup> The other curiosity is that the defendant in the case was not a very sympathetic one. The typical federal child pornography defendant is a first-time offender who passively downloaded illegal images.<sup>267</sup> In contrast, Dorvee also pled to a state charge of attempting to use a minor in a sexual performance, and the prosecution offered additional evidence of online solicitation of minor boys, attempts to transmit child pornography to them, and attempts to meet them for sexual activity.<sup>268</sup>

In any event, a later Second Circuit decision confirmed the nature of *Dorvee*’s policy ruling: district judges may deviate from § 2G2.2 based on a categorical disagreement and without having to show that the individual defendant had unique personal characteristics that differentiated him from other defendants who had committed the

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263. *Id.*

264. *United States v. Shay*, 434 F. App’x 1, 1 n.2 (2d Cir. 2011), *aff’d*, 478 F. App’x 713 (2d Cir. 2012).

265. *Dorvee*, 616 F.3d at 188.

266. *Id.*

267. *See id.* at 186.

268. *Id.* at 176.

same crime.<sup>269</sup> Indeed, the panel held that it would be plain error for a district judge to presume that *Kimbrough* did not permit a policy disagreement applicable to a wide class of offenders.<sup>270</sup> The decree from *Dorvee* has significantly impacted sentencing in the Second Circuit. Several district courts within the Second Circuit have varied downward, citing *Dorvee*, and have subsequently been affirmed on appeal.<sup>271</sup>

In sum, *Dorvee* took a strident tone in criticizing the child pornography guideline and has clearly influenced district judges.<sup>272</sup> However, subsequent Second Circuit opinions have scaled back some of the potential that defendants thought the case may yield.<sup>273</sup> Defendants within the circuit have thereafter cited *Dorvee* in arguing that their already below-guidelines sentences were still substantively unreasonable as the variances ought to have been greater.<sup>274</sup> These claims are generally rejected on appeal.<sup>275</sup> For example, a below-guidelines sentence was affirmed where the lower court, consistent with *Dorvee*'s pronouncement, applied the guidelines with great care, and the sentencing judge did not assume the defendant would sexually assault a child.<sup>276</sup> A different case affirmed a below-guidelines sentence as not unreasonable for not varying even further.<sup>277</sup> In *DeLong*, the appellate court conceded that, notwithstanding *Dorvee*, a sentence of sixteen years for receipt of child pornography was still within the realm of permissible decisions.<sup>278</sup>

Because the *Dorvee* appellate court acted on its own in this regard, it was an open issue as to whether the ruling meant that district courts

269. *United States v. Tutty*, 612 F.3d 128, 131 (2d Cir. 2010).

270. *Id.*

271. *E.g.*, *United States v. Alhakk*, 505 F. App'x 51, 55 (2d Cir. 2012); *United States v. Forbes*, 465 F. App'x 78, 79 (2d Cir. 2012); *United States v. Chow*, 441 F. App'x 44, 45 (2d Cir. 2011).

272. *See, e.g.*, *United States v. Bowman*, No. 12-2302, 2013 U.S. App. LEXIS 8595, at \*3 (2d Cir. Apr. 29, 2013) (affirming downward variance with sentencing judge's consideration of *Dorvee* despite evidence defendant molested minor daughter).

273. *E.g.*, *Forbes*, 465 F. App'x at 79–80; *Chow*, 441 F. App'x at 45.

274. *E.g.*, *Forbes*, 465 F. App'x at 79–80; *Chow*, 441 F. App'x at 45.

275. *Forbes*, 465 F. App'x at 81; *Chow*, 441 F. App'x at 45.

276. *United States v. Henchey*, 443 F. App'x 617, 619 (2d Cir. 2011).

277. *United States v. DeLong*, 486 F. App'x 945, 947 (2d Cir. 2012).

278. *Id.*

within the Second Circuit were required—or at least normatively expected—to essentially disregard § 2G2.2. Later panels have deflected broad legal claims about the scope of the *Dorvee* rejection.<sup>279</sup> A panel of the Second Circuit disavowed the argument that *Dorvee* necessarily means that a district court commits procedural error if it first calculates the guideline range using § 2G2.2 and its enhancements before considering a variance.<sup>280</sup> Nor does *Dorvee* impose a heightened standard to justify the application of § 2G2.2 enhancements.<sup>281</sup> Instead, the panel conceptualized *Dorvee*, from a procedural prospective, as approving a district court’s initial calculation of the guideline range and its enhancements, despite the guideline’s flaws, as long as the court then considers its discretionary ability to vary from the guideline range.<sup>282</sup> Regarding the substantive reasonableness prong, the same panel referred to *Dorvee* as merely admonishing sentencing justices “against mechanically sentencing child pornography defendants within Guidelines ranges prescribed by § 2G2.2.”<sup>283</sup> Similarly, a separate Second Circuit panel described *Dorvee* as merely having “suggested” the child pornography guideline may not deserve the usual deference because of empirical problems.<sup>284</sup>

In general, it appears that district courts in the Second Circuit have not interpreted *Dorvee* as requiring that they reject or give little deference to § 2G2.2. Several district judges within the Second Circuit have expressly considered the flaws specified in the *Dorvee* decision but have declined to vary from § 2G2.2, and the resulting within-guidelines sentences have been affirmed on appeal.<sup>285</sup> For example, the district court judge in one case indicated he actually

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279. See, e.g., *United States v. Reingold*, 731 F.3d 204, 226 (2nd Cir. 2013); *Chow*, 441 F. App’x at 45–46; *United States v. Tutty*, 612 F.3d 128, 132 (2d Cir. 2010).

280. *Chow*, 441 F. App’x at 45.

281. *Id.*

282. *Id.*

283. *Id.* at 46.

284. *Tutty*, 612 F.3d at 132.

285. See, e.g., *United States v. Shay*, 478 F. App’x 713, 714 (2d Cir. 2012); *United States v. Magner*, 455 F. App’x 131, 136 (2d Cir. 2012), *aff’d in part, vacated in part*, 518 F. App’x 36 (2d Cir. 2013), *cert. denied*, 2013 WL 4028656 (U.S. Oct. 7, 2013) (No. 13-5685).

agrees with the lengthy guideline sentence calculations as “each one of these children [is a] victim[] and scarred for life.”<sup>286</sup>

Nonetheless, the Second Circuit’s strong denouncement of the child pornography guideline as substantially flawed has had significant impact on other courts.<sup>287</sup> Much of *Dorvee*’s analysis and conclusions were adopted shortly thereafter by the Third Circuit in a decision published in late 2010.<sup>288</sup> In the case of *United States v. Grober (Grober II)*, the Third Circuit approved a policy disagreement with the child pornography guideline.<sup>289</sup> But unlike the Second Circuit in *Dorvee* that itself adopted the policy rejection, the Third Circuit affirmed the district judge’s own policy rejection.<sup>290</sup> The lower court in *Grober I* determined that a guidelines-based sentence would result in an “outrageously high” sentence and a “truly remarkable punishment.”<sup>291</sup> The calculated guideline range was 235–293 months.<sup>292</sup> The sentencing court issued a sentence of sixty months, representing the mandatory minimum.<sup>293</sup> It was barely a quarter of the lower end of the guideline range. The government appealed the sentence.<sup>294</sup> The Third Circuit affirmed, though, indicating respect for the lower court’s rigorous consideration of the guideline.<sup>295</sup>

Determined to take a long and hard look at the child pornography Guidelines in an effort to understand why Congress and the Sentencing Commission did what they did and whether it made sense both as an objective matter and as to the defendant,

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286. *United States v. Gouse*, 468 F. App’x 75, 77 (2d Cir. 2012).

287. *E.g.*, *Grober II*, 624 F.3d 592, 603 (3d Cir. 2010).

288. *See generally id.*

289. *Id.* at 611.

290. *Id.* at 603.

291. *Id.* at 595.

292. *Id.*

293. *Grober II*, 624 F.3d at 596, 612.

294. *Id.* at 599. Interestingly, the government did not challenge the sentence as substantively unreasonable. *Id.* Instead, it argued the case on procedural grounds, contending that the judge had not adequately addressed the prosecutor’s arguments before rejecting the guideline. *Id.* Nonetheless, the basis of appeal did not prove relevant to the appellate court’s analysis of the policy rejection issue. *See id.* at 599–611.

295. *Id.* at 611.

the Court embarked on a careful study of how the Guidelines range urged on it by the government came to be. It took evidence over twelve days, heard extensive oral argument and considered extensive written submissions, and rendered a lengthy oral opinion at sentencing and a forty-six page written opinion thereafter explaining in great detail how it arrived at what it believed to be the correct sentence for this defendant. All of this is to be much admired.<sup>296</sup>

Notably, the district judge had, in a rather unprecedented move, urged the government to produce an official to represent the Sentencing Commission as a witness in the lengthy proceedings.<sup>297</sup> But, in a letter declining the invitation to appear, the Commission's representative contended that it was inappropriate for courts to focus on the body's deliberative process; courts should rely only upon the Commission's official releases, such as guidelines, policy statements, and official commentary.<sup>298</sup> This response suggests the Sentencing Commission may have trouble with the judiciary's *Kimbrough*-like attempt to investigate the institutional process of creating specific guidelines.

*Grober II* accepts the proposition that *Kimbrough* permits district judges to vary based on a policy disagreement even when a guideline is a direct reflection of congressional directive.<sup>299</sup> It especially countenanced a policy rejection of any guideline that fails to “exemplify the Commission's exercise of its characteristic institutional role.”<sup>300</sup> Such a failure, the court asserted, accurately describes the situation with the child pornography guideline.<sup>301</sup> Indeed, the role of Congress in this guideline was not seen as a reason to defer. Instead, the *Grober II* court asserted that a sentencing court's policy rejection despite congressional involvement means

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296. *Id.* at 595.

297. *Grober I*, 595 F. Supp. 2d 382, 389 (D.N.J. 2008).

298. *Id.* at 413.

299. *Grober II*, 624 F.3d at 608.

300. *Id.* at 600–01 (quoting *Kimbrough v. United States*, 552 U.S. 85, 109 (2007)).

301. *Id.* at 601.

such a policy rejection is, actually, on even firmer ground given “the wealth of resources that have become available” to guide child pornography sentencing.<sup>302</sup>

The *Grober II* court clearly stated, however, that the decision is not meant as precedent that § 2G2.2 will always yield an unreasonable recommendation.<sup>303</sup> Consequently, Third Circuit decisions since *Grober II* reiterate that the decision does not require that district courts have a policy disagreement with § 2G2.2,<sup>304</sup> nor that the child pornography guideline always merits less deference.<sup>305</sup>

The Ninth Circuit has expressly acknowledged that the child pornography guideline suffers numerous flaws and thereby qualifies as a matter of law for policy nullification.<sup>306</sup> In the 2011 case styled *United States v. Henderson*, the court reviewed the history of the child pornography guideline, including the Commission’s History Report, and concluded that the guideline was repeatedly ratcheted higher as a result of congressional agendas, rather than deriving from the Commission’s own independent study.<sup>307</sup> The *Henderson* court concluded that, similar to the crack cocaine guidelines addressed in *Kimbrough*, the child pornography guideline is not the subject of the Commission’s characteristic institutional role and, therefore, sentencing courts have the same ability to bypass it on policy grounds.<sup>308</sup> The court further emphasized the policy disagreement could be on a wholesale level, not just on the retail end—meaning that a sentencing judge need not rely on the specific circumstances of the offender to justify its rejection.<sup>309</sup> In so ruling, the Ninth Circuit acknowledged the potential circuit split, noting it joined the Second

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302. *Id.* at 608–09. A dissenting judge disagreed. The dissent questioned the legitimacy of applying a *Kimbrough*-based policy disagreement to § 2G2.2 since he viewed the crack/powder cocaine ratio issue as *sui generis*. *Id.* at 613 n.2 (Hardiman, J., dissenting) (noting also that, even if *Kimbrough* was applicable, a court should not reject a guideline outright but consider each part on its own).

303. *Id.* at 609.

304. *United States v. Greene*, No. 11-3992, 2012 U.S. App. LEXIS 10156, at \*4 (3d Cir. May 21, 2012); *United States v. Hardy*, 454 F. App’x 132, 134 (3d Cir. 2011); *United States v. Tanzola*, 416 F. App’x 197, 202 (3d Cir. 2011).

305. *United States v. Sheridan*, 503 F. App’x 101, 103 (3d Cir. 2012).

306. *See United States v. Henderson*, 649 F.3d 955, 962–63 (9th Cir. 2011).

307. *Id.* at 960–62.

308. *Id.* at 960.

309. *Id.* at 963.

and Third Circuits (referring to *Dorvee* and *Grober II* respectively), despite the existence at the time of a contrary opinion by the Eleventh Circuit.<sup>310</sup>

Consistent with the other circuits that approve a policy rejection for child pornography sentencing, Ninth Circuit opinions are clear that sentencing courts are not required to have a policy disagreement.<sup>311</sup> Thus, the Ninth Circuit has since declined to presume within-guidelines sentences are substantively unreasonable.<sup>312</sup> And it has so demurred, even conceding that a within-guideline sentence creates disparities because other sentencing judges will vary below for policy reasons.<sup>313</sup>

To reach a total of four appellate courts clearly supporting a policy disagreement with the child pornography guideline, the First Circuit has weighed in on the issue.<sup>314</sup> The First Circuit has not yet directly affirmed or reversed a rejection on policy grounds, yet it is included in this group because it has offered its potential perspective in dicta in a 2009 opinion.<sup>315</sup> The case involved the defendant's appeal of a 17.5 year, within-guideline sentence for transmitting child pornography to an undercover agent posing as a child.<sup>316</sup> The district judge disagreed with the argument that the guideline was flawed, stating "the fact that the guidelines are a direct reflection of a congressional expression of popular will is an argument in favor, not against the imposition of a guideline sentence. Congress is, after all, the elected representatives of the people of this country . . . ." <sup>317</sup> On appeal, the First Circuit first recognized that a sentencing judge may, based on *Kimbrough*, have a policy disagreement with a guideline even when the guideline provision is a direct reflection of a

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310. *Id.* at 963 n.4 (citing *United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008)).

311. *E.g.*, *United States v. Frantz*, 485 F. App'x 890, 891 (9th Cir. 2012); *United States v. Shigley*, 451 F. App'x 705, 705 (9th Cir. 2011); *United States v. Psick*, 434 F. App'x 646, 648 (9th Cir. 2011).

312. *Frantz*, 485 F. App'x at 891; *United States v. Self*, 492 F. App'x 762, 764–65 (9th Cir. 2012).

313. *E.g.*, *Frantz*, 485 F. App'x at 891; *Self*, 492 F. App'x at 765; *Shigley*, 451 F. App'x at 705–06. The court has affirmed an above-guidelines sentence of twenty years for receipt where the defendant had a history of child molestation. *United States v. Claassen*, 475 F. App'x 255, 255 (9th Cir. 2012).

314. *United States v. Stone*, 575 F.3d 83 (1st Cir. 2009).

315. *Id.* at 89.

316. *Id.* at 85–87.

317. *Id.* at 87.

congressional directive.<sup>318</sup> On the other hand, the appellate court explained that the mere fact a guideline may have been influenced by congressional initiative does not necessarily mean a sentencing court may not rely upon it.<sup>319</sup> The First Circuit also acknowledged the unfortunate consequence of a substantially different sentence depending on the particular judge handling the case:

After *Kimbrough*, the law allows one judge to find that congressional input makes a sentence less empirical, and so less appropriate, while another judge may reasonably find such input makes the sentence more reflective of democratic judgments of culpability, and so more reasonable. *Kimbrough* itself specifically acknowledged the disparity the broad discretion it confers would create.<sup>320</sup>

In the end, the First Circuit affirmed the within-guidelines sentence because the district judge clearly was aware of his ability to vary yet simply had no policy disagreement.<sup>321</sup> Notably, the appellate court added a “coda” about its likely stance on the policy issue:

[W]e wish to express our view that the sentencing guidelines at issue are in our judgment harsher than necessary . . . [F]irst-offender sentences of this duration are usually reserved for crimes of violence and the like. Were we collectively sitting as the district court, we would have used our *Kimbrough* power to impose a somewhat lower sentence.<sup>322</sup>

Since then, the First Circuit has affirmed that it read *Kimbrough* as having “made pellucid a sentencing court’s authority to deviate from a properly calculated [range] because of a particularized disagreement with the Sentencing Commission’s policy

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318. *Id.* at 89.

319. *Id.* at 93.

320. *Stone*, 575 F.3d at 93.

321. *Id.* at 92.

322. *Id.* at 97.

judgments.”<sup>323</sup> Yet, when given another opportunity,<sup>324</sup> it again declined to overturn a sentence for its own policy reasons, despite referring to guideline recommended sentences for child pornography offending as “very stern.”<sup>325</sup> The directly contrasting perspective on the issue at hand is considered next.

## 2. *Repudiating Policy Rejection*

In contrast to the four circuit courts of appeals (First, Second, Third, and Ninth) that have definitively approved the ability to categorically refute the child pornography guideline, another four circuits have taken the opposite stance.<sup>326</sup> The four circuits on the other side of the split include the Fourth, Fifth, Sixth, and Eleventh Circuits.<sup>327</sup> These latter circuits generally have acknowledged the circuit split, with references to the contrary appellate critiques ranging from polite disagreement to more blatant disavowal.<sup>328</sup> These courts are more deferential to Congress and, to a lesser extent, work by the Commission.<sup>329</sup>

Collegiality best represents the Fourth Circuit’s discussions. In a late 2011 opinion, the Fourth Circuit was confronted with a case in which the defendant was sentenced to the statutory maximum of ten years, which qualified as a within-guideline sentence.<sup>330</sup> The defendant emphasized the Second Circuit’s *Dorvee* criticism to support his claim of substantive unreasonableness.<sup>331</sup> The Fourth Circuit issued a cogent response: “We acknowledge [defendant’s]

323. *United States v. Clogston*, 662 F.3d 588, 591 (1st Cir. 2011).

324. *See id.* at 593.

325. *Id.*

326. *See, e.g., United States v. Knight*, 496 F. App’x 969, 971 (11th Cir. 2012); *United States v. Bistline*, 665 F.3d 758, 761 (6th Cir.), *cert. denied mem.*, 133 S. Ct. 423 (2012); *United States v. Vanderwerff*, 459 F. App’x 254, 254–55 (4th Cir. 2011), *cert. denied mem.*, 132 S. Ct. 1985 (2012); *United States v. Miller*, 665 F.3d 114, 119 (5th Cir. 2011), *cert. denied mem.*, 132 S. Ct. 2773 (2012).

327. *See, e.g., Knight*, 496 F. App’x at 971; *Bistline*, 665 F.3d at 761; *Vanderwerff*, 459 F. App’x at 254–55; *Miller*, 665 F.3d at 119.

328. *See, e.g., Knight*, 496 F. App’x at 971; *Bistline*, 665 F.3d at 761; *Vanderwerff*, 459 F. App’x at 254–55; *Miller*, 665 F.3d at 119.

329. *See, e.g., Knight*, 496 F. App’x at 971; *Bistline*, 665 F.3d at 761; *Vanderwerff*, 459 F. App’x at 254–55; *Miller*, 665 F.3d at 119.

330. *Vanderwerff*, 459 F. App’x at 254.

331. *Id.* at 255.

heavy reliance on the Second Circuit” in *Dorvee* in critiquing the child pornography guidelines, but “[w]e are not persuaded that the approach taken in that case compels us to disturb the district court’s sentence here.”<sup>332</sup> Indeed, the Fourth Circuit in that case thought the issue did not even rise to the level of requiring oral argument.<sup>333</sup> The court has since summarily affirmed within-guidelines sentences.<sup>334</sup> In one case, it signaled its pro-guideline stance when commenting that ““district courts, in the course of selecting an appropriate sentence, ought to give respectful attention to Congress’ view that child pornography crimes are serious offenses deserving serious sanctions.””<sup>335</sup>

The Fifth Circuit, when first confronted with defendants challenging their within-<sup>336</sup> or above-guideline<sup>337</sup> sentences based on *Dorvee*, initially rebuffed them, simply asserting that, as an appellate court, it declined to second guess a sentencing court’s position regarding an empirical issue with any guideline.<sup>338</sup> In an opinion issued in late 2011, however, the Fifth Circuit directly confronted the issue.<sup>339</sup> In *United States v. Miller*, the Fifth Circuit outright opposed the Second Circuit’s *Dorvee* decision:

With great respect, we do not agree with our sister court’s reasoning. Our circuit has not followed the course that the Second Circuit has charted with respect to sentencing Guidelines that are not based on empirical data. Empirically based or not, the Guidelines remain the Guidelines. It is for the Commission to alter or amend them. . . . [W]e will not reject a Guidelines provision as “unreasonable” or “irrational” simply because it is

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332. *Id.*

333. *Id.*

334. *United States v. Silcox*, 474 F. App’x 1000, 1001 (4th Cir. 2012); *United States v. DeBolt*, 444 F. App’x 714, 716 (4th Cir. 2011).

335. *DeBolt*, 444 F. App’x at 716 (quoting *United States v. Morace*, 594 F.3d 340, 350 (4th Cir. 2010)).

336. *United States v. Verma*, 455 F. App’x 462, 464 (5th Cir. 2011).

337. *United States v. Abbate*, 435 F. App’x 326, 327 (5th Cir. 2011).

338. *Verma*, 455 F. App’x at 463; *Abbate*, 435 F. App’x at 327.

339. *United States v. Miller*, 665 F.3d 114, 120–21 (5th Cir. 2011), *cert. denied mem.*, 132 S. Ct. 2773 (2012).

not based on empirical data and even if it leads to some disparities in sentencing.<sup>340</sup>

The Fifth Circuit suggested that sentencing uniformity is not a dispositive consideration. Acknowledging Commission statistics showing a high rate of below-guidelines sentences for child pornography crimes, it commented that “[w]hile sentences imposed by other courts may be a consideration for a district court, such information does not set a median, floor, or ceiling.”<sup>341</sup> The court took further issue with the ideology of empirical-based sentencing. It asserted that neither appellate courts nor district courts are obligated to use statistical analyses to determine a reasonable sentence.<sup>342</sup> The Fifth Circuit declared it adheres to a rebuttable presumption that a guideline sentence is reasonable even if it is not empirically based or leads to sentencing disparities.<sup>343</sup>

*Miller* then became known as a precedent-setting opinion within its jurisdictional reach. The Fifth Circuit’s position is to firmly veto the argument that § 2G2.2 is legally subject to policy rejection.<sup>344</sup> To date there does not appear to be a decision in which the Fifth Circuit has affirmed a below-guideline child pornography sentence based on a policy disagreement.<sup>345</sup>

The Sixth Circuit has, in recent years, taken somewhat conflicting approaches to the child pornography guideline. On one hand, it has at least theoretically contemplated that a sentencing court may reject § 2G2.2<sup>346</sup> or its enhancements<sup>347</sup> for policy reasons. On the other

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340. *Id.*

341. *Id.* at 122.

342. *Id.*

343. *Id.* at 121; *see also* United States v. D’Binion, No. 12-50551, 2013 U.S. App. LEXIS 9745, at \*3 (5th Cir. May 15, 2013).

344. *E.g.*, United States v. Sherley, 480 F. App’x 336, 337 (5th Cir.), *cert. denied mem.*, 133 S. Ct. 625 (2012); United States v. Rios, 477 F. App’x 209, 211 (5th Cir.), *cert. denied mem.*, 133 S. Ct. 804 (2012); United States v. Gerholdt, 460 F. App’x 430, 431 (5th Cir.), *cert. denied mem.*, 132 S. Ct. 2790 (2012).

345. Prior to *Miller*, the Fifth Circuit affirmed probationary sentences in child pornography cases based on the deferential standard of review. United States v. Duhon, 541 F.3d 391, 399 (5th Cir. 2008); United States v. Rowan, 530 F.3d 379, 381 (5th Cir. 2008).

346. United States v. Hammonds, 468 F. App’x 593, 598 (6th Cir. 2012); United States v. Phillips, 455 F. App’x 624, 625 (6th Cir. 2012).

hand, the Sixth Circuit has appreciably limited policy rejections in several ways. First, it contends that a sentencing court does not commit procedural error by declining even to consider whether a guideline should be rejected on the basis of not deriving from the Commission's empirical expertise.<sup>348</sup> The court explained that requiring such consideration would solicit an exercise that would unnecessarily distract the court from focusing on the defendant's conduct to conducting a historical review of the guideline in question.<sup>349</sup>

A second limitation exists as the Sixth Circuit seemingly would strictly curtail the reasons upon which a sentencing court may base a policy rejection. Similar to the analyses by the Second and Third Circuits in *Dorvee* and *Grober II*, respectively, the Sixth Circuit itself conducted a historical review of the increasingly severe child pornography guideline.<sup>350</sup> But the Sixth Circuit came to the opposite conclusion.<sup>351</sup> Instead of Congress's involvement being a reason to spurn guideline recommendations, this circuit views congressional mandates as enhancing deference given Congress's constitutional prerogative to issue sentencing edicts.<sup>352</sup> It views Congress as enjoying ultimate authority for federal sentencing policy, with the Commission being obliged to implement congressional directives even in child pornography cases.<sup>353</sup>

Placing the Sixth Circuit in the anti-rejection group becomes clear after the 2012 decision in *United States v. Bistline*.<sup>354</sup> There, a Sixth Circuit panel explained that, because Congress has the preeminent authority to set sentencing policy, rejecting § 2G2.2 for being

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347. *United States v. Cunningham*, 669 F.3d 723, 733 (6th Cir.), *cert denied mem.*, 133 S. Ct. 366 (2012).

348. *Hammonds*, 468 F. App'x at 598–99; *United States v. Schimley*, 467 F. App'x 482, 485 (6th Cir. 2012).

349. *Hammonds*, 468 F. App'x at 598; *see also Schimley*, 467 F. App'x at 486.

350. *United States v. McNerney*, 636 F.3d 772, 775–78 (6th Cir. 2011).

351. *Id.* at 778.

352. *Id.*

353. *Id.*

354. *United States v. Bistline*, 665 F.3d 758 (6th Cir.), *cert. denied mem.*, 133 S. Ct. 423 (2012), *sentence vacated*, 720 F.3d 631 (6th Cir. 2013).

influenced by Congress is legally impermissible.<sup>355</sup> “[T]he fact of Congress’s role in amending a guideline is not itself a valid reason to disagree with the guideline.”<sup>356</sup> The court similarly argued that criticizing § 2G2.2 as politically motivated is equally untenable.<sup>357</sup> The court then proceeded to compare the child pornography and cocaine guidelines on this issue: unlike the 100:1 ratio in *Kimbrough*, which “the Commission had simply lifted the ratio off the rack of another, inapposite statutory provision,” the § 2G2.2 guideline is largely based on Congress’s own judgments.<sup>358</sup> Indeed, the *Bistline* court described § 2G2.2 as driven by Congress’s empirical approach—though in context it appears the court actually meant a deterrence orientation—and by Congress’s retributive value conclusions.<sup>359</sup> The appellate court chided the lower court for not having even attempted to refute Congress’s judgments.<sup>360</sup> In the end, the *Bistline* court overruled the district court’s policy rejection of § 2G2.2 and, after also finding the sentence to be overly lenient, vacated the below-guidelines sentence.<sup>361</sup>

Shortly after *Bistline* was rendered, another Sixth Circuit panel cited it in a relatively rare case of the government challenging on appeal a sentence as unreasonably low.<sup>362</sup> In that case, though, the sentencing judge had not expressly disagreed with the sentencing guidelines, but instead gave a seventy-eight month downward

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355. *Id.* at 762. “In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative . . . functions.” *Id.* at 761 (quoting *United States v. Evans*, 333 U.S. 483, 486 (1948)).

356. *Id.* at 762; *see also* *United States v. Cunningham*, 669 F.3d 723, 733 (6th Cir. 2012) (“[A] district court could not refuse to apply § 2G2.2 if the district court’s basis for its disagreement was the fact that Congress adopted the § 2G2.2 enhancements directly instead of in accordance with its usual practice of allowing the Sentencing Commission to formulate Guidelines.”) (citing *Bistline*, 665 F.3d at 761), *cert. denied mem.*, 133 S. Ct. 366 (2012).

357. *Bistline*, 665 F.3d at 762.

358. *Id.* at 763.

359. *Id.* at 764. “Congress’[s] child pornography legislation initiatives have been unambiguously motivated by a desire to cast a wider criminal net, and impose harsher punishments for child pornography offenses.” *United States v. McNeerney*, 636 F.3d 772, 776 (6th Cir. 2011).

360. *Bistline*, 665 F.3d at 764.

361. *Id.* at 768.

362. *United States v. Robinson*, 669 F.3d 767, 777 (6th Cir. 2012), *cert. denied mem.*, 133 S. Ct. 929 (2013).

variance based principally on the characteristics of the defendant.<sup>363</sup> The appellate court overturned the sentence, criticizing the sentencing judge for not adequately considering those sentencing factors that refer to the seriousness of the offense, need for deterrence, and sentencing disparities.<sup>364</sup>

Yet at least one justice on the Sixth Circuit evidently does not agree with his brethren: “The problem in this pornography case is the gross disparity, inequality, and unfairness that exists in sentencing generally, but even more so in these child pornography viewer cases. It illustrates the continued sad dependence of federal judges on a harsh sentencing grid created by a distant bureaucracy.”<sup>365</sup> The dissenter praised the Third Circuit in *Grober II*, for having “performed a real service to the federal judiciary; and we should follow their example.”<sup>366</sup> He further complained that the majority ignored the multiple flaws and the criticisms by other judges and academic writers, but instead they were convinced the sentence was reasonable if the judge and grid agreed.<sup>367</sup> “The grid becomes a biblical command for the reviewing judges.”<sup>368</sup>

The Eleventh Circuit is perhaps the first appellate court to have dismissed the argument that sentencing judges could disregard § 2G2.2, though its analysis is rather minimal in this regard.<sup>369</sup> In the 2008 case *United States v. Pugh*, the court found that the child pornography guideline does “not exhibit the deficiencies the Supreme Court identified in *Kimbrough*.”<sup>370</sup> In contrasting the child pornography guideline with *Kimbrough* and the cocaine guidelines, the Eleventh Circuit opinion concisely identified two distinguishing

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363. *Id.* at 775.

364. *Id.*

365. *United States v. Overmyer*, 663 F.3d 862, 866 (6th Cir. 2011) (Merritt, J., dissenting).

366. *Id.*

367. *Id.* at 867.

368. *Id.* A district judge in the Sixth Circuit faced with *Bistline* expressly indicated he was not rejecting the guideline, but instead, varying downward based on the characteristics of the defendant. *United States v. Rothwell*, 847 F. Supp. 2d 1048, 1078 (E.D. Tenn. 2012) (construing *Bistline* as precluding a policy disagreement based on “flaws in [§ 2G2.2] attributable solely to Congressional involvement”).

369. *United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008).

370. *Id.*

characteristics in a discussion contained entirely within a rather brief footnote.<sup>371</sup> First, it regarded the child pornography guideline as *not* “directly derived from [the] Congressional mandate.”<sup>372</sup> As the sole support for such conclusion, the court referred to the initial enhancement the Commission promulgated in 1987 for material involving a minor under age twelve.<sup>373</sup> Next, the court asserted that, unlike the 100:1 congressional policy underlying crack cocaine minimum sentencing, the Commission had not clearly disagreed with the harshness of the congressionally directed child pornography guideline.<sup>374</sup>

Curiously, later Eleventh Circuit opinions have somewhat morphed the concise *Pugh* reasoning into rather dubious broader conclusions.<sup>375</sup> Recent Eleventh Circuit opinions cite *Pugh*, for instance, as affirmatively ruling that § 2G2.2 is not inherently flawed.<sup>376</sup> On a slightly different front, Eleventh Circuit opinions cite *Pugh* for the conclusion that the child pornography guideline *actually does* adequately take into account empirical data and national experience.<sup>377</sup> Further, in a more recent decision, an Eleventh Circuit panel staunchly clarified that the *Pugh* result is not mere dicta but stands for its ruling that § 2G2.2 is a valid guideline, meaning that any arguments about the unreasonableness of the child pornography guideline are “in and of themselves” foreclosed.<sup>378</sup>

The *Pugh* doctrine remains established precedent in the Eleventh Circuit.<sup>379</sup> Recent decisions express that an *en banc* court or the

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371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* The court noted the harshness of the child pornography guideline reflects Congress’s concern for recidivism and that even the defendant’s expert could not guarantee a zero chance of recidivism. *Id.*

375. See *United States v. Rodriguez*, 503 F. App’x 841, 842 (11th Cir. 2013); *United States v. Knight*, 496 F. App’x 969, 971 (11th Cir. 2012); *United States v. Scott*, 476 F. App’x 845, 846 (11th Cir. 2012).

376. *Rodriguez*, 503 F. App’x at 842; *Knight*, 496 F. App’x at 971; *Scott*, 476 F. App’x at 846.

377. *United States v. Reaid*, 455 F. App’x 926, 627 (11th Cir.), *cert. denied mem.*, 132 S. Ct. 2754 (2012); *United States v. Flowers*, 438 F. App’x 831, 832–33 (11th Cir. 2011); *United States v. Gray*, 405 F. App’x 436, 437 (11th Cir. 2010).

378. *United States v. Boykin*, 497 F. App’x 867, 869 (11th Cir. 2012).

379. E.g., *Knight*, 496 F. App’x at 971; *United States v. Ford*, 438 F. App’x 822, 825 (11th Cir. 2011); *United States v. Wayerski*, 624 F.3d 1342, 1354 (11th Cir. 2010).

Supreme Court would be needed to overrule it.<sup>380</sup> *Pugh* was cited, for example, in an opinion quickly disposing of the defendant's challenge to his twenty year, statutory maximum sentence for distribution.<sup>381</sup> The court has apparently, as of late 2013, never substantively addressed the circuit split. Interestingly, in one case, while acknowledging *Dorvee*, the court merely reiterated *Pugh*'s precedential value without further commenting on the contrary decision.<sup>382</sup> The positions and rationales of the final courts of appeals in the three-way split follow.

### 3. *Neutral*

The remaining three circuits are captured in a sort of neutral category in that they have not ruled as a matter of law as to the viability of the child pornography guideline. They are deemed here to be neutral, or even equivocal, as these appellate courts have expressed strong apprehension at the prospect.

The Seventh Circuit has gone as far as recognizing that criticism of the child pornography guideline is “gaining traction.”<sup>383</sup> It appears to recognize a broad authority for a policy rejection outside the crack/powder cocaine disparity context such that sentencing judges may, but are not required to, reject guidelines based on such policy disagreement.<sup>384</sup> Nevertheless, in responding to a defendant's complaint that the guidelines relating to sexual offenders are “empirically unsupported, vindictive, and excessively harsh” (with supporting citations to *Grober II* and *Dorvee*), the Seventh Circuit demurred, relying upon separation of powers principles.<sup>385</sup> It contended that such an argument is “more properly addressed to the Sentencing Commission, or to Congress, which has greatly influenced the child-pornography guidelines . . . than to an individual

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380. *Knight*, 496 F. App'x at 971.

381. *Flowers*, 438 F. App'x at 832–33.

382. *Scott*, 476 F. App'x at 846.

383. *United States v. Halliday*, 672 F.3d 462, 474 (7th Cir. 2012) (vacating for other reasons).

384. *United States v. Hendrickson*, 507 F. App'x 599, 601 (7th Cir. 2013); *Halliday*, 672 F.3d at 474.

385. *United States v. Garthus*, 652 F.3d 715, 721 (7th Cir. 2011), *cert. denied mem.*, 132 S. Ct. 2373 (2012).

district judge in a sentencing hearing.”<sup>386</sup> The court further opined that it would be unmanageable and impractical to require that sentencing judges examine the legislative history of every applicable guideline.<sup>387</sup> The circuit has expressed skepticism of the argument that the guideline is not based on an empirical method by retorting that such argument fails to “account for the possibility that Congress itself may have studied the problem of child pornography.”<sup>388</sup> Similarly, in another case, the appellate court disagreed with one of the positions the Second Circuit relied on in *Dorvee*.<sup>389</sup> Remarking that, to the extent the guidelines routinely produce ranges at the top of the maximum, the Seventh Circuit believes it is up to Congress or the Commission to take action.<sup>390</sup>

For its part, the Eighth Circuit at one point seemingly dismissed a defendant’s argument that § 2G2.2 deserves less deference as lacking sufficient empirical support in summarily affirming a twenty-five year sentence for distribution.<sup>391</sup> In another case, the Eighth Circuit, unlike the Second Circuit in *Dorvee*, declined to take up a policy-based investigation of its own.<sup>392</sup> Any challenge to the reasonableness of a guideline based on an empirical argument, the court ruled, is more properly addressed to the sentencing judge than to the appellate court.<sup>393</sup> Since then, the Eighth Circuit has at least accepted that a sentencing court may vary based on a policy disagreement outside the context of cocaine sentencing.<sup>394</sup> Still, it maintains that *Kimbrough* does not require that the sentencing court even consider a policy rejection; instead, it just permits a sentencing judge to do so if she so chooses.<sup>395</sup>

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386. *Id.*

387. *Id.*

388. *United States v. Schuster*, 706 F.3d 800, 808 (7th Cir.), *cert. denied mem.*, 133 S. Ct. 2813 (2013).

389. *United States v. Mantanes*, 632 F.3d 372, 377 (7th Cir. 2011).

390. *Id.*

391. *United States v. Hubbard*, 414 F. App’x 893, 894 (8th Cir. 2011).

392. *United States v. Muhlenbruch*, 682 F.3d 1096, 1102 (8th Cir. 2012).

393. *Id.*

394. *United States v. Black*, 670 F.3d 877, 882 (8th Cir. 2012); *United States v. Munjak*, 669 F.3d 906, 907 (8th Cir. 2012).

395. *United States v. Greenwell*, 483 F. App’x 305, 307 (8th Cir. 2012), *cert. denied mem.*, 133 S. Ct. 967 (2013).

Despite acknowledging the sentencing court's discretion to reject a guideline on policy grounds, the Eighth Circuit appears less inclined to countenance such rejection if the disagreement is with congressional policy.<sup>396</sup> It has, for instance, declined a challenge to use § 2G2.2 as an “anchor” based on the claim the guideline was arbitrary and irrational; the court instead confirmed that the district court properly chose to use the guideline and the appellate presumption of reasonableness applies even if the guideline range results from congressional fiat.<sup>397</sup>

There is additional evidence that the Eighth Circuit prefers to be deferential to Congress in setting sentencing policy, including directing the length of sentences.<sup>398</sup> In a single case, the court firmly dismissed two constitutional claims the defendant raised against § 2G2.2.<sup>399</sup> The defendant argued that he was denied his substantive due process right of an individualized sentence as his was based on a “discredited guideline” and that § 2G2.2 violates the equal protection clause because it punishes child pornography offenses too severely compared with other sex-based crimes against children.<sup>400</sup> These attacks, responded the appellate court,

fundamentally overstate[] the extent to which legislative sentencing provisions are subject to constitutional scrutiny. Once a person has been convicted of a crime in accordance with constitutional guarantees, determining the severity of his punishment is, in the first instance, a legislative task. It is within the legislative prerogative to determine, for example, whether child pornography offenses should be punished more or less harshly than sexual offenses involving personal contact with a child.<sup>401</sup>

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396. *United States v. Hyer*, 498 F. App'x 658, 661 (8th Cir. 2013).

397. *United States v. Althage*, 484 F. App'x 76, 77–78 (8th Cir. 2012).

398. *See United States v. Meirick*, 674 F.3d 802, 804–05 (8th Cir.), *cert. denied mem.*, 133 S. Ct. 357 (2012).

399. *Id.* at 804.

400. *Id.* at 804–05.

401. *Id.* at 805.

Further, the panel believed that a guideline provision “that accurately implements a directive of Congress does not implicate substantive due process concerns.”<sup>402</sup> Thus, the Eighth Circuit approved of the application of those enhancements enacted by the Commission at the direction of Congress, considering the Commission, not the courts, is “fully accountable” to Congress.<sup>403</sup>

The last of the circuits to be addressed herein is the Tenth Circuit. The Tenth Circuit has recognized the ability of a sentencing court to vary when it determines that § 2G2.2 recommends an unreasonable sentence.<sup>404</sup> In one case, a circuit panel referred to the *Dorvee* and *Grober II* analyses concerning the lack of empirical basis as being “quite forceful,” but then also slighted them as having no precedential impact for jurisdictional reasons.<sup>405</sup> In another case, the court similarly warned against relying heavily on policy conclusions made in other jurisdictions.<sup>406</sup> “[W]hile a court may vary from a guideline based on a disagreement with a policy decision of the Sentencing Commission, it should do so on a case-by-case basis, not merely because other courts have done so in other cases.”<sup>407</sup>

It may be curious why the Tenth Circuit is listed herein with the neutral group. Whereas the Tenth Circuit has recognized the possibility of a policy rejection, there are signs that the Tenth Circuit seems unlikely to join the clear pro-policy rejection contingency.<sup>408</sup> It has opined that basing a sentence on a guideline without an empirical basis is not necessarily unreasonable.<sup>409</sup> Further, “[g]uidelines levels can properly follow Congressional policy regarding the severity of punishment appropriate for particular offenses, and that policy need

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402. *Id.* (quoting *United States v. Fortney*, 357 F.3d 818, 821 (8th Cir. 2004)).

403. *Id.* at 805 n.4 (citing *Mistretta v. United States*, 488 U.S. 361, 393 (1989)).

404. *United States v. Nghiem*, 432 F. App’x 753, 757 (10th Cir. 2011); *United States v. Ilgen*, 417 F. App’x 728, 738 (10th Cir. 2011).

405. *United States v. Regan*, 627 F.3d 1348, 1353–54 (10th Cir. 2010).

406. *Ilgen*, 417 F. App’x at 738.

407. *Id.* The court cited as support for such assertion Justice Breyer’s concurrence in *Pepper v. United States*, 131 S. Ct. 1229, 1255 (2011), in which he opined that an appellate court should review departures from the guidelines based on a disagreement with Commission policy more strictly than when founded upon the individual circumstances in a non-heartland case. *Id.*

408. *Nghiem*, 432 F. App’x at 757.

409. *Id.*

not be founded on scientific data.”<sup>410</sup> The Tenth Circuit has, then, affirmed within-guidelines sentences<sup>411</sup> as well as an upward variance in a case with a history of a prior contact offense.<sup>412</sup>

This Section has proposed a three-way divide on the issue of rejecting the child pornography guideline for policy reasons. The next Section navigates these stormy seas and theorizes the best responses to the issues.

### *B. The Authority for Policy Nullification*

Sentencing stakeholders disagree on the overall question as to the ability of judges to disregard either congressional or Sentencing Commission policies. For instance, a leading expert argues that idiosyncratic policy preferences by a particular judge should have no relevance because individual judges have no institutional capacity to make systemic policy choices.<sup>413</sup> Instead, he asserts that Congress has democratic legitimacy and as a central institution can hear expert testimony or utilize the Commission to collect data and ascertain various views.<sup>414</sup> There is also the perspective that a democratically elected Congress is a better authority for determining just punishment.<sup>415</sup> It is argued that permitting judges to engage in policy nullification in terms of congressional- or Commission-led initiatives is unjustifiable considering individual judges have no institutional ability to instill systemic uniformity.<sup>416</sup>

Still, a federal criminal law expert reminds us that Congress is a “political, non-expert, lay body.”<sup>417</sup> A policy analyst with the Federal Public Defenders argues that for *Booker* to be fully realized “judges must turn their attention from *calculating* the guideline range to

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410. *Id.*

411. *E.g.*, *United States v. Sletten*, 458 F. App’x 782, 783 (10th Cir.), *cert. denied mem.*, 133 S. Ct. 185 (2012); *United States v. Croucher*, 456 F. App’x 767, 771 (10th Cir. 2012); *United States v. Regan*, 627 F.3d 1348, 1355 (10th Cir. 2010).

412. *United States v. Herget*, 499 F. App’x 743, 749 (10th Cir. 2012).

413. Stephanos Bibas et al., *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1388 (2009).

414. *Id.*

415. Priester, *supra* note 142, at 69–72.

416. *Id.*

417. Sun Beale, *supra* note 125, at 385.

*examining* the particular guideline—how it was developed, what the Commission says, or does not say, about how it achieves the purposes of sentencing, and the research evidence on its fairness and effectiveness.”<sup>418</sup> He contends that, when the Commission cannot substantiate how a particular guideline is ““sufficient, but not greater than necessary”” to achieve statutory goals, judges are left without their intellectual guidance to craft a reasoned and just sentence and the guidelines then become an end rather than a means to an end.<sup>419</sup> Further, he charges that the Commission has attempted to stigmatize and stifle judges’ *Booker* powers.<sup>420</sup> He may be accurate in this assessment. The Commission recently recommended that Congress require district judges to provide greater justification for outside-guideline sentences and require a heightened appellate review of policy disagreements.<sup>421</sup>

Several commentators specifically countenance the idea that judges should be obligated to adhere to the current child pornography guideline.<sup>422</sup> One of them suggests that, even if sentences for child pornography possession are longer than actual contact offenses, the better solution would be to increase sentences for the latter group.<sup>423</sup> In contrast, a sentencing appeals expert urges no appellate presumption of reasonableness for § 2G2.2 especially because it is evident that it fails to reflect the Commission’s own conclusions about what sentences may be reasonable for those crimes.<sup>424</sup>

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418. Paul J. Hofer, *Beyond the “Heartland”*: Sentencing Under the Advisory Federal Guidelines, 49 DUQ. L. REV. 675, 677 (2011) (emphasis added).

419. *Id.* at 679–80.

420. *Id.* at 697.

421. BOOKER REPORT, *supra* note 7, pt. A, at 9.

422. Kathryn A. Kimball, Note, *Losing Our Soul: Judicial Discretion in Sentencing Child Pornography Offenders*, 63 FLA. L. REV. 1515, 1536 (2011) (“Justice requires that courts adhere to the democratically decided [child pornography] Guidelines which express the high moral culpability of these crimes, deter other potential offenders, and prevent the realistic threat of recurring sexual offenses.”); Holly H. Krohel, Comment, *Dangerous Discretion: Protecting Children by Amending the Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Noncustodial Sentences*, 48 SAN DIEGO L. REV. 623, 674 (2011) (suggesting statutorily mandating enhancements to undermine judicial policy disagreements); Loren Rigsby, Comment, *A Call for Judicial Scrutiny: How Increased Judicial Discretion Has Led to Disparity and Unpredictability in Federal Sentencings for Child Pornography*, 33 SEATTLE U. L. REV. 1319, 1345 (2010).

423. Krohel, *supra* note 422, at 644.

424. Carissa Byrne Hessick, *Post-Booker Leniency in Child Pornography Sentencing*, 24 FED.

The circuit split leaves open certain issues concerning a district court's discretionary ability to categorically reject the child pornography guideline. The following commentary offers definitive answers.

### 1. *Is Kimbrough Restricted to Crack Cocaine?*

The first issue is the basic question as to whether *Kimbrough* is limited to the crack cocaine guideline. In other words, can a judge who has a policy disagreement with any other guideline discount it as well? In numerous passages in the *Kimbrough* decision, the majority seems to carefully tie its holding and reasoning to the crack cocaine guideline.<sup>425</sup> In decisions post-*Kimbrough*, the Court likewise commonly couches the *Kimbrough* result by also tying it to crack cocaine sentencing.<sup>426</sup> However, other language suggests that its intent was not so circumscribed. For example, in *Kimbrough* itself, and repeated in a later decision, the Court indicates its holding in *Kimbrough* is that “under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only.”<sup>427</sup> Then in the more recent case of *Pepper v. United States*, the Court extended *Kimbrough*, though not to another category of crime.<sup>428</sup> Instead, the Court used *Kimbrough*-like reasoning to permit a sentencing judge to consider post-sentence rehabilitation when resentencing a defendant, despite the fact that doing so violated an express Commission policy.<sup>429</sup> The Court there explained that “a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views. That is particularly true where, as here, the Commission’s views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted.”<sup>430</sup> In

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SENT’G REP. 87, 88 (2011).

425. See *Kimbrough v. United States*, 552 U.S. 85, 91, 93, 110 (2007).

426. E.g., *Pepper v. United States*, 131 S. Ct. 1229, 1229, 1245 (2011); *Spears v. United States*, 555 U.S. 261, 264 (2009).

427. *Kimbrough*, 552 U.S. at 91; *Spears*, 555 U.S. at 263.

428. *Pepper*, 131 S. Ct. at 1247.

429. *Id.*

430. *Id.*; see also *id.* at 1256 (Alito, J., concurring in part, dissenting in part) (summarizing *Kimbrough* as not requiring a sentencing court to give weight to a usual policy decision in the

resolving this issue, it is significant that the federal government seems to now concede *Kimbrough*'s application to any policy disagreement with a Commission statement or guideline. In *Pepper*, the United States declined to argue that a district judge could not vary from the guidelines based on any policy disagreement with the Commission.<sup>431</sup> The Supreme Court, therefore, was forced to assign *amicus curiae* to argue against the policy rejection.<sup>432</sup>

The resolution of this issue in the negative—in that the *Kimbrough* reasoning is not limited to crack cocaine sentencing—necessitates the review of two other potential limitations.

## 2. Does *Kimbrough* Permit Rejecting Congressional Policy?

The next question is whether a judge may vary from a guideline based on a policy disagreement with a congressional directive. The Supreme Court has previously recognized Congress's power over sentencing.<sup>433</sup> In a decision over twenty years ago, a case involving the Court upholding the constitutionality of the Commission and the guidelines, the Court accepted that Congress could revoke or amend any guideline at any time.<sup>434</sup> In *Kimbrough*, it recognized Congress's ability to also control sentencing through mandatory minimum sentencing statutes.<sup>435</sup> Both opinions suggest that congressional mandate might override the decisions of the Commission and the judiciary. Indeed, the *Kimbrough* decision expressly distinguished the policy at issue there as being one created by the Commission rather than Congress.<sup>436</sup> Nonetheless, there is substantial other evidence that any congressional edict impacting a guideline—outside statutory minimums and maximums—cannot control.<sup>437</sup> A primary

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guidelines).

431. Brief for the United States at 38–39, *Pepper v. United States*, 131 S. Ct. 1229 (2011) (No. 09-6822).

432. *Id.*

433. *Mistretta v. United States*, 488 U.S. 361, 393–94 (1989).

434. *Id.*

435. *Kimbrough v. United States*, 552 U.S. 85, 108 (2007).

436. *See id.* at 103.

437. Though, even minimums and maximums can be overruled as Eighth Amendment violations if found to be cruel and unusual punishment. *Steiker*, *supra* note 8, at 34–35.

consideration here is that it would appear to be unconstitutional as violating *Booker*'s remedy of rendering the guidelines advisory.

To posit a simple example, assume crime X has no mandatory minimum and the maximum prison term is sixty months. In other words, the possible statutory punishment is no prison term (probation) or up to sixty months of incarceration. Then assume Congress directs the Commission to institute a base offense level of fifteen for crime X. With no criminal history score, a base offense level of fifteen yields a range of eighteen to twenty-four months.<sup>438</sup> The sentencing judge in our hypothetical, though, has a categorical disagreement with the severity of eighteen to twenty-four months for crime X because she has determined that even eighteen months would be greater than necessary to satisfy statutory sentencing goals. Is she precluded from varying downward from the clear, congressionally directed guideline? Pursuant to *Booker* principles, the answer must be in the negative.<sup>439</sup> Otherwise the base offense level of fifteen for crime X would constitute a mandatory guideline, a concept in direct violation of *Booker*.<sup>440</sup> A similar conclusion would apply to any congressional requirement that would effectively mandate enhancements for crime X or otherwise tie the sentencer's hands in terms of the discretion provided by *Booker* and its progeny.<sup>441</sup>

A response to this may be that a congressionally mandated base offense level is analogous to a mandatory minimum sentence, which Congress does have the power to force onto the judiciary. This argument is appealing. To the extent a mandatory base offense level required a judge to make a factual determination beyond what was found by a jury or admitted in a plea agreement, it would clearly be unconstitutional.<sup>442</sup> But what if the mandatory base offense level did not require such a factual determination? That is more arguable. For

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438. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2013).

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

440. *See generally id.*

441. The Supreme Court has recently ruled that any fact-finding that would invoke a mandatory minimum or increase the statutory minimum must be found by a jury. *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013).

442. *See id.*

the reasons set forth herein, the better approach under *Booker* principles, at least until Congress makes the necessary changes to make the guidelines system compliant with the Sixth Amendment, is to keep mandatory minimums theoretically separate from guidelines to reduce confusion. Hence, the best conclusion to this question is that the all guidelines are advisory principle should not distinguish between those promulgated independently by the Commission and those which are not.

This conclusion is bolstered by other interests. Notably, the Supreme Court has continued to highlight the other congressional requirement involving § 3553(a) factors.<sup>443</sup> In *Kimbrough*, it gave respect to the Commission's judgment that Congress's 100:1 crack/powder cocaine ratio suffered serious deficiencies regarding the § 3553(a) sentencing factors, including seriousness of the offense, proportionality among differentially culpable offenders, and disparities (at least in *Kimbrough* with respect to race).<sup>444</sup> The sentencing factors were considered so essential that the Court in *Pepper* actually struck a federal statute, which precluded judges from considering post-sentence rehabilitation upon resentencing, because it failed to comply with a relevant statutory sentencing circumstance regarding the risk of future offending and would otherwise be in violation of *Booker*'s advisory remedy.<sup>445</sup> The Court, thereby, has signaled its willingness to find federal legislation unconstitutional if it interferes with the consideration of § 3553(a) factors or with the advisory nature of the guidelines system.

Any rule that would require a determination on the origin of any policy would be practically inefficient as well. Such a differentiation would lead to an unfortunate exercise in trying to elicit the basis of every guideline and every particular piece of a guideline. The guidelines, including their commentary and policy statements, represent thousands of policies, perhaps millions depending on how thinly one slices the pie, so to speak. And because the Commission is

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443. *E.g.*, *Kimbrough v. United States*, 552 U.S. 85, 113–14 (2007).

444. *Id.* at 97.

445. *Pepper v. United States*, 131 S. Ct. 1229, 1242 (2011).

subject to few of the transparency requirements of the Administrative Procedure Act, it is under no obligation to disclose its policymaking process or even to explain how it came up with any particular policy or guideline provision.<sup>446</sup> Too many of the guidelines appear to be sheer anomalies, odd provisions that defy rationality and bear no public paper trail explaining them. Further, if a litigant were to try to determine the origin of a particular guideline policy and was confronted by a dearth of information on which to make such an assessment, reliance on asking for the Commission's guidance will likely be fruitless. When formally invited by a federal prosecutor to send a representative to explain the child pornography guideline, notably, the Commission outright refused.<sup>447</sup>

Additional problems would plague a rule reliant on differentiating policies derived from Congress. One is the likely erroneous assumption that it is a simple, dichotomous query. The legislature none too rarely enacts legislation that represents multiple and sometimes conflicting policy statements. The Sentencing Reform Act is itself a conglomeration of inconsistent and vague goals and mandates. Limiting *Kimbrough* to Commission initiated guidelines, too, would unfortunately require creating a hodgepodge of mandatory versus nonmandatory guidelines. This type of historical exercise is not only impractical; it would also appear to contradict *Booker*'s assumption that "Congress would not have authorized a mandatory system in some cases and a nonmandatory system in others."<sup>448</sup>

Recently, both the Commission and the executive branch appear to have conceded these constitutional issues.<sup>449</sup> In the 2012 report to Congress previously discussed, the Commission comments that distinguishing between congressional or Commission policy in terms of judicial variances appears to be a concept disfavored both by federal courts and the executive branch.<sup>450</sup> To support the latter's

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446. U.S. SENTENCING COMM'N, RULES OF PRACTICE & PROCEDURE (2007), available at [http://www.ussc.gov/Meetings\\_and\\_Rulemaking/Practice\\_Procedure\\_Rules.pdf](http://www.ussc.gov/Meetings_and_Rulemaking/Practice_Procedure_Rules.pdf).

447. *Grober I*, 595 F. Supp. 2d 382, 413 (D.N.J. 2008).

448. *United States v. Booker*, 543 U.S. 220, 266 (2005).

449. See BOOKER REPORT, *supra* note 7, pt. A, at 40.

450. *Id.*

perspective, it directs attention to the Solicitor General's concession in a case in which it was argued that a judge could not legally disregard the career offender guideline for policy reasons since that guideline was a result of clear congressional directive. The Solicitor General's filing countered: "Such a conclusion would have to rest on a faulty premise: that congressional directives to the Sentencing Commission are equally binding on the courts."<sup>451</sup> The Solicitor General's filing further considered the issue of whether *Kimbrough* means "congressional directives to the Sentencing Commission are equally binding on sentencing courts."<sup>452</sup> It responded: "That premise is incorrect."<sup>453</sup> Moreover, the brief explained that distinguishing between whether a policy derived from the Commission as opposed to Congress would lead to a fruitless exercise of parsing subsections.<sup>454</sup>

In other briefs filed recently, as well, federal prosecutors appear to have officially capitulated. For instance, they have stated in a filing that "*Kimbrough* made clear that a sentencing court has authority to deviate from . . . a categorical disagreement with the way a particular guideline operates (and the policy that informs such guideline), even when the guideline provision is a direct reflection of congressional directive."<sup>455</sup> Similarly, in another brief, the Solicitor General wrote that

[e]ven when Congress does legislate Guidelines changes itself, such legislation does not have a direct effect on criminal sentences. Instead, it becomes incorporated into a framework that is itself only advisory. The independent judgment of the sentencing judge thus provides a buffer against the "danger that

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451. *Id.* (quoting *United States v. Vazquez*, 796 F. Supp. 2d 1370, 1374 (M.D. Fla. 2011)).

452. Brief for the United States at 9, *Vazquez v. United States*, 558 U.S. 1144 (2010) (No. 09-5370), 2009 WL 5423020.

453. *Id.*

454. *See id.* at 11 n.1.

455. Brief for Appellee at 15, *United States v. Medina-Medina*, No. 11-2308 (1st Cir. Aug. 27 2012), 2012 WL 3776652; *see also* Brief of Appellee at 14, *United States v. Stiggers*, 499 F. App'x 954 (11th Cir. 2012) (No. 12-11876-DD), 2012 WL 2989869 (articulating *Kimbrough* broadly: the "Supreme Court significantly expanded the scope of permissible variance from the Guidelines. *Kimbrough* allows a district court to categorically disagree with policy determinations underlying the Guidelines.").

legislatures might disfavor certain persons after the fact.”<sup>456</sup>

Furthermore, the brief indicates that *Booker* means that “imbuing the guidelines with the ‘force and effect of laws’” would be unconstitutional.<sup>457</sup>

Federal prosecutors have recently recognized another important value in permitting judicial policy disagreements. Since sentencing judges’ decisions are “entirely insulated from political concerns,” they can properly assist the Commission in its empirical analyses.<sup>458</sup> In another symbolic bow to judicial policy decisions, the Solicitor General declined to press for an appellate standard of closer review of them.<sup>459</sup>

Overall, the foregoing observations champion a conclusion that district courts have the discretion to vary from a guideline either in the individual case or for a categorical reason when they have any policy disagreement, whether nullifying a policy decision by the Commission or Congress.<sup>460</sup> This still, though, leaves open the issue of disparity. The Court has addressed the subject in several cases. For example, in *Kimbrough*, the government argued that permitting a variance based on a disagreement with the crack/powder cocaine ratio could mean that “defendants with identical real conduct will receive markedly different sentences, depending on nothing more than the particular judge drawn for sentencing.”<sup>461</sup> The Court deflected the concern, indicating that though variances might detract from uniformity they are an inevitable cost of the *Booker* remedy.<sup>462</sup> It recognized that, while avoiding unwarranted disparities is a § 3553(a) factor to be considered, it is not the only one,<sup>463</sup> and it is

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456. Brief for the United States at 43–44, *Peugh v. United States*, 133 S. Ct. 2072 (2013) (No. 12-62), 2013 WL 315237 (quoting *Garner v. Jones*, 529 U.S. 244, 253 (2000)).

457. *Id.* at 10 (citing *United States v. Booker*, 543 U.S. 220, 234 (2005)).

458. *Id.* at 42.

459. Brief for the United States in Opposition at 5–8, *VandeBrake v. United States*, No. 12-488 (U.S. Jan. 22, 2013), 2013 WL 243395.

460. This statement is not meant here to apply to statutory minimums or maximums.

461. Brief for the United States at 40, *United States v. Kimbrough*, 552 U.S. 85 (2007) (No. 06-6330).

462. *Kimbrough*, 552 U.S. at 108.

463. *Id.* at 90–91.

not appropriate to “elevate” it above the other § 3553(a) factors.<sup>464</sup> Besides, disparities are not necessarily the result of arbitrary sentencing practices as they may result from the ordinary operation of sentencing practices.<sup>465</sup> Sentencing disparities may properly occur through such other avenues as appellate review, opportunity for rehabilitation, sentencing errors, prosecutorial discretion, and reversals of convictions.<sup>466</sup> Further, it is reasonable to believe that disparities can be healthy and informative outcomes as they may suggest a need for change. Justice Breyer, a former Sentencing Commission official, describes the interplay: “Trial courts, appellate courts, and the Commission all have a role to play in what is meant to be an iterative, cooperative institutional effort to bring about a more uniform and a more equitable sentencing system.”<sup>467</sup>

### 3. *Should Courts Reject the Child Pornography Guideline?*

The foregoing leads to the question of whether the child pornography guideline should be disregarded. The arguments expounded upon in this Article in support of disfavoring it are ultimately persuasive. To the extent predilections for lengthy sentences are based on assumptions that child pornography offenders are at high risk of either having committed a prior contact sexual offense or will in the future, such presumptions are erroneous, as the author has addressed elsewhere.<sup>468</sup> Plus, there are additional reasons to call for the guideline’s immediate withdrawal and complete overhaul. The starting point itself (high base offense level plus the significant increases through the universal enhancements) has an

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464. *Pepper v. United States*, 131 S. Ct. 1229, 1249 (2011).

465. *Id.* at 1248.

466. *Id.* at 1248–49.

467. *Id.* at 1255 (Breyer, J., concurring).

468. See generally Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679 (2012) [hereinafter Hamilton, *Child Pornography Crusade*]; Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL’Y REV. 545 (2011). In its 2012 report to Congress, the Commission suggested that both theses appear true, citing the results of research. FED. CHILD PORNOGRAPHY OFFENSES, *supra* note 19, at 171–206. While the Commission’s effort to address these questions is laudable, the report and its conclusions are problematic for a host of reasons. A critical assessment of that lengthy report would require an expository rebuttal and is therefore beyond the scope of this Article.

unfortunate consequence called an “anchoring effect.”<sup>469</sup> “Higher sentences are awarded when parties start with an anchor of a higher demand even when it is clear to the judge that the source of the anchor is not rational.”<sup>470</sup> Then the guideline’s tendency toward unreasonable aggregation does not permit differentiating between what are very different levels of culpability. By grouping offenders into an extremely broad categorical guideline, the Commission has acted inconsistently with its statutory directives. It effectively has substantially replaced individualized sentencing with aggregated sentencing, creating unwarranted uniformity for dissimilar offenses and leading to what one commentator calls equal nonsense for all.<sup>471</sup> Finally, when a guideline clearly does not guide its constituencies, its credibility is forfeited.

This Section has postulated a three-way split among the circuits. Such a situation has legal and constitutional significance in and of itself. But other questions arise. Does the split actually matter with respect to the likelihood that individual district judges within each circuit will vary downward or in the length of the resulting sentences issued? Are there actual disparities in sentencing across the country? If so, are disparities driven along the lines of the circuit split? In other words, the issue of interest becomes whether this has been merely a doctrinal exercise or whether significant sentencing variations exist.<sup>472</sup> The next Section provides empirical perspectives to try to answer these questions through a variety of simplistic and multivariate statistical runs and analyses using Commission data.

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469. Jane Goodman-Delahunty & Siegfried Ludwig Sporer, *Unconscious Influences in Sentencing Decisions: A Research Review of Psychological Sources of Disparity*, 42 *AUSTRALIAN JOURNAL OF FORENSIC SCIENCE* 19, 21 (2010).

470. *Id.*

471. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 4 *FEDERAL SENTENCING REPORTS* 161, 161–63 (1991).

472. Steiker, *supra* note 8, at 44 (“This profound disagreement among the federal appellate courts guarantees that there will be an increase—probably a substantial one—in sentencing disparities among child pornography offenders, depending on whether they are sentenced in circuits that strongly advise, permit, or forbid sentencing judges to reject the applicable Guidelines.”).

## IV. STATISTICAL PERSPECTIVES

The Sentencing Commission makes publicly available databases containing information on all sentencing decisions, and they include a host of rich and informative data measures.<sup>473</sup> The data are in a form that can easily be analyzed using standard statistical software. This Section contains various statistical perspectives that appear relevant to explore more fully the issues and controversies discussed previously in this Article. The statistics herein utilize the Commission's data on nonproduction child pornography sentences issued in fiscal year 2011.<sup>474</sup> The sample data yield a variety of descriptive measures and permit a variety of correlation tests and a multivariate logistic regression analysis.<sup>475</sup>

A. *Bivariate Measures*

The sample comprises sentencing data on 1,645 defendants. The following table includes a variety of descriptive measures of the dataset (Table 1).<sup>476</sup>

Table 1: Select Descriptive Statistics

Final Sentence	94.72 months (mean)
Guideline Minimum	127.95 months (mean)
Base Offense Level	19.95 (mean)
Final Offense Level	30.42 (mean)
In Custody	57.8%

473. See *Research and Statistics*, U.S. SENTENCING COMM'N, [http://www.ussc.gov/Research\\_and\\_Statistics/index.cfm](http://www.ussc.gov/Research_and_Statistics/index.cfm) (providing access to annual reports and sourcebooks dating back to 1995).

474. Data and analyses compiled by the author and on file with the Georgia State University Law Review. See also *Commission Datafiles*, *supra* note 85.

475. The D.C. Circuit is included in overall statistics, but excluded from the circuit comparison statistics and the multivariate model due to the very small number of child pornography defendants in that jurisdiction (n=11). Technically, the dataset represents a population, rather than a sample, as it includes all child pornography offenders sentenced in the chosen year.

476. See generally *Commission Datafiles*, *supra* note 85.

Plea	97.1%
Criminal History Score	
I	82.5%
II	7.6%
III	6.5%
IV	1.9%
V	1.0%
VI	.5%
Minimum = Maximum	9.6%
Enhancements	
Minor under 12	96.1%
Use of a Computer	97.4%
Violent Content	79.6%
Distribution	48.8%
Number of Images	96.8%
History of Sexual Abuse	11.4%
Male	99.1%
Race	
White	89.2%
Black	2.4%
Hispanic	6.0%
Other	2.2%
Education	
Less than High School	9.5%
High School Graduate	32.8%
Some College	38.2%
College Graduate	18.4%

The foregoing table and its statistics, along with additional data not explicitly provided therein, provide a number of measures to explore

the general descriptors of the child pornography defendant group in federal sentencing. The vast majority of defendants sentenced for child pornography offenses in 2011 were white males and American citizens. The average age was forty-two years, with the range from nineteen to eighty-eight years old.<sup>477</sup> Approximately 11% were age twenty-five and under, 28% were over age fifty, and 5% were age sixty-five or older.<sup>478</sup> This is a particularly educated group among federal defendants, with the vast majority of child pornography defendants holding a high school degree and almost half having post-secondary educational experience.

The guidelines rank criminal history scores on an ordinal scale from I-VI with VI being the highest category.<sup>479</sup> Over 80% of child pornography defendants earned the minimum criminal history score of I, meaning either no prior criminal offenses, prior offenses were minor, or prior crimes were too dated to count. Fewer than 4% received a criminal history score of IV or above. Ninety-six percent of child pornography defendants received some point reduction for acceptance of responsibility for their offense behavior.<sup>480</sup> It is notable that the average child pornography defendant was older, relatively educated, assigned a minimal criminal history, and accepted responsibility. All of these attributes favor a low-risk offender with good prospects for rehabilitation.<sup>481</sup>

Few child pornography defendants went to trial. Almost all of the cases were resolved on guilty pleas. At the time of sentencing, 40% were not in custody, which might indicate that a large percentage was not deemed to be a risk to the community after their arrests.

With regard to the application of the child pornography guideline, the universality of certain enhancements is evident. Three of the six enhancements were applied in almost all cases: material involving minors under twelve, use of a computer, and number of images. The violent content enhancement was applied in a substantial majority of

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477. *See generally id.*

478. *See generally id.*

479. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 cmt. (2013).

480. *See generally Commission Datafiles, supra* note 85.

481. *See* Hamilton, *Child Pornography Crusade, supra* note 468, at 1726.

cases, and the distribution enhancement was present in almost half of the cases. In contrast, the history of sexual abuse enhancement was assigned to only about one out of every nine defendants. The commonality of the enhancements might help explain the fact that enhancements accounted for one-third of the average final offense level,<sup>482</sup> a number that along with the criminal history score determines the guideline minimum.<sup>483</sup> Such occurrences likely also contribute to why the guideline minimum was simultaneously the guideline maximum in approximately 10% of the cases.

A particular combination of sentencing factors suggests that prosecutors are engaging in charge bargaining. For those cases in which the files were designated as no applicable child pornography mandatory minimum, over one-third received a distribution-related enhancement.<sup>484</sup> Because distribution and receipt are five-year mandatory minimum crimes,<sup>485</sup> the presence of distribution enhancements in so many cases where no mandatory minimum is flagged suggests that the offense of distribution was downgraded to possession where no mandatory minimum applies.<sup>486</sup> The implication offered here is consistent with the Commission's own previous study. Using fiscal year 2010 data, the Commission conducted a more in-depth inspection of the case fact files on a sub-sample of child pornography sentences.<sup>487</sup> It found the files suggested that more than half of those convicted of possession—for which a mandatory minimum is not applicable—had also engaged in distribution conduct that would, strictly speaking, have triggered a five-year mandatory minimum charge.<sup>488</sup> From this revelation, the Commission staff, in a report to Congress, warned of two significant consequences. One is that “a substantial number of similarly situated offenders are being treated differently under the mandatory minimum penalties

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482. *See generally Commission Datafiles, supra* note 85.

483. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1.

484. *See generally Commission Datafiles, supra* note 85.

485. 18 U.S.C. §§ 1466A(a), 2252A(b)(1) (five-year mandatory minimum for distribution or receipt).

486. 18 U.S.C. §§ 1466A(b), 2252A(b)(2) (no mandatory minimum for possession).

487. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FED. CRIMINAL JUSTICE SYSTEM (2011).

488. *Id.* at 317–18.

applicable to child pornography offenses.”<sup>489</sup> The second is it signals that “prosecutors may believe the mandatory minimum penalties for certain child pornography offenses, and the resulting guidelines sentencing range, are excessive in individual cases.”<sup>490</sup>

The foregoing statistics imply charge bargaining on a separate front. Another consequence of downgrading distribution offenses to possession is that the starting base offense level begins lower (a reduction from twenty-two to eighteen points).<sup>491</sup> Even if the typical enhancements are added, the ending range remains lower. Thus, these measures might be evidence that at least some prosecutors are sensitive to the harshness of sentences driven by the guideline and mandatory minimums. On the other hand, there is the possibility that charge bargaining is instead intended for purposes of efficiency by encouraging plea agreements and faster resolution of cases.

The bivariate results yield additional statistics. The base offense level averaged twenty points, which makes sense considering that twenty-two is the base offense level in nonproduction child pornography crimes other than possession.<sup>492</sup> The mean final offense level (after adjustments) increased by half to just over thirty points. The range for the final offense level was widespread, almost tripling from fifteen to forty-three points.<sup>493</sup> The highest reached a ceiling of forty-three, the highest possible level recognized in the federal guideline system.<sup>494</sup>

The mean sentence for nonproduction child pornography crimes in fiscal year 2011 was approximately ninety-five months, or almost eight years.<sup>495</sup> Yet there was great variation. On the lowest end of sentences issued, thirty-two defendants (2%) received probation-only sentences, seventy-five defendants (5%) received sentences of one

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489. *Id.* at 318.

490. *Id.* at 365.

491. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2013).

492. *Id.*

493. *See generally Commission Datafiles, supra* note 85.

494. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (forty-three is highest final offense level); *see generally Commission Datafiles, supra* note 85 (highest final offense level issued was forty-three points).

495. *See BOOKER REPORT, supra* note 7, pt. C, at 116, 177. Life sentences were converted to 470 months as is common in sentencing statistics. 2012 SOURCEBOOK, *supra* note 16, at app. A.

year or less, and 465 defendants (28%) received sentences of less than five years.<sup>496</sup> On the upper side, seventy-nine defendants (5%) received sentences of twenty years or more, with an upper threshold of fifty years for a single defendant.<sup>497</sup> These results show wide variability in final sentences, despite the vast majority having begun at the same base offense level.<sup>498</sup> Overall, the range of incarcerative punishments for nonproduction child pornography crimes was between zero (probation) to fifty years.<sup>499</sup> Then comparing sentences for the lowest and highest ranges, 5% received sentences less than five years while an equivalent 5% were sentenced to at least twenty years.<sup>500</sup>

The previous Section discussed the theoretical importance of differences in rulings between circuits. There, the broader issue was the constitutional power of district judges to disregard the child pornography guideline. Here, potential statistical variations in sentencing between the different circuits are provided. The mean sentences in the circuits are shown below, ranked in numerical order of sentence averages (Figure A).<sup>501</sup>

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496. *See generally* Commission Datafiles, *supra* note 85.

497. *See generally id.*

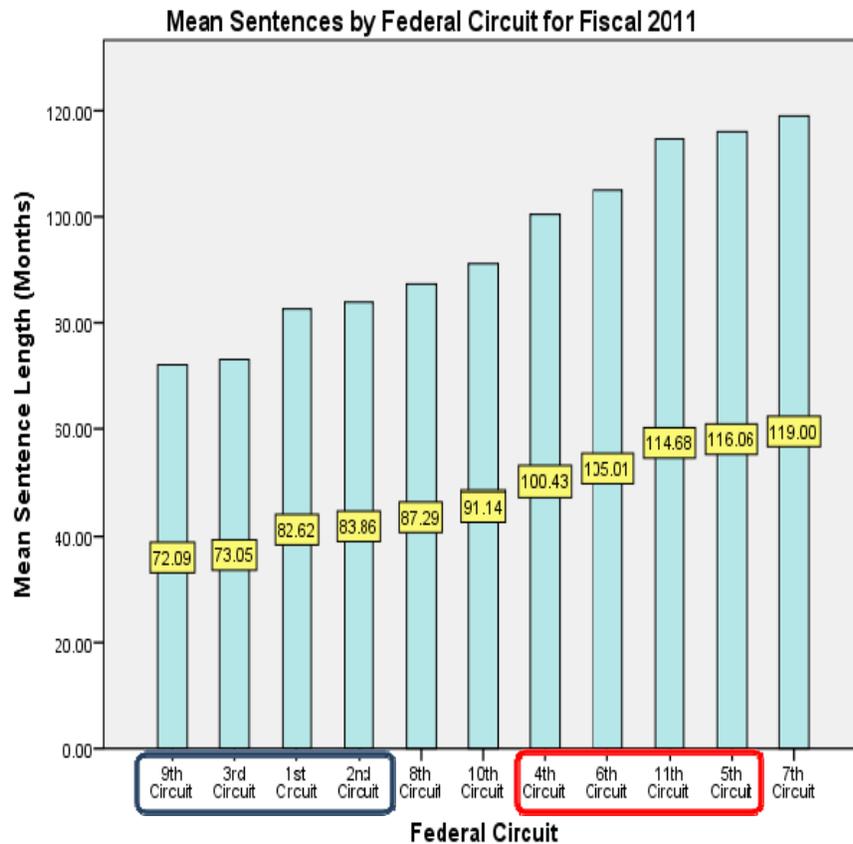
498. *See generally id.*

499. *See generally id.*

500. *See generally id.*

501. *See generally id.*

Figure A



The numbers reflected in Figure A indicate that, from the lowest to the highest, the mean sentence increased by forty-seven months (almost four years), representing a 65% differential. Significantly, mean sentences provide simplistic support for the three-way circuit split posited in Section III. The four circuits in the pro-policy rejection group (left circle) are the same four circuits with the lowest mean sentences. The four circuits in the anti-policy rejection group (right circle) give the highest mean sentences. Two of the neutral circuits are in the middle, with the Seventh Circuit being the outlier with the longest mean sentence of all.

Circuit variations in sentencing were empirically studied in additional ways. A new variable, named Policy Acceptance, was created for the appellate level matter of law ruling on whether a district court could categorically reject the child pornography guideline. The variable is ranked on an ordinal scale: pro-rejection (yes), neutral, anti-rejection (no). Circuit courts were assigned to each group according to the split conceived in Section III. Correlation tests showed that Policy Acceptance was significantly and positively correlated ( $p < .001$ ) with a below-guideline sentence. Additionally, Policy Acceptance was significantly and negatively correlated ( $p < .001$ ) with the sentence given, meaning that it correlated with a lower sentence. In addition, the possibility that the circuit level's position on the issue factors into district judges' sentencing decisions is bolstered when considering mean sentences. The length of the mean sentence was consistent with whether the defendants were within a circuit that was pro-rejection, neutral, or anti-rejection (Table 2).<sup>502</sup>

Table 2

Policy	Circuits	Mean Sentence
Pro-Rejection	1st, 2nd, 3rd, 9th	75.53
Neutral	7th, 8th, 10th	96.15
Anti-Rejection	4th, 5th, 6th, 11th	109.51

The next statistical measure to be considered concerns measures of conformance. Overall, almost 33% of child pornography sentences in 2011 were within-guideline range, approximately 66% were below-guideline recommendations (18% of which were government-sponsored), and less than 2% were above-guideline.<sup>503</sup> The variations

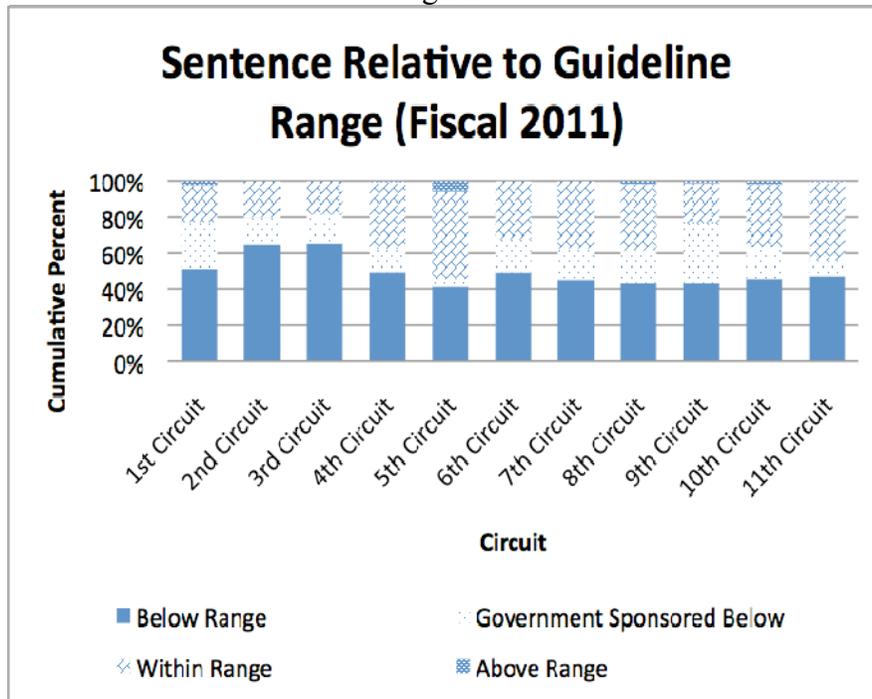
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502. See generally *Commission Datafiles*, *supra* note 85.

503. See generally *id.*

in percentages across circuits are represented below (Figure B).<sup>504</sup> The upper band represents the percentage of above-guideline sentences and the white band indicates the percentage of within-guideline sentences. The next two bands combined are the percentage of below-guideline sentences, here separately distinguished for percentage of government-sponsored below-range sentences and all other below-range sentences. Figure B is in numerical order of circuit number.

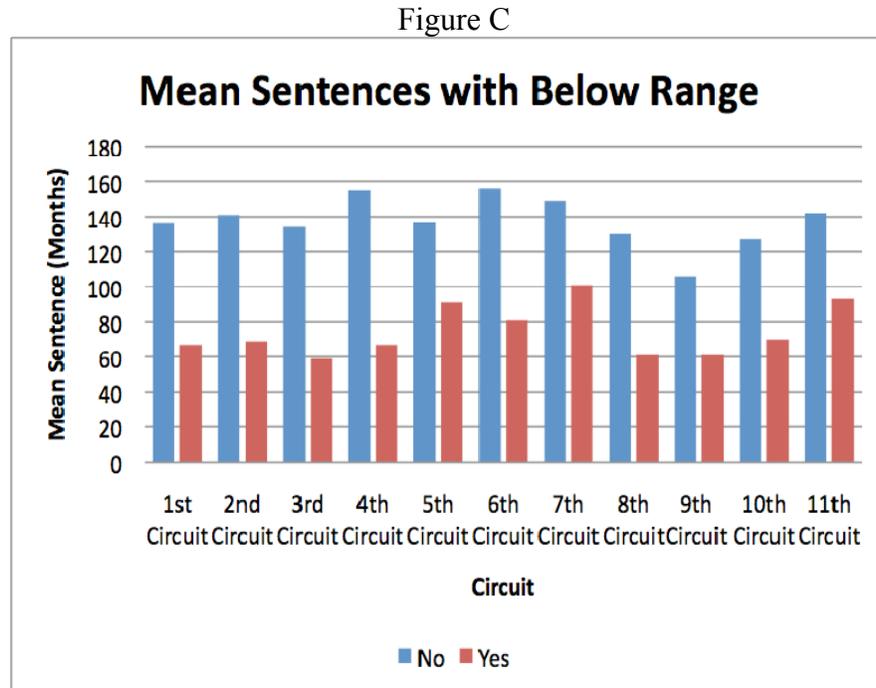
Figure B



The next data analysis was to combine the effects of downward variances with mean sentences. The results show that, when any below-guideline sentences were imposed, the consequences were significant. Overall, the mean sentence with a below-guideline variance was 72.68 months (roughly 6 years), compared to a mean of

504. See BOOKER REPORT, *supra* note 7, pt. C, at 117–19; see generally *Commission Datafiles*, *supra* note 85.

136.90 months (about 11 years) otherwise.<sup>505</sup> The mean sentences related to whether a downward variance was given are shown below (Figure C).<sup>506</sup> The figure conveys information from left to right in order of circuit number.



These simple statistics are enlightening in terms of showing support for a widespread boycott of this guideline by district judges as well as demonstrating significant circuit level deviations. Overall, the average guideline minimum was about 128 months, yet the average sentence actually given was about ninety-five months.<sup>507</sup> This means that, on average, actual sentences were almost three years below, or a 25% decrease from, the average guideline minimum. This large difference is itself notable. Still, as the immediately preceding figure suggests, the mean sentence is correlated with a decision to

505. See generally *Commission Datafiles*, *supra* note 85.

506. See generally *id.*

507. See generally *id.*

vary downward and the circuit in which the defendant is sentenced. Notwithstanding, simple statistics can mask whether a correlation may be due to other unrelated factors. It is theoretically possible, for example, that higher percentages of offenders in the anti-policy rejection circuits are simply more culpable offenders with characteristics rendering them at higher risk and warranting use of longer sentences. Accordingly, these issues are the focus of a multivariate regression analysis, which can control for other relevant variables.

### *B. Multivariate Results*

Will circuit differences exist when holding other relevant variables of interest constant? A methodological choice was made to focus on downward variances rather than on mean sentence considering the results exemplified in Figure C. A multivariate logistic regression analysis was employed, which is the appropriate model when the dependent variable is dichotomous. Here, the dependent variable is whether the court issued a sentence that constituted a downward variance from the recommended guideline range (yes=1; no=0). The independent variables used in the regression include a host of legally relevant variables, such as initial base offense level, final offense level, criminal history score, acceptance of responsibility, and the guideline minimum recommendation. Because the guideline minimum number of months was significantly skewed to the right due to high outliers, the model uses the natural log of the number. The guideline minimum number represents the combined effect of the offense level and criminal history through the guidelines' grid.

A series of dummy variables for circuit courts of appeals are the main issue of interest here. The Eighth Circuit is the dummy category because it represents a neutral circuit in the three-way policy rejection circuit split proposed in Section III. Also included in the model are additional variables comprised of whether the minimum recommended sentence was the same as the maximum (yes=1; no=0), custody status (in custody=1; not in custody=0), and conviction after trial (trial=1; plea=0). Recoded from a series of file variables is a new

variable titled General Adequacy Issue, which was coded in the positive if the sentencing judge listed her concern with the general adequacy of the relevant guideline (here all cases relied on § 2G2.2) as a reason for the sentence issued. In addition, a few demographic variables are encompassed, including gender, race, age, and education.

There are 1,604 cases<sup>508</sup> in the logistic regression model (Table 3).<sup>509</sup> The resulting regression model was significant at the  $p < .001$  level. The model successfully predicted 86% of cases with a below-guideline sentence and 48% of those given a within-guideline sentence or upper variance. Overall, 73% of predictions were accurate. The columns represent, from the left, the independent variables of interest and their corresponding coefficients, standard errors, and odds ratios. Odds ratios are used as they generally provide more interpretable representations of their complementary coefficients.

Table 3: Logistic Regression Model

<u>Variable</u>	<u>B</u>	<u>S.E.</u>	<u>Odds Ratio</u>
Federal Circuit (8 <sup>th</sup> Circuit as reference)			
1 <sup>st</sup> Circuit	.766	.449	2.150
2 <sup>nd</sup> Circuit	.715*	.310	2.045
3 <sup>rd</sup> Circuit	.763*	.324	2.146
4 <sup>th</sup> Circuit	-.055	.252	.946
5 <sup>th</sup> Circuit	-.766***	.232	.465
6 <sup>th</sup> Circuit	.334	.237	1.397
7 <sup>th</sup> Circuit	-.010	.277	.990
9 <sup>th</sup> Circuit	.695**	.226	2.004
10 <sup>th</sup> Circuit	.063	.284	1.065
11 <sup>th</sup> Circuit	-.256	.236	.774

508. Excluded from the original dataset of  $n=1,645$  are defendants sentenced in the D.C. Circuit ( $n=11$ ) and other cases in which data was missing in at least one of the independent variables.

509. See generally *Commission Datafiles*, *supra* note 85.

Criminal History Score	-.201*	.090	.818
Base Offense Level	-.200***	.039	.819
Final Offense Level	.160***	.047	1.174
Guideline Minimum (logged)	-.601	.442	.548
Acceptance of Responsibility	1.270*	.576	3.560
Minimum Equals Maximum	-.473*	.216	.623
General Adequacy Issue	4.042***	1.016	56.956
Trial	.146	.665	1.157
In Custody	-1.268***	.137	.281
Age 30 or Younger	.785***	.152	2.192
Race (White as reference)			
Black	.566	.404	1.762
Hispanic	.291	.276	1.338
Other	.195	.480	1.216
Education (Less than High School as reference)			
High School Graduate	.051	.212	1.053
Some College	.174	.211	1.190
College Graduate	.346	.238	1.414
Male	-.274	.673	.760
Constant	2.174	1.197	
n=1,604			
-2 log likelihood=1671.715			
Nagelkerke R <sup>2</sup> =.301			
Model chi-square=394.700			

\*p<.05; \*\*p<.01; \*\*\*p<.001

The circuit split continues to resonate in the logistic model. Defendants in all four circuits on the positive side of accepting, as a matter of law, a policy rejection of the child pornography guideline were noticeably more likely (holding other variables of interest constant) to have received a downward variance than defendants sentenced in the reference category using a neutral circuit. The odds in each pro-policy rejection circuit of a below-guideline sentence

were at least two times greater than the odds of receiving a below-guideline sentence in the neutral Eighth Circuit, with three of the results being statistically significant. The odds of a below-guideline sentence in the other two neutral circuits are roughly equivalent to the Eighth Circuit, neither of which reached any measure of significance.

The results for comparisons to circuits in the anti-policy rejection circuits were divided. The odds of defendants receiving a below-guideline sentence in the Eighth Circuit were roughly equivalent to those in one circuit, greater than the odds in two of the circuits, but less than the other circuit in this group. For instance, the odds of a downward variance in the Sixth Circuit are 40% greater than the Eighth Circuit, though it was not statistically significant. The one statistically significant result within the anti-policy rejection circuits was in the Fifth Circuit, where the odds of a downward variance in the Eighth Circuit were 2.15 times greater than in the Fifth Circuit.

These results, overall, support the concern that circuit disparities exist for sentences, at least for downward variances, in child pornography sentencing. And the circuit disparities may be linked to the circuit split in the appellate level legal rulings on the ability to reject the child pornography guideline. To be clear, though, this model is not a causative model and did not attempt to isolate case decisions based on the timing of circuit level decisions. One reason is that several of the circuit opinions upon which the posited three-way split is founded are too new and sentencing statistics that post-date them are not yet available. Thus, this model cannot represent a direct impact of the circuit split on the likelihood of variances, but it provides substantive evidence of a potential connection.

Even though the circuit split was the main focus, several other variables yielded interesting results. As would be expected, a higher base offense level and a higher criminal history score each decreased the odds of a below-guideline sentence, both statistically significant. These results suggest that the guideline does continue to have an anchoring effect. A one point increase in each measure decreased the odds by 22%. For every one percent increase in the guideline

minimum, the odds of a defendant receiving a below-guideline variance decreased 82%, a statistically significant result. In contrast, the odds of a below-guideline variance increased 17% for each additional point in the final offense level, a statistically significant result. This might provide support, albeit indirectly, for general dissatisfaction with the child pornography guideline enhancements, which substantially drive up offense level calculations. However, as the final offense level can be impacted by adjustments for other reasons, a definitive conclusion is not possible from this model.

A reduction for acceptance of responsibility was a strong predictor. The odds of a downward variance were 3.6 times greater when such a reduction occurred than when it did not, a statistically significant result. It could be that judges perceived the lower guideline range based on a strict calculation of the guideline reduction itself (usually 2–3 points) was insufficient reward for defendants who accepted responsibility. The odds of a below-guideline sentence for defendants not in custody at the time of sentencing were 3.6 times greater than the odds for those in custody, also statistically significant.<sup>510</sup> Since pretrial detention is often a risk-based decision, this latter result likely is because custody status reflects other factors suggesting the defendant's risk level.<sup>511</sup> For instance, a separate bivariate correlation test (not shown here) indicated a positive correlation between being in custody at sentencing and criminal history score ( $p < .001$ ).<sup>512</sup> There was no indication of a trial penalty with respect to the odds of a downward variance.

Results for the demographic variables will be briefly noted. The single statistically significant result related to demographic characteristics was an age-related variable. The odds of a downward variance for those under age thirty were 2.2 times greater than the odds for those thirty and over, a statistically significant result. The odds of a below-guideline sentence for Blacks, Hispanics, and Others

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510. *See generally id.*

511. Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 *LAW & CONTEMP. PROBS.* 75, 80–81 (2013) (noting research supporting positive effect of pretrial detention on sentencing severity).

512. *See generally Commission Datafiles, supra* note 85.

were higher (76%, 34%, and 22%, respectively) than the odds for White defendants. From a racial disparity perspective, this distinguishes child pornography defendants from many other criminals in the federal system.<sup>513</sup> The odds of a downward variance for male defendants were 1.3 times lower than the odds for females, meaning that females were more likely to receive a downward variance. As education level increases (as indicated in the ordinal dummy variables), the odds of a below-guideline sentence increases.

It is noted that a few additional demographic variables proved insignificant, and since they were not of particular interest for the Article's purposes, were removed from the final model. These included citizenship, marital status, and number of dependent children.

The logistic regression model yielded another notable perspective. The most robust independent variable in the model in terms of odds ratios was the General Adequacy Issue factor. The odds of a below-guideline sentence when the judge invoked a general adequacy explanation were fifty-six times greater than without that explanation, a statistically significant result. This result strongly reinforces the salience of federal judges' dissatisfaction with the child pornography guideline as being inadequate in providing advice for a reasonable sentence and their drawing upon that rationale to justify disregarding it.

In sum, this Section offered empirical support for disparities nationwide in sentencing for child pornography crimes. Empirical measures also underscored the circuit split posited in Section III. The results were substantially consistent between downward variances and circuit level holdings on the ability to reject the guideline for policy reasons. Differences between circuits were observed even in a logistic regression model that was able to control for other potentially relevant factors.

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513. See generally BOOKER REPORT, *supra* note 7, pt. E.

## CONCLUSIONS

Fairness, equality of treatment, and parsimony are primary interests in sentencing individuals. When the balance goes awry, political, judicial, and equitable principles are harmed. This Article posited a three-way circuit split in matter of law conclusions as to whether district judges can reject the child pornography guideline for a policy reason. The split is of consequence from legal and constitutional perspectives. The statistical analyses herein using Commission data showed the split also has correlative effects to sentences issued and to the likelihood of downward variances. The effects generally existed even in a multivariate regression model.

There is an obvious reason the child pornography guideline is the Achilles' heel of federal sentencing. It is nonsensical and incongruous with normal sentencing practices. It fails to represent the Commission's institutional abilities and has not incorporated the federal judiciary's learned judgments on the reasonableness of sentencing for these crimes. The dual concerns of severity and disparity are clearly intertwined here. The child pornography guideline recommends sentences that are extraordinarily disproportionate and, therefore, problematic for criminal justice in other ways. Overly punitive sentences infringe upon fundamental ideas of justice and fairness. Excessive sentences also raise questions about the efficient use of public monies and resources.

This Article concludes that it is not only reasonable to reject the child pornography guideline; it is constitutional to do so. At the same time, it is most likely unconstitutional to preclude a policy rejection. *Booker* renders all guidelines advisory, and *Kimbrough* permits categorical nullification of congressional or Commission policy. The fact that many of the modifications to the child pornography guideline are direct mandates by Congress becomes irrelevant. *Booker* stands for the proposition that there can be no mandatory guideline. Even the executive branch appears to concede these points regarding policy rejection on legal and constitutional grounds. In the end, the status of child pornography sentencing is emblematic of

larger problems in federal sentencing.<sup>514</sup> A guideline that fails to guide—indeed, it is widely recognized as failing to guide—raises issues of integrity not only with that guideline; it also invites broader challenges to the guidelines *in toto* and to the Commission’s work. When a problematic guideline leads to widespread disparity in sentences nationwide, the system is also subject to equitable concerns. It is likely not as much that a defendant who is sentenced by a judge willing to reject the guideline is lucky—considering that mean sentences are still quite lengthy—it is more apposite that the defendant who is sentenced by a judge following the guideline is unlucky. He likely will receive a sentence that is disproportionate to his offense and inconsistent with the punishment assigned to similarly situated offenders.

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514. Steiker, *supra* note 8, at 49 (referring to this guideline as showing that guided discretion can mask unjustified uniformities and is a “testament[] to the ‘stickiness’ of bad ideas in guiding sentencing discretion”).