

# Reacting to the Judicial Revolt: Applying Innovations in Narcotics Sentencing to Federal Non- Production Child Pornography Cases

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*In the last twenty years, average sentence for defendants convicted of possessing, receiving or distributing child pornography (“non-production child pornography offenses”) has risen dramatically. Many federal judges have started to buck this trend, sentencing defendants below the range recommended by the Federal Sentencing Guidelines. These long prison terms are the product of antiquated sentencing guidelines, mandatory minimum sentences, and high maximum sentences. This Note suggests two novel changes to child pornography sentencing that would help to resolve these issues. First, a “safety valve” provision should be instituted to avoid imposing mandatory minimum sentences in inappropriate cases, similar to the provision that already exists for certain federal drug offenses. Second, judges should have the option of mandating psychological treatment in lieu of prison for low-risk offenders. Drug Treatment as an Alternative to Prison programs are already doing this in context of narcotics, and have been successful at reducing recidivism rates.*

## I. INTRODUCTION

Reading Senior District Judge Jack B. Weinstein’s opinion in *United States v. C.R.*, it would appear that he had had enough.<sup>1</sup>

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Before him was another non-production child pornography defendant who was subject to a harsh mandatory minimum sentence. C.R., a 19-year-old, had pled guilty to distribution of child pornography, which carries a mandatory minimum sentence of five years.<sup>2</sup> The government argued that under the Federal Sentencing Guidelines, the applicable sentencing range was 168 to 210 months.<sup>3</sup>

Between the ages of fifteen and nineteen, C.R. used peer-to-peer file sharing software in order to download still images and videos of child pornography.<sup>4</sup> Although his desire was only to obtain the images and videos for himself, he was aware that using the software required sharing his files with other users (as is standard for many peer-to-peer file sharing programs).<sup>5</sup> He apparently only downloaded child pornography while high on drugs.<sup>6</sup> C.R. had a troubled upbringing and a somewhat unstable home life.<sup>7</sup> The court noted that shortly after his arrest at the age of 19, he was evaluated as “grossly naïve,” and that “[e]xpert health evaluations confirmed his continued neurological, psychiatric, and emotional immaturity.”<sup>8</sup> A typical “battle of the experts” took place at the sentencing hearing regarding his mental and psychological state.<sup>9</sup> One defense expert opined that C.R. might be said to suffer from a “moderately severe mental disorder,”<sup>10</sup> while the report of an expert witness for the prosecution noted that he “was able to ‘nail’ his college interviews without

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1. 792 F. Supp.2d 343 (E.D.N.Y. 2011).

2. 18 U.S.C. § 2252(b)(1) (2006).

3. *C.R.*, 792 F. Supp.2d at 511.

4. *Id.* at 350.

5. *Id.* at 354.

6. *Id.* at 351.

7. C.R.’s parents were separated and divorced at an early age. His mother was a cocaine addict with whom he had very limited contact throughout his life. After his father remarried, C.R. became quite close to his stepmother, who was his primary caregiver for most of his childhood. At the age of fifteen, C.R. found his stepmother in bed with a family friend. His father’s second marriage fell apart in short order, and his stepmother and half-sister moved out. C.R. began abusing a variety of substances in his teens, and first encountered adult pornography on the Internet at the age of thirteen. On three occasions, C.R. and his half-sister (eight years C.R.’s junior) engaged in physical sexual contact, which came to light during the government’s initial investigation into the child pornography charges. *Id.* at 349–51.

8. *Id.* at 350.

9. The court recounted at length the many examinations undergone by C.R. and the variety of conclusions that those examiners arrived at. *Id.* at 408–61.

10. *Id.* at 410.

being perceived as abnormally immature.”<sup>11</sup> Since his arrest, C.R. had committed a few bail violations, but none were of a sexual nature.<sup>12</sup>

Judge Weinstein ruled that as applied to C.R., the statutory minimum five-year sentence was unconstitutional, as it constituted cruel and unusual punishment.<sup>13</sup> C.R. was instead sentenced to 30 months of intensive psychological treatment in prison at F.M.C. Devens, a facility with a residential program designed to rehabilitate sex offenders.<sup>14</sup>

It is exceedingly rare for these kinds of Eighth Amendment challenges to succeed, especially in the non-capital context.<sup>15</sup> While Judge Weinstein’s voluminous district court opinion assembled a wealth of arguments for his position, only a relatively small portion of the opinion was actually devoted to the relevant legal doctrine: substantial portions of the record are excerpted, along with lengthy policy arguments concerning both recidivism and the relevant scientific literature concerning neurological and psychological development in young people around C.R.’s age.<sup>16</sup>

The United States appealed Judge Weinstein’s sentencing decision, and the Second Circuit reversed, ordering Judge Weinstein to impose a sentence consistent with the five-year statutory minimum.<sup>17</sup> As noted, Eighth Amendment challenges to non-capital sentences rarely succeed, especially outside of the juvenile context, and the relevant case law did not support a finding of unconstitutional cruel and unusual punishment on the facts of *United States v. C.R.* And Judge Weinstein must have known that he was fighting an uphill battle—so why did he rule this way? One answer might be found in the extraordinary memorandum and order Judge Weinstein wrote in response to Second Circuit’s reversal. After noting that “[a]n important duty of an Article III district judge is to prevent injustices by the government in individual cases,” Judge Weinstein wrote that despite the

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11. *Id.* at 416.

12. C.R. broke curfew, used drugs, and had contact (not of a sexual nature) with his half-sister in violation of a court order. *Id.* at 407.

13. *Id.* at 347; U.S. CONST. amend. VIII.

14. *Id.* at 519–20.

15. *See infra* Part III.D.

16. *See, e.g., C.R.*, 792 F. Supp.2d at 495–502.

17. *United States v. Reingold*, No. 11-2826-CR, 2013 WL 5356875, at \*23 (2d Cir. Sept. 26, 2013).

Second Circuit's reversal, "at least the matter has been brought to the government's and public's attention, so that in due course, in our caring democracy, future injustices of this kind will be avoided."<sup>18</sup>

There appears to be growing discontent among judges with respect to the federal non-production child pornography laws. This has been expressed most widely through the imposition of sentences that fall short of the recommended Guidelines range.<sup>19</sup> Alternatively, judges will sometimes protest a federal sentencing practice — e.g., a mandatory minimum sentence — by criticizing the relevant statute in an opinion that still, at the end of the day, imposes the sentence required by statute.<sup>20</sup> Judge Weinstein went a step further, assembling a wealth of policy arguments and using the Eighth Amendment's prohibition on cruel and usual punishment in order to avoid imposing the mandatory minimum sentence. This was perhaps the most dramatic example of a mounting judicial revolt against excessive federal sentencing for non-production child pornography offenses.

The problem is not simply that sentences are high, though that is certainly true. Similarly-situated defendants frequently receive wildly different sentences.<sup>21</sup> Additionally, the Federal Sentencing Guidelines are outdated, and still reflect notions of relative culpability that were developed before the Internet age.<sup>22</sup> Defendants that receive the harshest sentences are frequently not those who actually pose the most significant risk to society.<sup>23</sup>

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18. *United States v. C.R.*, No. 09-CR-155, 2013 WL 5366961, at \*2 (E.D.N.Y. Sept. 26, 2013).

19. *See infra* Part III.A.

20. *See, e.g.*, *United States v. Marshall*, 870 F. Supp.2d 489, 499–500 (N.D. Ohio 2012) ("Despite the compelling argument that the mandatory minimum sentence impermissibly infringes on this Court's mandate to fashion an adequate sentence under Section 3553(a), as well as the argument that subjecting an individual to a mandatory minimum under the circumstances in this case may be unconstitutional, this Court finds it is not presently in a position to make such declarations. Case law in this Circuit and elsewhere is silent on these issues. Therefore, this Court arrives at a frustrating conclusion: it is statutorily bound to impose a sentence of 60 months, and does so, while at the same time emphasizing its strong disagreement."); *United States v. Angelos*, 345 F. Supp.2d 1227, 1263 (D. Utah 2004) ("The 55-year sentence mandated by § 924(c) in this case appears to be unjust, cruel, and irrational. But our constitutional system of government requires the court to follow the law, not its own personal views about what the law ought to be.").

21. *See infra* Part IV.A.

22. *See infra* Part IV.B.

23. *See infra* Part IV.C.

This Note argues that while many non-production child pornography defendants deserve harsh sentences, the current sentencing regime does not accurately target the worst offenders. Furthermore, not only should the Guidelines be revised to more accurately target the most culpable defendants, but certain innovations originally developed in narcotics sentencing should be imported into the context of federal non-production child pornography offenses.

Part II of this Note provides an account of how federal non-production child pornography sentencing arrived at its present, highly-punitive state. Part III discusses the growing number of federal judges who have expressed varying degrees of disapproval of this regime, and the ways in which they have tried to combat it or mitigate its effects. Part IV further catalogs some of the current problems associated with the law. Part V suggests a number of reforms that will, while continuing to mete out harsh sentences when they are actually warranted, avoid the draconian sentences that the law currently tends to require and/or recommend for less culpable defendants. Two key innovations that were originally developed in the context of sentencing for narcotics violations — (1) a “safety valve” provision that exempts certain offenders from the applicable mandatory minimum sentence and (2) substance abuse treatment in lieu of prison for certain qualifying defendants — serve as the inspiration for two analogous proposals in the context of non-production child pornography offenses.

A “safety valve” modeled in part on the existing provision for federal drug laws could effectively carve out less culpable defendants: first-time offenders who cooperate with law enforcement and who are not distribution “kingpins.”<sup>24</sup> Psychological treatment in lieu of prison for certain defendants will not only avoid unnecessarily harsh sentences, but will also better protect children, as it will reduce recidivism and encourage the actual rehabilitation of offenders, making them less likely to commit a contact offense upon their release. Additionally, there is substantial agreement among commentators and stakeholders that the rele-

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24. A requirement of the federal safety valve for narcotics crimes is that the defendant was “was not an organizer, leader, manager, or supervisor of others in the offense.” 18 U.S.C. § 3553(f)(4) (2006).

vant Federal Sentencing Guidelines are in need of reform in order to better fit the modern technological context.<sup>25</sup>

Before proceeding further, one important clarification is in order. The subject of this Note is sentencing practices related to “non-production” child pornography offenses, not “production” offenses. A “non-production” offense is one in which a defendant violates the law not by actually creating child pornography — which necessarily involves the direct commission of heinous acts of sexual abuse against a minor — but rather by possessing, receiving, or distributing images or videos.<sup>26</sup> The judicial revolt and the criticisms of the sentencing regime discussed in this Note are directed at these “non-production” offenses. Similar criticisms have not been leveled (and are not being raised in this Note) at the deservedly harsh sentences that are imposed on the producers of child pornography, who by committing even a single such offense demonstrate the great danger that they pose to minors and the need for their long-term incapacitation.

## II. A BRIEF OVERVIEW OF THE FEDERAL NON-PRODUCTION CHILD PORNOGRAPHY OFFENSES

Congress first addressed child pornography in the late 1970s. Since then, there have been two distinct legislative trends. First, the law has been periodically revised to include more types of content.<sup>27</sup> Second, average sentences for defendants have increased as a result of general changes to the Federal Sentencing Guidelines, increases in maximum sentences, and the creation of mandatory minimum sentences.<sup>28</sup>

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25. See *infra* Part IV.C.

26. 18 U.S.C. § 2252(a)(1) (2006) also criminalizes the transportation of child pornography. In the vast majority of cases, a defendant charged with transportation could also have been charged with distribution. U.S. SENTENCING COMM’N, FEDERAL CHILD PORNOGRAPHY OFFENSES 189 n.72 (2012). This Note will treat transportation cases as a subset of distribution cases. Transportation and distribution also carry the same penalty. 18 U.S.C. § 2252.

27. See *infra* Part II.A.

28. See *infra* Part II.B.

## A. THE INCREASING SCOPE OF THE LAW

Congress has consistently expanded federal non-production child pornography law to include a greater variety of conduct. The federal government first dipped its toe into these waters with the Protection of Children Against Sexual Exploitation Act of 1977.<sup>29</sup> This legislation was quite modest compared to the modern laws, criminalizing only the commercial production of obscene material that featured children under the age of sixteen. A few years later, Congress passed the Child Protection Act of 1984, which did away with any obscenity requirement, changed the age threshold from sixteen to eighteen, and expanded the law to cover noncommercial production and distribution of child pornography.<sup>30</sup> Next, the Child Protection and Obscenity Enforcement Act of 1988 made it illegal to use a computer to distribute, transport, or receive child pornography.<sup>31</sup> In the Crime Control Act of 1990, Congress took things a step further and made mere possession of child pornography a federal crime.<sup>32</sup> The Child Pornography Prevention Act of 1996 brought “virtual child pornography” (such as computer generated images that *appear* to depict real children but which in fact do not) within the preexisting child pornography laws,<sup>33</sup> but the Supreme Court struck down this extension of the law as a violation of the First Amendment.<sup>34</sup> Undeterred, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Act of 2003 (the “PROTECT Act”), which made it a crime to attempt to trade materials under the false pretense that they are, or that they contain, child pornogra-

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29. Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. § 2251 (2006)). In 1982, the Supreme Court rejected a free speech-based challenge to a similar state prohibition. *New York v. Farber*, 458 U.S. 747 (1982).

30. Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (codified as amended at 18 U.S.C. § 2252).

31. Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4485-4503 (codified as amended at 18 U.S.C. § 2252).

32. Crime Control Act of 1990, Pub. L. No. 101-647, tit. III, § 323(a), (b), 104 Stat. 4789 (codified as amended at 18 U.S.C. § 2252).

33. Child Pornography Prevention Act of 1996, Pub. L. 104-208, 110 Stat. 3009, § 121, (codified as amended at 18 U.S.C. § 2251 (2006)).

34. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).



phy.<sup>35</sup> This time, the Supreme Court upheld Congress' expansion of the law.<sup>36</sup> Finally, the Protect Our Children Act of 2008 criminalized distribution or possession of a pornographic image created using the image of an identifiable minor.<sup>37</sup> This legislation made it illegal to, among other things, superimpose a minor's face onto the image of an adult's naked body.<sup>38</sup> Thus, in certain cases, materials that did not involve in their creation the physical sexual abuse of a minor are illegal to possess or distribute.

#### B. INCREASINGLY LONG PRISON TERMS FOR OFFENDERS

The average sentence for defendants convicted of possessing, receiving, or distributing child pornography has increased quite significantly. In *United States v. C.R.*, Judge Weinstein notes that "[t]he mean sentence for offenders convicted of possession, receipt, or distribution of child pornography has risen from 20.59 months in 1997 to 91.82 months in 2008."<sup>39</sup> These lengthy average sentences are the result of a combination of statutory mandatory minimum sentences, high maximum sentences, and high recommendations from the Federal Sentencing Guidelines. 18 U.S.C. § 2252, the federal child pornography statute, makes a sentencing distinction between "receipt" and/or "distribution" on the one hand, and "possession" on the other.<sup>40</sup> A conviction for receipt or distribution of child pornography carries a statutory minimum of five years and a maximum of twenty years, subject to enhancements for repeat offenders that increases both upper and lower bounds.<sup>41</sup> These harsh sentences are a relatively recent development. As recently as 1996, a first-time offender

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35. Prosecutorial Remedies and Other Tools to End the Exploitation of Children (PROTECT) Act of 2003, Pub. L. 108-21, 117 Stat. 650, § 502 (codified as 18 U.S.C. § 2252A(a)(3)(B)).

36. *United States v. Williams*, 553 U.S. 285 (2008).

37. Providing Resources, Officers, and Technology to Eradicate Cyber Threats to (PROTECT) Our Children Act of 2008, Pub. L. 110-401, 122 Stat. 4229, § 304.

38. Melissa Hamilton, *The Child Pornography Crusade and its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1685 (2012).

39. *United States v. C.R.*, 792 F. Supp.2d 343, 494 (E.D.N.Y. 2011).

40. 18 U.S.C. § 2252(a)(1) also criminalizes the transportation of child pornography. See *supra* note 26.

41. These enhancements can be triggered not only by prior violations of 18 U.S.C. § 2252, but also by violations of various other state and federal laws that relate to minors. 18 U.S.C. § 2252(b)(1).



found guilty of distribution was subject only to a maximum of ten years.<sup>42</sup>

Simple possession now carries a maximum sentence of ten years.<sup>43</sup> However, any defendant who possesses child pornography can probably also be charged with receipt or distribution, both of which carry a mandatory minimum sentence of five years and a maximum of twenty.<sup>44</sup> Sometimes, indictments will allege “possession and/or receipt,” and the threat of a mandatory minimum associated with “receipt” may be used to induce defendants to plead guilty to possession, in order to avoid the mandatory minimum associated with the alternative charging theory.<sup>45</sup>

Not only have the statutory minima and maximums increased quite significantly in the last twenty years, but the Federal Sentencing Guidelines have also undergone changes that virtually always result in higher recommended sentences.<sup>46</sup> In the 1990s, Congress made a series of changes to the Guidelines, increasing the base offense level for possession from its original ten to thirteen, and then again from thirteen to fifteen.<sup>47</sup> Two-level en-

42. Pub. L. 103-322, tit. XVI, § 160001(c), tit. XXXIII, § 330010(8), 108 Stat. 2037, 2143 (1994).

43. Possession is also subject to statutory enhancements for past criminal behavior. 18 U.S.C. § 2252(b)(2).

44. Several commentators have pointed out that the distinction between “receipt” and “possession” is quite unclear, creating a host of problems. See generally Stephen L. Bacon, Note, *A Distinction Without a Difference: “Receipt” and “Possession” of Child Pornography and the Double Jeopardy Problem*, 65 U. MIAMI L. REV. 1027 (2011). Additionally, any defendant who used peer-to-peer software in order to download files might also have engaged in distribution, so long as the software enabled other users to access those files. See Part IV.A for a more in-depth discussion of this issue.

45. U.S. SENTENCING COMM’N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 114 (2011), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm).

46. For a deeper analysis of how these changes to the Guidelines over the last twenty years tend to work in the context of child pornography prosecutions, see generally TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES (2009), available at <http://www.lb7.uscourts.gov/documents/INND/110CR40.pdf>.

47. For a typical first-time offender, these changes represent a twelve-month increase in the base sentencing recommendation, before other sentencing enhancements are applied. For a brief overview of how base offense levels affect a defendant’s final sentence, see generally U.S. SENTENCING COMM’N, AN OVERVIEW OF THE SENTENCING GUIDELINES \*3, available at [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/Overview_Federal_Sentencing_Guidelines.pdf) (“The final offense level is determined by taking the base offense level and then adding or subtracting from it any specific offense characteristics and adjustments that apply. The point at which the final offense level and

hancements apply for possessing images of minors under the age of twelve and for virtually any use of a computer in connection with the crime,<sup>48</sup> both of which apply to over 90% of defendants.<sup>49</sup> Later changes to the Guidelines added a range of enhancements based on the number of images the defendant possessed, and a four-level enhancement for masochistic or sadistic content.<sup>50</sup> Between fiscal years 2005 and 2010, 96.9% of offenders received an enhancement based on the number of images they possessed, and 69.6% of offenders received the maximum five-level enhancement for possession of 600 or more.<sup>51</sup> In the same time period, the enhancement for possession of sado-masochistic images applied to 74.2% of defendants.<sup>52</sup> In 2003, the base offense level for simple possession was raised once more, to 18;<sup>53</sup> the base offense level for distribution and receipt now sits at 22.<sup>54</sup> The combination of high base offense levels and significant enhancements that apply to the vast majority of offenders has resulted in high Guidelines recommendations for the average case. For example, consider a first-time offender convicted of the receipt of pornographic images of children. Assuming this hypothetical defendant used a computer and possessed over 600 images, at least one of which depicted an eleven-year old, and at least one of which depicted “sadistic or masochistic” conduct, his final offense level under the Guidelines is 35, which is associated with a recommended sentence of 168–210 months,<sup>55</sup> which is what the government rec-

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the criminal history category intersect on the Commission’s sentencing table determines the defendant’s sentencing guideline range.”).

48. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL, § 2G2.2, 209 (2012).

49. Stabenow, *supra* note 46, at 26–27.

50. Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8, \*11–12 (2010) (“According to the new [guidelines]: 10 to 150 images warranted a two-level enhancement; 150 to 300 images led to a three-level enhancement; 300 to 600 images resulted in a four-level enhancement; and more than 600 images would increase a base offense level by five levels”).

51. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 141.

52. *Id.* at xi.

53. Prosecutorial Remedies and Other Tools to End the Exploitation of Children (PROTECT) Act of 2003, Pub. L. 108-21, 117 Stat. 650, § 504(c) (codified at U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL, § 2G2.2(a)(1) (2012)).

54. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL, §§ 2G2.2(a)(2), 2G2.2(b)(1), 209 (2012). Note that a two-level reduction is available for defendants convicted of receipt upon a showing that they did not intend to distribute the materials. *Id.*

55. U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A (2012).

ommended in *United States v. C.R.* As the United States Sentencing Commission recently pointed out,

[t]he average guideline minimum for non-production child pornography offenses in fiscal year 2004 — the last full fiscal year when the guidelines were mandatory and the first full fiscal year after the enactment of the PROTECT Act — was 50.1 months of imprisonment, and the average sentence imposed was 53.7 months. By fiscal year 2010 . . . the average guideline minimum was 117.5 months of imprisonment, and the average sentence imposed was 95.0 months.<sup>56</sup>

Mandatory minimum sentences, higher maximum sentences, and higher Guidelines recommendations have all led to a stark increase in the average sentence for violations of 18 U.S.C. § 2252.

### III. THE JUDICIAL REVOLT

*United States v. C.R.* is just one of many cases in which judges have expressed their opposition to harsh sentencing in non-production child pornography cases. Again, it is especially important to emphasize that this criticism by judges and commentators is not directed at the sentences being given to producers of child pornography, but rather at the disproportionately harsh sentencing for “downloaders,” that is, offenders who did not commit a contact offense, but instead downloaded pictures or videos off of the internet.

In many of these cases, no money changed hands, and thus no financial support was provided to the producers of the actual material.<sup>57</sup> That said, the utter depravity involved in the production of child pornography, and the horrid acts which must necessarily be committed against the children who are forced to appear in it,

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56. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at x.

57. Any “intangible support” that is provided by mere downloading does not appear to have a significant encouraging impact on abusers. As discussed in Part IV below, child pornography tends to be the byproduct of abuse, and not its original inspiration. UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT 214 (2010), *available at* [http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA\\_Report\\_2010\\_low\\_res.pdf](http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf).

should not be minimized or, at any point, forgotten, and the knowledge that the images and videos of their abuse continues to circulate on the internet causes ongoing trauma to the victims of child pornography.<sup>58</sup> Nevertheless, many judges appear to question whether decades-long sentences in prison for first-time offenders really make for good policy.

#### A. FEDERAL JUDGES ARE IMPOSING LARGE NUMBERS OF BELOW-GUIDELINES SENTENCES IN NON-PRODUCTION CHILD PORNOGRAPHY CASES

A recent study found that in the 2011 fiscal year, not including those that were sponsored by the government (often in the context of a plea deal), district court judges imposed below Guidelines range sentences in 48.2% of non-production child pornography cases.<sup>59</sup> Among all federal criminal cases, judges imposed non-government sponsored, below Guidelines range sentences just 18.6% of the time.<sup>60</sup> Thus, this is not simply judicial opposition to harsh federal sentencing generally.<sup>61</sup> In a recent survey, over 70% of judges expressed the opinion that the statutory five-year mandatory minimum was too harsh in receipt cases.<sup>62</sup> Ever since *Booker* rendered the Federal Sentencing Guidelines advisory,<sup>63</sup> judges have been well within their rights to issue sen-

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58. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 112–13; United States v. C.R., 792 F. Supp.2d 343, 360–63 (E.D.N.Y. 2011).

59. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 7.

60. U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, 17 (2012), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Booker\\_Reports/2012\\_Booker/Part\\_C1\\_Overview.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_C1_Overview.pdf).

61. It is perhaps worth noting that the vast majority of defendants in child pornography cases are white males. *Id.* at 112. An interesting question not explored in this Note is whether the federal judiciary, which remains both very white and male, might be more sympathetic to defendants in child pornography cases because those offenders are more likely to be of the same gender and race as the sentencing judge, at least as compared to other offenses.

62. U.S. SENTENCING COMM’N, SURVEY OF FEDERAL JUDGES Question 1 (2010) available at [http://www.ussc.gov/Research\\_and\\_Statistics/Research\\_Projects/Surveys/20100608\\_Judge\\_Survey.pdf](http://www.ussc.gov/Research_and_Statistics/Research_Projects/Surveys/20100608_Judge_Survey.pdf).

63. See generally *United States v. Booker*, 543 U.S. 220, 245 (2005) (holding that the Federal Sentencing Guidelines were unconstitutional in their “mandatory” form, rendering them merely “advisory”).

tences that fall outside the Guidelines.<sup>64</sup> Still, the gap between Guidelines adherence in all cases and Guidelines adherence in non-production child pornography cases is significant. This gap has not escaped notice; many law review articles criticize the judiciary for being soft on child pornography offenders, and/or for contributing to new, wide disparities in sentencing for child pornography offenses.<sup>65</sup> These arguments tend to conflate very different kinds of offenders. There certainly appears to be some difference in culpability between a young offender who only downloaded files using peer-to-peer software and a middle-aged defendant who helped create a private server in order to more widely disseminate child pornography — indeed, analogous distinctions are frequently made in the context of narcotics between “users” and drug dealers. However, in their current form, neither the statute nor the Guidelines effectively distinguish between these very different types of offenders.

B. SOME DISTRICT COURTS HAVE RULED THAT THE NON-  
PRODUCTION CHILD PORNOGRAPHY SENTENCING GUIDELINES  
ARE NOT ENTITLED TO THE NORMAL DEFERENCE THAT IS SHOWN  
TO THE GUIDELINES FOR OTHER OFFENSES

In addition to exercising their discretion under *Booker* and *Gall* to impose sentences that do not fall within the recommended Guidelines ranges — even if the basis of a below range sentence is a broad, generalized policy argument<sup>66</sup> — some judges have criticized the way in which the current Federal Sentencing

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64. See, e.g., *United States v. Marshall*, 870 F. Supp.2d 489, 495 (E.D. Ohio 2012); *United States v. Rothwell*, 847 F. Supp.2d 1048, 1055 (E.D. Tenn. 2012); *United States v. Munoz*, No. 11-167JRT/ABJ, 2012 WL 5351750, at \*5–6 (D. Minn. 2012); *United States v. Taylor*, No. 1:10-CR00011, 2011 WL 322843, at \*3 (W.D. Va. 2011); *United States v. Cruikshank*, 667 F. Supp.2d 697, 701–04 (S.D. W. Va. 2009); *United States v. Stern*, 590 F. Supp.2d 945, 947–48 (N.D. Ohio 2008).

65. See generally 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 (2011); Kathryn A. Kimball, *Losing Our Soul: Judicial Discretion in Sentencing Child Pornography Offenders*, 63 FLA. L. REV. 1515 (2011); Loren Rigsby, Comment, *A Call For Judicial Scrutiny: How Increased Judicial Discretion Has Led to Disparity and Unpredictability in Federal Sentencing for Child Pornography*, 33 SEATTLE U. L. REV. 1319 (2010) (arguing that the judicial revolt has led to an unacceptable degree of unpredictability in sentencing in child pornography cases).

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

Guidelines for child pornography were created. Many district courts have concluded that the non-production child pornography guidelines<sup>67</sup> are entitled to less deference because they are merely “the result of congressional mandates” and are, therefore, “entitled to considerably less deference than other guidelines that are based on the Commission’s exercise of its institutional expertise and empirical analysis.”<sup>68</sup>

At least one district court has gone so far as to rule that the non-production child pornography Guidelines “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>69</sup> The court reasoned that Congress had interfered with the “work of the Sentencing Commission”<sup>70</sup> and that the resultant guideline “impermissibly and illogically skews sentences for even ‘average’ defendants to the upper end of the statutory range, regardless of the particular defendant’s acceptance of responsibility, criminal history, specific conduct, or degree of culpability.”<sup>71</sup>

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67. U.S. SENTENCING COMM’N, U.S. SENTENCING GUIDELINES MANUAL, § 2G2.2 (2012).

68. *United States v. Beiermann*, 599 F. Supp.2d 1087, 1103 (N.D. Iowa 2009) (arguing that the non-production child pornography guidelines were “the result of congressional mandates, often passed by Congress with little debate or analysis”). In general, Congress did not incorporate research and study of the kind that the Sentencing Commission typically conducts before it made changes to the child pornography Guidelines. See *United States v. Gellatly*, No. 8:08-CR-50, 2009 WL 35166, at \*5–7 (D. Neb. Jan. 5, 2009); *United States v. Stern*, 590 F. Supp.2d 945, 960–61 (N.D. Ohio 2008); *United States v. Johnson*, 588 F. Supp.2d 997, 1003–05 (S.D. Iowa 2008); *United States v. Baird*, 580 F. Supp.2d 889, 892 (D. Neb. 2008); *United States v. Hanson*, 561 F. Supp.2d 1004, 1009–11 (E.D. Wis.2008); *States v. Shipley*, 560 F. Supp.2d 739, 744 (S.D. Iowa 2008); *United States v. Noxon*, No. 07–40152–01–RDR, 2008 WL 4758583, at \*2 (D. Kan. Oct. 28, 2008); *United States v. Stults*, No. 8:07-CR-199, 2008 WL 4277676, at \*4–7 (D. Neb. Sept. 12, 2008), *aff’d*, 575 F.3d 834 (8th Cir. 2009); *United States v. Grinbergs*, No. 8:05CR232, 2008 WL 4191145, at \*5–8 (D. Neb. Sept. 8, 2008); *United States v. Ontiveros*, No. 07–CR–333, 2008 WL 2937539, at \*8 (E.D. Wis. July 24, 2008); *United States v. Goldberg*, No. 05-CR-0922, 2008 WL 4542957, at \*6 (N.D. Ill. April 30, 2008).

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

70. *Id.*

71. *Id.* at 1105 (citation omitted).



C. A FEW DISTRICT COURT JUDGES HAVE AVOIDED IMPOSING  
THE FIVE-YEAR MANDATORY MINIMUM FOR RECEIPT AND/OR  
DISTRIBUTION ON CONSTITUTIONAL GROUNDS, INCLUDING  
JUDGE JACK WEINSTEIN

One district court has already ruled that a five-year mandatory minimum sentence for receipt of child pornography was unconstitutional as applied to an intellectually disabled twenty-one-year-old (though this ruling was later vacated by the Ninth Circuit).<sup>72</sup> In *United States v. C.R.*, Judge Weinstein took things a step further, holding that a five-year mandatory minimum sentence was unconstitutional cruel and unusual punishment as applied to a defendant who had downloaded child pornography on numerous occasions between the ages of fifteen and nineteen.<sup>73</sup> Although C.R. was arrested on the basis of conduct that occurred after his eighteenth birthday, Judge Weinstein's district court opinion seems to suggest that C.R. should nonetheless benefit from precedent that proscribed a certain severity of punishments for minors, arguing that "there is no magic age at which young people become adults, and, for most, the development process extends far beyond the 18th year."<sup>74</sup> This is the key turn in Weinstein's reasoning: although C.R. was not a minor when he committed a crime, Weinstein seems to treat him as though he was. Citing C.R.'s adolescence and immaturity,<sup>75</sup> Weinstein concludes that all of the reasons for limiting the punishment of juveniles apply to C.R. just as they do to a seventeen year-old.<sup>76</sup> Prior to its reversal, at least one other district court expressed support for Weinstein's constitutional argument.<sup>77</sup>

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72. *United States v. Larson*, 558 F. Supp.2d 1103, 1112–13 (D. Mon. 2008), *aff'd in part, dismissed in part, and vacated in part*, 346 Fed. Appx. 166, 168 (9th Cir. 2009).

73. *United States v. C.R.*, 792 F. Supp.2d 343, 347 (E.D.N.Y. 2011).

74. *Id.* at 506.

75. *Id.* at 507.

76. *Id.* at 507–08.

77. *United States v. Marshall*, 870 F. Supp.2d 489, 496–499 (N.D. Ohio. 2012) ("This Court is convinced that the logic of *United States v. C.R.* applies equally to this case.").



D. EIGHTH AMENDMENT CHALLENGES TO FIVE-YEAR  
MANDATORY MINIMUM SENTENCES FOR ADULT  
NON-PRODUCTION CHILD PORNOGRAPHY OFFENDERS ARE  
UNLIKELY TO SUCCEED

Judge Weinstein's district court opinion leaned heavily on applying the Supreme Court's jurisprudence limiting the punishment of minors to *C.R.*, who was nineteen at the time of his charged offense. It is true that with respect to the Eighth Amendment's ban on cruel and unusual punishment, the Supreme Court has applied different standards to minors and adults.<sup>78</sup> For adults, in order for the length of a sentence to violate the Eighth Amendment, the sentence must be "grossly disproportionate to the severity of the crime."<sup>79</sup> This has proven to be a difficult standard to overcome, especially in the noncapital context.<sup>80</sup> Given that the Court has upheld a sentence of twenty-five years to life for stealing golf clubs (under California's "Three Strikes" law),<sup>81</sup> it is difficult to see how sentencing an adult to five years in prison for distributing child pornography could possibly constitute unconstitutional cruel and unusual punishment under the Supreme Court's Eighth Amendment jurisprudence. As Judge Weinstein noted in his district court opinion, many other federal courts had already considered and rejected Eighth Amendment challenges to lengthy non-production child pornography sentences, some of which were longer than five years.<sup>82</sup>

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78. See generally *Graham v. Florida*, 560 U.S. 48 (2010) ("It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.").

79. *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

80. See, e.g., *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding life sentence under California's Career Criminal Punishment Act for two counts of petty theft); *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion) (upholding sentence of 25 years to life for felony grand theft conviction under California's Career Criminal Punishment Act); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life sentence without the possibility of parole for defendant convicted of possessing more than 650 grams of cocaine); *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam); and *Rummel v. Estelle*, 445 U.S. 263 (1980) (life sentence under state recidivist statute for obtaining \$120.75 by false pretenses upheld). But see *Solem v. Helm*, 463 U.S. 277 (1983) (life sentence for uttering a "no account" check for \$100 constitutes cruel and unusual punishment).

81. *Ewing*, 538 U.S. at 18, 20.

82. See e.g., *United States v. Martin*, 180 Fed. Appx. 301 (2d Cir. 2006) (upholding paraplegic's five-year sentence for distribution of child pornography); *United States v.*

Weinstein reasoned that the precedential force of these decisions was weakened after the Supreme Court decided *Graham v. Florida*<sup>83</sup>:

*Graham* opened the door for analyzing a term of years sentence under the proportionality test employed for capital cases. Rather than simply assessing whether the sentence was “grossly disproportionate” to the crime committed, *Graham* confirms a [proportionality] requirement in its non-capital cases. It also cements an analysis of crimes committed by adolescents based on their relative immaturity compared with adults.<sup>84</sup>

Judge Weinstein’s opinion leaned heavily on *Graham*, which simply could not bear the argumentative weight that Weinstein needed it to.

Judge Weinstein does not go into much detail about *Graham*’s actual holding, which provides only weak support for his conclusion:

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.<sup>85</sup>

Weinstein’s assertion that *Graham* “confirms” a proportionality requirement in “non-capital cases” oversimplifies the Supreme Court’s argument. Elsewhere in his opinion in *Graham*, Justice Kennedy writes:

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Soule, 250 Fed. Appx. 834 (10th Cir. 2007) (upholding sentence of 130 months for possession of child pornography); and *United States v. Meiners*, 485 F.3d 1211 (9th Cir. 2007) (per curiam) (upholding fifteen-year sentence under § 2251(d) for advertising child pornography).

83. 130 S.Ct. 2011 (2010).

84. *United States v. C.R.*, 792 F. Supp.2d 343, 507 (E.D.N.Y. 2011) (internal citations omitted).

85. *Graham*, 130 S. Ct. at 2034.

As for the punishment, life without parole is the second most severe penalty permitted by law. It is true that a death sentence is unique in its severity and irrevocability; yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency — the remote possibility of which does not mitigate the harshness of the sentence.<sup>86</sup>

Thus, *Graham* was not a decision about “non-capital cases” writ large. Rather, it was about life sentences without the possibility of parole, as applied to juveniles. Any argument that *Graham* significantly changes the Eighth Amendment analysis in the context of a prison sentence of five years evaporates upon a close reading of Justice Kennedy's opinion.<sup>87</sup>

Judge Weinstein engaged in another bit of sleight-of-hand in his opinion in *United States v. C.R.*: he uses the terms “adolescent” and “juvenile” nigh-interchangeably, and as the Second Circuit points out, “[t]he district court tries to blur the distinction between juvenile and adult offenders by finding that, ‘At the time of the crime,’ [C.R.] was a developmentally immature young adult.”<sup>88</sup> Federal law defines a “juvenile” as “a person who has not attained his eighteenth birthday.”<sup>89</sup> Still, Judge Weinstein asserted that *Graham* “cements an analysis of crimes committed by adolescents based on their relative immaturity.”<sup>90</sup> Citing also *Roper v. Simmons*, which held that juveniles may not be executed for crimes committed before their eighteenth birthday,<sup>91</sup> Judge Weinstein concluded that “the law described . . . as well as the science and particulars of defendant's background,

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86. *Id.* at 2027 (internal citations and quotations omitted).

87. As the Second Circuit points out, “[t]he district court appears to have construed *Graham* to invite categorical rule analysis of any terms-of-years sentence, including the mandatory five-year sentence at issue here. This misconstrues *Graham*.” *United States v. Reingold*, No. 11-2826-CR, 2013 WL 5356875, at \*18 (2d Cir. Sept. 26, 2013).

88. *Id.* at 19.

89. 18 U.S.C. § 5031 (2006).

90. *C.R.*, 792 F. Supp.2d at 507.

91. 543 U.S. 543, 573 (2005).

leads to the conclusion that, as applied to this defendant, a five-year term of imprisonment would be cruel and unusual.”<sup>92</sup> Both *Graham* and *Roper* — which are the main referents of Judge Weinstein’s phrase, “the law described” — were decided specifically in the context of juvenile defendants. They do not provide the direct support that is required in order to render unconstitutional the five-year mandatory minimum sentence mandated by Congress, at least for adult defendants such as C.R. On several occasions in his opinion, Judge Weinstein argues that many of the justifications for leniency toward juveniles in sentencing do not disappear at the age of eighteen.<sup>93</sup> In *Roper*, a case that Weinstein relies on heavily, the Supreme Court acknowledges that drawing a line at eighteen is arbitrary, but that a rule must nonetheless be established:

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn . . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.<sup>94</sup>

This language clearly implies that the Supreme Court would, at a minimum, agree that nineteen year-olds may be constitutionally sentenced to five years in prison for distributing child pornography. This is especially true in light of the rest of its Eighth Amendment jurisprudence, which in the last thirty years has overturned an adult’s sentence as cruel and unusual punishment on only one occasion.<sup>95</sup> The United States unsurprisingly appealed Judge Weinstein’s sentence, and the Second Circuit re-

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92. *C.R.*, 792 F. Supp.2d at 509–10.

93. *Id.* at 495–506.

94. *Roper*, 543 U.S. at 574.

95. *Solem v. Helm*, 463 U.S. 277 (1983).

versed, ordering that the mandatory minimum sentence be imposed.<sup>96</sup>

In short, the Eighth Amendment did not provide shelter for C.R. from the harsh federal sentencing regime, nor is it likely to help any other defendants who seek to avoid a five-year mandatory minimum sentence, let alone the excessive Guidelines recommendation of the typical non-production child pornography case. Thus, while the judicial revolt against the high recommendations of the Guidelines may continue unabated, Judge Weinstein's method of avoiding the imposition of a mandatory minimum sentence has failed.

#### IV. CURRENT PROBLEMS WITH THE LAW

There are several problems with current federal laws concerning non-production child pornography, and they extend beyond mere lengthy sentences. Even for similarly situated defendants, sentences are unpredictable; the Guidelines are out-of-date and do not account for the technological advancements that have occurred over the last few decades; and the severity of individual sentences are not accurately calibrated to a defendant's actual culpability or risk.

##### A. UNPREDICTABILITY IN SENTENCING FOR SIMILARLY SITUATED DEFENDANTS

As critics of the judicial revolt have pointed out, sentences for non-production child pornography cases are now quite unpredictable.<sup>97</sup> If a defendant is convicted of simple possession and the judge deviates from the Guidelines, he could receive a punishment as light as a day in prison.<sup>98</sup> On the other hand, if a defendant is convicted of "receipt" or "distribution," then the five-year mandatory minimum automatically applies, and the Guidelines will usually recommend a very lengthy sentence, even if the de-

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96. *United States v. Reingold*, No. 11-2826-CR, 2013 WL 5356875, at \*23 (2d Cir. Sept. 26, 2013).

97. See generally Rigsby, *supra* note 65.

98. For example, the defendant in *United States v. Rausch* received a sentence of one day, with credit for time served. 570 F. Supp.2d 1295, 1307 (D. Colo. 2008).

fendant does not appear to pose much of a risk to society.<sup>99</sup> And many judges still stick to these recommended Guidelines ranges, which frequently result in sentences that are measured in decades.<sup>100</sup> In short, a broad (and often inconsistent) range of sentences are being imposed.

The mysterious or trivial difference between “possession” and “receipt” further contributes to the disparity in sentences between similarly situated defendants.<sup>101</sup> After all, it is difficult to “possess” something that one did not produce, without having ever “received” it. Thus, whether “possession” or “receipt” is charged has more to do with the prosecutor’s decision than the defendant’s actual conduct, even though only one of these theories carries a five-year mandatory minimum. Additionally, many offenders who used peer-to-peer file sharing software can be charged with distribution. Courts have interpreted “distribution” such that most users of peer-to-peer file sharing software will satisfy its definition.<sup>102</sup> In sum, most defendants can be charged either with possession, receipt, or distribution, all at the discretion of the prosecutor. Despite these charging theories’ relative interchangeability, a significantly lighter penalty is associated with possession.<sup>103</sup> The United States Sentencing Commission found that this formalistic, technical, and frequently arbitrary distinction has a dramatic impact on the defendant’s likely sentence:

On average, offenders convicted of possession but who knowingly received child pornography were sentenced to a term of 52 months of imprisonment, while on average similarly situated offenders convicted of receipt were sentenced to a term of 81 months of imprisonment. On average, offenders convicted of possession but who distributed child pornography in exchange for other child pornography received a sentence of 78 months, while similarly situated offenders con-

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99. See, e.g., *United States v. Toothman*, 543 F.3d 967 (8th Cir. 2008).

100. See, e.g., *United States v. Burman*, 666 F.3d 1113 (8th Cir. 2012) (upholding sentence of 420 months); *United States v. Fiorella* 602 F. Supp.2d 1057 (N.D. Iowa 2009) (upholding sentence of 360 months).

101. See generally Bacon, *supra* note 44.

102. See *infra* Part V.A. for a discussion of courts’ interpretation of “distribution” under 18 U.S.C. § 2252 (2006).

103. 18 U.S.C. § 2252(b).

victed of distribution received an average sentence of 132 months.<sup>104</sup>

Congress expressed a strong desire for uniformity in federal sentencing when it passed the Sentencing Reform Act of 1984 and created the United States Sentencing Commission, but the language of the federal child pornography statute has resulted in arbitrary disparities in sentences. If judges were sentencing within the recommended Guidelines ranges, there might be greater uniformity on paper, but there would still be significant substantive disparities between similarly-situated defendants due to the different base offense levels of possession on the one hand and distribution/receipt on the other.

Perhaps the best evidence of the current lack of uniformity in non-production child pornography sentencing is the Sentencing Commission's finding that average sentences for non-production child pornography cases vary considerably by Circuit. In the 2010 fiscal year, the median sentence for non-production cases in the Seventh Circuit was 108 months.<sup>105</sup> In the First, Third, and Eighth Circuits, the median sentence was sixty months.<sup>106</sup> The Sentencing Commission attributes this to whether — and how — a court and/or the parties reduced an offender's "sentencing exposure."<sup>107</sup> The Commission explains several ways of doing so:

78.8 percent of non-production defendants in fiscal year 2010 had their sentencing exposure reduced by one or more of the four practices employed by the parties and/or courts — charging practices, guideline stipulations inconsistent with the facts recounted in [Pre-Sentencing Reports] and/or plea agreements, government sponsored variances and departures (other than for substantial assistance), and non-government sponsored variances and departures (other than for substantial assistance), and non-government sponsored variances and departures.<sup>108</sup>

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104. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at xiii.

105. *Id.* at 236.

106. *Id.*

107. *Id.* at 225–26.

108. *Id.* at 225.



The report went on to note that differences in “sentencing exposure,” and hence differences in sentence lengths, “were more pronounced at the district level.”<sup>109</sup> It concluded that “geography — in particular, the district in which a non-production defendant was charged and sentenced — appears to be a more significant explanatory factor with respect to whether the defendant’s sentencing exposure was limited than any of the above noted offender or offense characteristics.”<sup>110</sup> In other words, courts in the various circuits and districts are employing different techniques in order to mitigate excessive non-production sentences, which creates vastly different average sentences. The law is relatively inflexible as written, and it would appear that courts and parties are improvising different remedies in different jurisdictions in order to arrive at what they believe are more just sentences. Reforming the statute and its related Guidelines section to allow for better, more sensible, and more *formal* gradation of offenders would help reduce the present disparity in sentences between similarly-situated defendants. In short, many courts seem to agree that the law is not working, but they are bootstrapping different fixes, resulting in greater sentencing disparities.

#### B. THE GUIDELINES HAVE NOT BEEN UPDATED TO REFLECT THE MODERN TECHNOLOGICAL CONTEXT

While the rise of the Internet seems also to have contributed to a proliferation of child pornography in the last twenty years,<sup>111</sup> neither the federal non-production child pornography statute nor the Guidelines have been adequately updated to reflect the modern technological environment. Recall, for example, the Guidelines’ enhancement for using a computer, which virtually all defendants now satisfy.<sup>112</sup> Sentencing enhancements that apply even to the least culpable defendants — such as the use of a computer — should be eliminated. These outdated enhancements could be replaced by new ones that actually target the worst offenders. For example, a sentencing enhancement could apply to

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109. *Id.* at 237.

110. *Id.*

111. *United States v. C.R.*, 792 F. Supp.2d 343, 367 (E.D.N.Y. 2011).

112. *See generally* Exum, *supra*, note 50, at 33–38.

those who create or administer online communities that intentionally promote the distribution of child pornography.

C. THE EXCEPTIONALLY HIGH SENTENCES FOR MANY  
DOWNLOADERS ARE DISPROPORTIONATE TO THEIR CULPABILITY  
AND RISK

Another alarming fact is that defendants convicted of “receipt” or “distribution” might have received a similar, or even shorter, sentence if they had molested a child instead of downloading a collection of digital images.<sup>113</sup> Once again, the ongoing impact on victims of the circulation of child pornography should not be minimized. Nonetheless, it is not sensible to punish “downloaders” as severely as child molesters. One commentator has gone so far as to suggest that the exceptionally high penalties for child pornography are actually counterproductive, in that they might actually *encourage* individuals to become interested in child pornography in the first place.<sup>114</sup> And, as a group, child pornography offenders have low recidivism rates, especially as compared to other categories of sex offenders.<sup>115</sup> Defendants who simply download child pornography using peer-to-peer software do not provide any financial support to producers.<sup>116</sup> In addition, the United Nations Office on Drugs and Crimes found that most of the time, child pornography is created *as a result of* abuse; i.e., the production of child pornography is not the motivation behind the original

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113. Arlen Specter & Linda Dale Hoffa, *A Quiet but Growing Judicial Rebellion Against Harsh Sentences for Child Pornography Offenses — Should the Law be Changed?*, 35 CHAMPION MAG. 12, 13 (Oct. 2011).

114. Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001) (arguing, *inter alia*, that the taboo of child sexuality, reinforced by harsh child pornography laws, might create additional interest in child pornography).

115. *Child Pornography Offender Characteristics and Risk to Reoffend: Public Hearing Before the U.S. Sentencing Commission on Federal Child Pornography Crimes*, 3 (2012) (written testimony of Michael C. Seto, Royal Ottawa Health Care Group), available at [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20120215-16/Testimony\\_15\\_Seto.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_15_Seto.pdf) (“The recidivism rates were relatively low compared to the average recidivism rates found for contact sexual offenders . . . . Approximately 5% of the child pornography offenders were caught for a new sexual offense of any kind, with 3.4% being rearrested, recharged or reconvicted for a new CP offense and 2.1% for a new contact sexual offense”).

116. This is not to say that other, immaterial forms of support are meaningless. Still, it seems clear that any moral support provided is of less value to producers of child pornography than actual payment.

abuse.<sup>117</sup> This calls into question any argument that “downloaders” truly encourage producers to create child pornography.<sup>118</sup> The possession of child pornography is certainly deserving of punishment and opprobrium, but the current gradation of its punishment is not well reasoned.

Much of the rhetoric employed on this issue tends to ignore the important distinction between child sex abusers and those who view child pornography. This distinction is important for more than just abstract and theoretical reasons: the empirical evidence suggests that while those who have committed contact offenses in the past might be more likely to reoffend if they view child pornography, “studies show little demonstrable risk for other individuals (including child-pornography offenders without a history of contact sexual offending) to commit future molestation pursuant to pornography consumption.”<sup>119</sup> Presumably, one of the main justifications for these harsh penalties is to prevent *future* contact offenses (not necessarily in connection with the production of new child pornography, but rather inspired or in some way motivated by past viewing). However, the empirical evidence indicates that individuals who have not already committed a contact offense are not significantly more likely to do so after viewing child pornography.<sup>120</sup> The Second Circuit has acknowl-

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117. UNITED NATIONS OFFICE ON DRUGS AND CRIME, THE GLOBALIZATION OF CRIME: A TRANSNATIONAL ORGANIZED CRIME THREAT ASSESSMENT 214 (2010), available at [http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA\\_Report\\_2010\\_low\\_res.pdf](http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf).

118. Those who actually provide direct financial support for producers of child pornography, of course, are in a separate category from defendants like C.R., and it appears that there might still be a significant commercial market for child pornography. See *United States v. C.R.*, 792 F. Supp.2d 343, 368 (E.D.N.Y. 2011).

119. Neil Malamuth & Mark Huppert, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 827 (2007).

120. Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 874–79 (2011) (“while individuals who have previously been convicted of contact offenses may pose a recidivism risk if exposed to child pornography, studies show little demonstrable risk for other individuals (including child-pornography offenders without a history of contact sexual offending) to commit future molestation pursuant to pornography consumption”) (internal quotations omitted). See also *C.R.*, 792 F. Supp.2d at 376; L. Webb et al., *Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters*, 19 SEXUAL ABUSE 449, 464 (2007); Jerome Endrass et al., *The Consumption of Internet Child Pornography and Violent Sex Offending*, 9 BMC PSYCHIATRY no. 43, 14 July 2009, at 6 (“[T]he consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses . . . at least

edged that courts should not simply assume that there is a link between viewing child pornography and later going on to commit a contact offense.<sup>121</sup> Even if psychologists would classify both viewers of child pornography and contact sex offenders as “pedophiles,” there are still important differences between the two groups with respect to the ongoing danger that they pose to society, and this should be reflected in the sentencing regime.

## V. PROPOSALS FOR REFORM

This Note proposes two sentencing innovations developed in the context of narcotics convictions that should be applied to federal non-production child pornography cases: a safety valve provision that exempts the least culpable of defendants from the applicable mandatory minimum sentence, and the availability of mental health treatment as an alternative to prison. The Note also supports the revision of the Guidelines to account for recent technological advancements.

### A. A SAFETY VALVE PROVISION SHOULD BE ADDED TO AVOID IMPOSITION OF MANDATORY MINIMUM SENTENCES FOR SOME DEFENDANTS

Past contact sex offenders should absolutely receive harsh sentences for possession of child pornography, because the empirical evidence suggests that these individuals are indeed more likely to commit subsequent contact offenses after viewing child pornography.<sup>122</sup> 18 U.S.C. § 2252, the federal child pornography statute, already contains enhancements for offenders who have committed contact offenses in the past.<sup>123</sup> These defendants have already demonstrated that they are a risk to society, and the significant risk they pose is appropriately reflected in significantly higher minimum and maximum sentences. This aspect of the law is well-designed.

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not in those subjects without prior convictions for hands-on sex offenses”), *available at* <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2716325/pdf/1471-244X-9-43.pdf>.

121. *United States v. Dorvee*, 616 F.3d 174, 183–84 (2d Cir. 2010).

122. Hessick, *supra* note 120, at 876–77. *See generally* Endrass, *supra* note 120.

123. 18 U.S.C. § 2252(b) (2006).

But for many non-contact offenders, a mandatory five-year minimum sentence is simply not necessary. While it might be argued that the deterrence value of the current sentencing regime justifies the harsh penalties, this claim is suspect. The available data indicates that those who have never committed a contact offense are not more likely to do so after viewing child pornography, and despite the steadily increasing penalties for non-production child pornography offenses, there is no indication that the number of people who violate these prohibitions has dropped.<sup>124</sup> In fact, the number of child pornography prosecutions in federal courts has continued to rise.<sup>125</sup> Further skepticism with regard to the deterrence value of these harsh sentences is warranted by the example of the War on Drugs. Strict mandatory minimum sentences for federal drug crimes do not appear to have significantly affected the number of citizens who buy or sell narcotics,<sup>126</sup> and there is little reason to believe that anything different will happen in the context of child pornography.<sup>127</sup>

Recently, the United States Sentencing Commission proposed realigning the penalties for “receipt” and “possession.”<sup>128</sup> Recall that “receipt” carries a statutory minimum of five years, but “possession” does not. The substantive conduct related to these two offenses is usually indistinguishable.<sup>129</sup> Recognizing this, the Commission proposed making the penalties identical for both charging theories, but the Commission disagreed internally over which should be changed; i.e., whether the penalty for possession should be increased to match the current penalty for receipt, or whether the penalty for receipt should be lowered to that of possession.<sup>130</sup> If the penalty for possession were increased, then *all* of the non-production child pornography offenses would carry a

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124. Hessick, *supra* note 120, at 876–77.

125. U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Table 29 (2011).

126. United States v. Beiermann, 599 F. Supp.2d 1087, 1103 (N.D. Iowa 2009) (“Indeed, the persistent ratcheting up of sentences for drug trafficking has done nothing to slow the tide of criminal activity.”). Of course, the number of prosecutions related to certain kind of conduct does not always correlate perfectly with the actual incidence of that conduct.

127. And as noted above, the high sentences might even have the counterintuitive effect of encouraging violations of the law. See generally Adler, *supra* note 114.

128. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 329.

129. *Id.*

130. *Id.*

mandatory minimum sentence, though the Commission agreed that if the mandatory minimum was changed to apply to possession offenses, then it should be lower than five years.<sup>131</sup> If receipt's punishment were aligned with the current, lesser punishment for possession, then only distribution<sup>132</sup> of child pornography would carry a mandatory minimum sentence. However, because "distribution" is relatively easy to prove in the modern technological context, where most defendants use peer-to-peer file sharing software, even if receipt were to no longer carry a mandatory minimum, prosecutors could, in many cases, simply charge the offender with distribution instead. Therefore, whether Congress accepts either or neither of the Commission's recommendations, mandatory minimum sentences will remain an important part of the landscape of non-production child pornography offenses, and whether such a mandatory minimum sentence applies will still have more to do with the charging decision of the prosecutor than it will with the defendant's actual conduct.

Another area of modern federal criminal law known for its harsh sentences — many of which are imposed because of mandatory minimums — is narcotics. However, in the 1990s, Congress created a "safety valve" provision that enables certain less dangerous offenders to avoid the mandatory minimum sentences that are contained in many federal criminal laws related to controlled substances.<sup>133</sup> Congress should pass a similar law for non-

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131. *Id.*

132. As mentioned above, in the vast majority of cases, distribution and transportation are largely interchangeable for the purposes of 18 U.S.C. § 2252 (2006). *FEDERAL CHILD PORNOGRAPHY OFFENSES*, *supra* note 26, at 189 n.72.

133. A defendant is eligible for the safety valve if she satisfies five requirements:

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information

production child pornography offenders, designed to exempt the least culpable and least dangerous defendants from harsh mandatory minimums. Some features of the narcotics safety valve could be incorporated into the non-production child pornography version (hereinafter, the “CP safety valve”).

The first eligibility requirement of the narcotics safety valve, that the “defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines,” should be included in the CP safety valve; this would ensure that no career criminals or repeat offenders would be eligible.<sup>134</sup>

Second, a requirement of the CP safety valve should be that the defendant did not engage in “extensive distribution,” which might be defined as “intentionally transmitting child pornography to ten or more individuals.”<sup>135</sup> This requirement is intended to exclude from the CP safety valve defendants who, for example, created private message boards or other online structures intended to facilitate the distribution of child pornography. Offenders who used peer-to-peer software on a limited number of occasions, recklessly or unknowingly allowing some small number of individuals to download images from their computer, would still be eligible. Courts have disagreed over what constitutes “distribution” under 18 U.S.C. § 2252, especially in the context of peer-to-peer file sharing software, but most have ruled that placing “child pornography files in a shared folder accessible to others via a P2P program on the internet constitutes ‘distribution’ under Section 2252(a)(2) to persons to share and download.”<sup>136</sup> Because most defendants engaged in “distribution,” as the courts have interpreted that term, this new requirement of not engaging

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shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3553(f) (2006).

134. 18 U.S.C. § 3553(f)(1).

135. The required “intent” could be shown in a variety of ways, such as an e-mail sent by the defendant or testimony that he or she encouraged others to view child pornography.

136. *United States v. Caparotta*, 890 F. Supp. 200, 203–06 (E.D.N.Y. 2012). As noted in *Caparotta*, the First, Eighth, Tenth, and Eleventh Circuits have all adopted this view. See *United States v. Chiaradio*, 684 F.3d 265, 282 (1st Cir. 2012); *United States v. Dayton*, No. 09-5022, 2012 WL 2369328, at \*3 (10th Cir. June 25, 2012); *United States v. Collins*, 642 F.3d 654, 656–57 (8th Cir. 2011); *United States v. DeGennaro*, 309 Fed.Appx. 350, 351–52 (11th Cir. 2009). But see *United States v. C.R.*, 792 F. Supp.2d 343, 353–355 (E.D.N.Y. 2011) (interpreting “distribute” as requiring both “an active intention to give or transfer a specific visual depiction to another person” and “active participation in the actual delivery”).



in “extensive distribution” (as defined above, with the intent requirement) would more accurately exclude the most culpable offenders from being eligible for the CP safety valve.

Third, also like the narcotics safety valve, the CP safety valve should include a requirement that “the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan.”<sup>137</sup> Like the narcotics safety valve, this would not require that the information be of substantial assistance to the authorities. Presumably, however, it would at least on many occasions be useful in helping law enforcement officials to penetrate child pornography distribution rings.

The safety valve option might also have the advantage of being more politically viable than some other reforms. Perhaps the ideal course would be to eliminate statutory minimums in the child pornography context altogether. Still, any rational and self-interested legislator will probably oppose such a change, lest in the next election her opponent uses the fact that she “eliminated mandatory minimum sentences for child pornographers” to win an easy victory at the polls. The “safety valve” exception would be less politically risky; after all, Congress managed to pass the narcotics safety valve in the mid-1990s, an era when the dominant sentencing policy was to “get tough” on crime.<sup>138</sup> And it should be emphasized that the CP safety valve would only make it *possible* for a defendant to avoid the mandatory minimum sentence. The judge would still be able to impose a sentence of five years or more, if in her judgment it is warranted.

#### B. PSYCHOLOGICAL TREATMENT AS AN ALTERNATIVE TO PRISON

Another sentencing tool that should be available is psychological treatment as an alternative to prison for certain low-risk offenders. In fact, failure to complete a psychological treatment program should disqualify a defendant from being eligible for the

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137. 18 U.S.C. § 3553(f)(5).

138. See generally Marc Mauer, *State Sentencing Reforms: Is the “Get Tough” Era Coming to a Close?*, 15 FED. SENT’G REP. 50, 50–52 (2002).

CP safety valve. Looking once again to narcotics sentencing for inspiration, many local jurisdictions throughout the country have established “Drug Treatment as an Alternative to Prison” (or “DTAP”) programs for nonviolent felony drug offenders, and the empirical evidence indicates that these programs can significantly reduce recidivism rates among those who complete the program.<sup>139</sup>

The Kings County DTAP Program was one of the first of these programs to be put into place. Started in 1990, the program uses a “deferred sentencing” model:

Participants must plead guilty to a felony prior to their admission into the program. The plea agreement includes a specific prison term that will be imposed in the event of treatment failure. The prospect of prison has proven very effective in maintaining high treatment retention rates. In recognition that relapse is part of the recovery process, DTAP also has a selective readmission policy. Defendants who relapse or experience treatment setbacks are readmitted to DTAP if they express a genuine desire to continue treatment and pose no threat to the provider or the community. Defendants who successfully complete DTAP are allowed to withdraw their guilty pleas, and the charges against them are dismissed.<sup>140</sup>

Only nonviolent offenders are eligible for the DTAP program.<sup>141</sup> Of the 7,864 individuals who were screened for potential admission into the program, 37% entered “rigorous, intensive residen-

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139. THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, CROSSING THE BRIDGE: AN EVALUATION OF THE DRUG TREATMENT ALTERNATIVE-TO-PRISON (DTAP) PROGRAM 6 (2003), *available at* <http://www.casacolumbia.org/articlefiles/379-Crossing%20the%20Bridge%20DTAP%20Evaluation.pdf>. Interestingly, Portugal has gone even further, and has stopped putting its citizens in jail for possession offenses, instead emphasizing substance abuse programs. This practice has proven to be quite successful. *Portugal Decriminalized All Drugs Eleven Years Ago and the Results are Staggering*, BUS. INSIDER, Jul. 17, 2012, <http://www.businessinsider.com/portugal-drug-policy-decriminalization-works-2012-7>.

140. Anne. J. Swern, KING’S COUNTY DISTRICT ATTORNEY’S OFFICE, DTAP TWENTIETH ANNUAL REPORT, EXECUTIVE SUMMARY (2011), *available at* <http://www.brooklynda.org/dtap/reports/DTAP%20Twentieth%20Annual%20Report.pdf>.

141. *Id.* at 1.

tial drug treatment,” and of those who were accepted into the program, 43% graduated.<sup>142</sup> One five-year recidivism study published in 2001 compared a group of nonviolent offenders who had completed the DTAP program to a group who were (at least initially) eligible for it, but declined to participate:

In the five-year recidivism study, a much lower recidivism rate for DTAP completers was reported than for the offenders in the comparison group. Of the 184 DTAP completers, 30 percent were rearrested within five years of the date that they had completed DTAP. In contrast, 56 percent of the 215 drug offenders comprising the comparison group were rearrested within five years of the date of their prison release.<sup>143</sup>

Of course, completely isolating the relevant variables in any such comparison is next to impossible. Offenders who are willing to enter the DTAP program in the first place are presumably more invested in their own rehabilitation anyway, which might account for some of the difference in five-year recidivism rates. Even so, the DTAP program rewards those who are committed to becoming productive members of society not only with dismissed charges, but also with employment assistance.<sup>144</sup> It has been estimated the Kings County DTAP program has saved taxpayers over 50 million dollars in incarceration and other costs.<sup>145</sup>

Judge Weinstein made clear in his opinion in *United States v. C.R.* that something analogous to DTAP, but instead tailored to sex offenders, is the sort of outcome that he would have favored for C.R.<sup>146</sup> He imposed a 30-month “prison term with full treatment and completion of a program for control of sex offenders at

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142. *Id.* at 2 (“Of those who were accepted by the program and entered treatment, 1,250 (43%) have graduated; 354 (12%) are currently in treatment; 46 (2%) have been transferred to ‘TADD,’ a diversion program dedicated to mentally ill defendants with a concurrent substance abuse disorder; and 1,240 (43%) have dropped out of treatment”).

143. *Id.* at 13. The study also noted that this was a statistically significant difference. See also, Steven Belenko et. al., *Recidivism Among High-Risk Drug Felons: A Longitudinal Analysis Following Residential Treatment*, 40 J. OFFENDER REHABILITATION 105 (2004) (concluding that “diverting high-risk, prison-bound felony drug sellers to long-term treatment can yield significant, long-term reductions in recidivism”).

144. Swern, *supra*, note 140, at 15.

145. *Id.* at 17.

146. *United States v. C.R.*, 792 F. Supp.2d 343, 519 (E.D.N.Y. 2011).

the Federal Medical Center Devens prison,”<sup>147</sup> and the sentence was that long only because the five-year statutory minimum evinced a Congressional preference for high penalties.<sup>148</sup> One of the experts who testified at C.R.’s trial pointed out that the limited available evidence seems to indicate that treatment programs *inside* of prisons are not very effective at reducing recidivism rates,<sup>149</sup> and that treatment outside of prison, in the community, is significantly more likely to be effective.<sup>150</sup> Providing the most effective treatment will help ensure that these defendants do not become contact offenders in the future, which will obviously better protect children in the long run.

Additionally, giving judges the discretion and tools needed to reduce the recidivism rate as much as possible is likely to result in fewer future contact offenses. If the protection of children is the main goal of this sentencing regime — and it should be — then it is worth considering the following: treatment programs in the context of narcotics have shown to be effective at reducing recidivism among those offenders.<sup>151</sup> The available evidence suggests that offenders such as C.R. would be less likely to reoffend if they received mental health care outside of prison.<sup>152</sup> It also suggests that defendants are more likely to reoffend if they are incarcerated in a federal penitentiary for five or more years with violent criminals and other sex offenders — hardly an environment that is conducive to rehabilitation.<sup>153</sup>

Under the current sentencing regime, a defendant like C.R. would be released in five or more years, with a higher risk of recidivism.<sup>154</sup> If a psychological treatment program similar to DTAP were in place, those defendants who complete the program would be released sooner, but with a significantly lower risk of reoffending. In other words: less risk now, as opposed to more

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147. *Id.* at 349.

148. *Id.* at 519.

149. *Id.* at 440–41.

150. *Id.* at 443.

151. Swern, *supra* note 140, at 2. *See also* Belenko et al., *supra* note 143.

152. *C.R.*, 792 F. Supp.2d at 443.

153. *Id.* at 440–41; Henry J. Steadman & Bonita M. Veysey, *Providing Services for Jail Inmates with Mental Disorders*, NAT’L INST. OF JUST. J. RES. IN BRIEF, Jan. 1997, at 1, available at <https://www.ncjrs.gov/pdffiles/162207.pdf> (“[P]roviding for appropriate treatment for inmates with mental disorders is a task for which most facilities are ill equipped.”).

154. *C.R.*, 792 F. Supp.2d at 443.

risk later. It is true that harsh sentences and mandatory minimums incapacitate offenders for longer periods of time, but almost all of these defendants will be released eventually; incapacitation in this context is temporary. If the Kings County DTAP program is any indication, this sentencing practice would also save taxpayers a great deal of money in incarceration costs and make it more likely for offenders to rehabilitate and become productive members of their communities.

It is hard to see what justification can override evidence indicating that psychological treatment will reduce recidivism and, therefore, the number of both future contact offenses and the number of individuals who continue to view images and videos of past abuse, which is a source of not insignificant psychological trauma for victims.<sup>155</sup> Furthermore, judges would not be obligated to use the psychological treatment option. It would simply be one of several sentencing choices, perhaps requiring certain on-the-record findings that the chances of a contact offense occurring during treatment are small. If a defendant is defiant, refuses treatment, or if the judge has any reason to believe that psychological treatment will not be effective, she can simply impose a normal prison sentence, as before. And in any event, the usual state controls on sex offenders can still be put into place, even if the defendant serves little to no prison time. Thus, the idea is not to *remove* the threat of prison, but rather to simply give judges an additional option for defendants who really do not appear to pose much of a risk to anyone, for whom the mandatory minimum sentence and the typical Guidelines recommendation are too harsh.

Providing judges with yet another sentencing option might appear to encourage disparity — after all, more choices often leads to a wider range of outcomes — but the current regime already lacks uniformity, and this proposal will actually encourage uniformity among similarly-situated defendants. As discussed above, judges in different districts are already employing various

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155. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 112–13; *C.R.*, 792 F. Supp.2d at 360–63. Perhaps the expression of society's moral outrage is being prioritized over concrete results; which of these values should be prioritized is largely a normative argument, but it is the position of this Note that the protection of children should be emphasized, and that this can be most effectively accomplished by lowering the recidivism rate.

kinds of practices in order to distinguish between defendants with more or less culpability, with a wide range of results.<sup>156</sup> Creating a more systematic and formal mechanism for calibrating sentences to culpability will help standardize sentencing practices in the non-production child pornography context, resulting in sentences that are not based on the location of the court. Less culpable defendants will often be eligible for the safety valve and/or to receive psychological treatment, so judges will not have to improvise their way around excessive sentences. This will also avoid unnecessarily draconian sentences and help protect children, as psychological treatment will reduce recidivism among offenders.

In short, federal sentencing for non-production child pornography offenses should be focused on protecting children and not on simply maximizing the length of sentences. Lengthy sentences have their place in the sentencing regime, and are certainly appropriate for many, and maybe even most, child pornography defendants. In the 2010 fiscal year, 31.4 percent of offenders sentenced under one of the 18 U.S.C. § 2252 offenses had either a prior conviction for a sex offense or were found in a presentencing report to have engaged in “criminal sexually dangerous behavior.”<sup>157</sup> These are not the individuals who would be eligible for the proposed CP safety valve and/or psychological treatment as an alternative to prison. Instead, these tools would be applied only to first-time offenders, who have otherwise been upstanding members of their community and who stand a very good chance, with the right treatment, of rehabilitation. Mindlessly doling out harsh sentences to every single defendant regardless of his culpability or risk makes for poor sentencing policy. Lest this be justified on the grounds of uniformity, leaving courts to find their own ways around sentences that most federal judges consider excessive has itself led to great disparities.<sup>158</sup> And the existence of a safety valve provision in the narcotics context has not proven disastrous in sentencing for drug cases. For some specific defen-

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156. See *supra* Part III.A.

157. The United States Sentencing Commission defines “criminal sexually dangerous behavior” as including contact sex offenses, non-contact sex offenses, and prior non-production child pornography sex offenses. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 174.

158. *Id.* at 317–18.

dants who have committed non-production child pornography offenses, the focus should be on reform and rehabilitation, so that when they are released back into the community, they are able to control whatever dark impulses led them to offend in the first place.

### C. REFORM THE FEDERAL SENTENCING GUIDELINES TO FIT THE MODERN CONTEXT

The problems with the current non-production child pornography guidelines have been noted and written about at length by numerous stakeholders and commentators.<sup>159</sup> While there are differences of opinion regarding whether non-production child pornography sentences should generally be as harsh as they are, there is substantial agreement that the Guidelines are out of date.<sup>160</sup>

Both the United States Sentencing Commission and the Department of Justice have recognized that the Federal Sentencing Guidelines are not calibrated to the modern technological context, and do not accurately distinguish between more culpable and less culpable offenders. In a 2013 report, the Sentencing Commission noted:

The current sentencing scheme in § 2G2.2 places a disproportionate emphasis on outmoded measures of culpability regarding offenders' collections (e.g., a 5-level enhancement under § 2G2.2(b)(3)(B) for possession of 600 or more images of child pornography, which the typical offender possesses today). At the same time, the current scheme places insufficient emphases on other relevant aspects of collecting behavior as well as on offenders' involvement in child pornog-

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159. See generally Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G REP. 108 (2011); Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession for the Federal Sentencing of Child Pornography Offenses*, 16 RICH. J.L. & TECH. 8 (2010). See also Letter from Anne Gannon, Nat'l Coordinator for Child Exploitation Prevention and Interdiction, U.S. Dep't of Justice, to The Honorable Patti B. Saris, Chair, U.S. Sentencing Comm'n (Mar. 5, 2013), available at <http://sentencing.typepad.com/files/doj-letter-to-ussc-on-cp-report.pdf>; FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 320–25.

160. See *supra* Part IV.C.



raphy communities and their sexual dangerousness. As a result, the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior. At the same time, it results in unduly lenient ranges for other offenders who engaged in aggravated collecting behaviors not currently addressed in the guideline, who were involved in child pornography communities, or who engaged in sexually dangerous behavior not qualifying for an enhancement in the current penalty scheme.<sup>161</sup>

The Department of Justice concurred that the Guidelines do not correctly differentiate between the more and less culpable.<sup>162</sup> The recent suggestions of the Sentencing Commission in its 2013 Report would improve the Guidelines significantly. These proposed changes include accounting for the offender's level of engagement in child pornography communities and any history of sexually dangerous behavior.<sup>163</sup>

## VI. CONCLUSION

Among major federal crimes, it is only for non-production child pornography cases that federal judges sentence below the Guidelines recommendations in such high numbers.<sup>164</sup> While many federal criminal laws carry significant punishments (especially as compared to their state counterparts), for other offenses, federal judges tend to stick to the Guidelines. At least in the context of the federal non-production child pornography laws, where there is smoke, there appears to be fire. In the 2011 fiscal year, federal judges imposed below Guidelines range sentences (not sponsored by the government) in almost half of all non-production child pornography cases.<sup>165</sup> Within-range sentences were imposed in only about a third of all cases.<sup>166</sup> In no other major type of federal

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161. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 321.

162. Letter from Anne Gannon, *supra* note 159.

163. FEDERAL CHILD PORNOGRAPHY OFFENSES, *supra* note 26, at 320–26.

164. *Id.* at 7.

165. *Id.*

166. *Id.*

criminal case do sentences so frequently fall below the applicable Guidelines range.<sup>167</sup>

Fortunately, judges can continue to sentence below the recommended ranges, and smart proposals to reform the Guidelines have already been made by the Sentencing Commission. Still, however convincing Judge Weinstein's opinion in *United States v. C.R.* might be for why the mandatory minimum sentences are unjust and unnecessary for some defendants, his Eighth Amendment argument failed to convince the Second Circuit, and similar attacks are unlikely to succeed elsewhere. Therefore, another solution for this problem must be found, so that sentences are determined based on real culpability and future risk.

A safety valve provision would provide an escape hatch for low risk and low culpability defendants, and psychological treatment in lieu of prison will help ensure that these individuals do not pose a risk to society. Similar structures have already been created in the context of narcotics, which serve as useful templates. Furthermore, the evidence suggests that these proposals could create a more just sentencing regime, save taxpayers' money, and, most importantly, keep children safer by reducing recidivism. Given that this is a very politically sensitive topic, legislative action might be difficult. Still, it is a rare thing for so much of the federal judiciary to agree that a certain class of sentences are too harsh, and still rarer for so many to routinely impose sentences below the Guidelines' recommendations. This underscores the wide agreement that there is indeed something wrong with the current sentencing regime of defendants in non-production child pornography cases. Hopefully, Congress will take notice and institute some of the reforms suggested in this Note in order to make the law both less brutal and more intelligent. Not only will this ensure that substantial justice is done, it will also help ensure the safety of our country's children.

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167. *Id.*