

2016

Emerging Clinical Research Demonstrates the Importance of Adhering to Federal Sentencing Guidelines for Defendants Convicted of Possession of Child Pornography

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Beck, Margaret A. (2016) "Emerging Clinical Research Demonstrates the Importance of Adhering to Federal Sentencing Guidelines for Defendants Convicted of Possession of Child Pornography," *University of Florida Journal of Law & Public Policy*: Vol. 27: Iss. 1, Article 6.

Available at: <https://scholarship.law.ufl.edu/jlpp/vol27/iss1/6>

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NOTE

EMERGING CLINICAL RESEARCH DEMONSTRATES THE IMPORTANCE OF ADHERING TO FEDERAL SENTENCING GUIDELINES FOR DEFENDANTS CONVICTED OF POSSESSION OF CHILD PORNOGRAPHY

*Margaret A. Beck**

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* J.D. Anticipated May 2016, University of Florida Levin College of Law; B.S. Biology, University of Florida, 2011. The Author would like to thank Professor E. Lea Johnston for her guidance and instruction during her Sentencing Law Seminar, from which this Note was adapted.

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**I. INTRODUCTION OF THE CHILD PORNOGRAPHY PROBLEM AND
FEDERAL SENTENCING GUIDELINES**

Every day of my life I live in constant fear that someone will see my pictures and recognize me and that I will be humiliated all over again. It hurts me to know someone is looking at them—at me—when I was just a little girl being abused for the camera. . . . It’s like I am being abused over and over and over again.¹

This statement summarizes the tragic reality for victims of child pornography. Even after the actual abuse ends, the digital record of the

1. *Paroline v. United States*, 134 S. Ct. 1710, 1717 (2014).

abuse is sold, shared, and distributed among people who seek out child pornography. A disturbing situation exists—digital preservation of child pornography has fueled its accessibility and demand.

A. Prevalence of Child Pornography

The advent of file sharing programs has greatly increased the prevalence of child pornography.² File sharing, also referred to as “peer-to-peer” sharing (P2P),³ allows users to obtain and exchange files directly with other Internet users, rather than utilizing the traditional method of obtaining files from a server.⁴ Because P2P programs eliminate the use of central servers, which are regularly monitored by internet service providers (ISPs), P2P programs make it more difficult for law enforcement officers to detect and track child pornography.⁵ Although P2P sharing is the fastest-growing method of sharing and viewing child pornography, the majority of child pornography is housed on file-hosting websites.⁶ File hosting differs from file sharing or P2P because images on a file-hosting site are uploaded and downloaded through a central server that the ISP (and law enforcement) can access.⁷ Viewing and sharing child pornography on file-hosting sites is riskier for offenders, who typically engage a stranger online, explore whether the stranger is also there for child pornography, and exchange links or passwords to their private image-hosting accounts.⁸ If no one reports the child pornography, the exchange typically goes unnoticed. However, because police more commonly target file hosting during police stings (and ISPs can more easily track the images to the offender), P2P is becoming increasingly attractive to offenders.⁹ Possession of child pornography arrests stemming from P2P sharing grew from only four percent of child

2. U.S. DEPT. OF JUSTICE, “THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION,” A REPORT TO CONGRESS 11 (2010), <http://www.justice.gov/psc/docs/natstrategyreport.pdf> (last visited Nov. 2, 2015).

3. This Author prefers the term “P2P,” recognizing that file sharing and P2P are the same, and acknowledging that the subsequent sources may refer to it as file sharing.

4. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-634, FILE SHARING PROGRAMS: THE USE OF PEER-TO-PEER NETWORKS TO ACCESS PORNOGRAPHY 14 (2005) [hereinafter GAO-05-634, FILE SHARING PROGRAMS].

5. *Id.* at 21.

6. INTERNET WATCH FOUNDATION, ANNUAL REPORT 2014 10. See Figure 3.

7. GAO-05-634, FILE SHARING PROGRAMS, *supra* note 4, at 21.

8. P2P provides a framework in which offenders who seek child pornography network with other offenders in order to gain access to folders containing child pornography, sometimes offering their own abusive images in a trade. Tony Krone, *A Typology of Online Child Pornography Offending*, 279 AUSTRALIAN INST. OF CRIMINOLOGY 1, 4 (2004).

9. Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 22, 37 (2011) [hereinafter Wolak et al., *Child Pornography Possessors*].

pornography arrests in 2000 to sixty-one percent of arrests in 2009.¹⁰ Images of child pornography on P2P programs grew by nearly 300% in 2014.¹¹

Researchers funded by the Department of Justice recently analyzed the prevalence of child pornography on P2P programs and obtained disturbing results.¹² During 2012, nearly half of all known child pornography images passed through one P2P program, Gnutella.¹³ Eighty-six percent of the child pornography content on Gnutella was shared exclusively in the United States.¹⁴ While the study only examined Gnutella,¹⁵ dozens of other P2P programs host child pornography.¹⁶ Although many P2P users utilize the programs to obtain files that range from adult pornography and pirated media to legitimate business files,¹⁷ the ease of use and relative anonymity makes P2P an enticing venue for those who seek out child pornography.

In 2011, Attorney General Eric Holder recognized that the sheer amount of child pornography has increased, and that child pornography increasingly departs from traditional sex acts to depict violent, sadistic sexual abuse of child victims: “[T]he only place we’ve seen a decrease is in the age of victims. This is – quite simply – unacceptable.”¹⁸ In 2005, 39% of child pornography arrestees possessed images of children ages 3-5 years old; 19% possessed images of children younger than 3 years old.¹⁹ And, 80% of those arrestees possessed images that involved penetration of a child, while 21% percent possessed images that depicted bondage, rape, or torture of children.²⁰

B. Overview of Current Federal Sentencing Guidelines

Under 18 U.S.C. § 2252, those who knowingly possess or distribute child pornography face a sentence of 5-20 years; the sentence is increased

10. Janis Wolak et al., *Measuring a Year of Child Pornography Trafficking by U.S. Computers on a Peer-to-Peer Network*, 38 CHILD ABUSE & NEGLECT 2 (2013).

11. *Id.* at 10.

12. *See id.* at xx.

13. *Id.* at 5.

14. *Id.*

15. *See id.*

16. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-757T, FILE SHARING PROGRAMS: USERS OF PEER-TO-PEER NETWORKS CAN READILY ACCESS CHILD PORNOGRAPHY 15 (2004).

17. *See id.*

18. *Child Pornography*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/criminal-ceos/child-pornography> (last visited Oct. 12, 2015).

19. Janis Wolak et al., *Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile Online Victimization Study 2005*, NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, 4, <http://www.unh.edu/ccrc/pdf/jvq/CV81.pdf> (last visited Oct. 11, 2015).

20. *Id.* at 5.

to 15-40 years for repeat offenders.²¹ To avoid prosecuting those who might mistakenly download or stumble upon child pornography, Congress included an affirmative defense for those who possess 3 or fewer images.²² The Federal Sentencing Guidelines (Guidelines) rely heavily on quantity of images to determine the appropriate sentence range.²³ For example, an offender who simply possesses images without intent to distribute will start with a Level 18 base sentence, which carries 27-33 months in prison.²⁴ Possession of 10-149 images will increase the sentence by 2 levels, 150-299 images will increase the sentence by 3 levels, 300-599 images will increase by 4 levels, and 600 or more images will increase the sentence by 5 levels.²⁵ Each video counts as 75 images, without regard to the video's length.²⁶ Higher numbers of images are rightfully met with a higher sentencing level, because it shows that there was a higher level of commitment to obtain more images, and increased intent to view the images.

The Guidelines recognize several aggravating and mitigating factors that factor into the analysis of sentencing levels and their respective sentence ranges. For example, images depicting sadistic conduct carry an increase of four levels,²⁷ and images of children under age twelve carry a two-level increase.²⁸ If the defendant possessed images without intent to distribute, the Guidelines call for a decrease of two levels.²⁹ The presence of these factors lends a positive quality to the Guidelines, allowing sentencing judges to account for individual circumstances.

C. Congress Should Modify the Guidelines to Punish the Worst Offenders

Although the Guidelines were revised in 2010, they are still out of touch with the increase in the number of images defendants possess, as well as the increased trend of pornography involving children age 5 or younger. Although all child pornography is deeply disturbing, the abuse

21. 18 U.S.C. § 2252(b)(1) (2012).

22. 18 U.S.C. § 2252(c)(1) (2012).

23. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (2014).

24. *Id.* § 2G2.2(a)(1) (2014).

25. *Id.* § 2G2.2(b)(7) (2014). Each sentencing level increase carries a 3-4 month increase in the sentencing range; for example, a 5-level increase for possession of 600 or more images would carry a sentence of 46-57 months in prison, compared to the 27-33 month base-level sentence. See *id.* § 5A (2014).

26. John Richard Murphy, *The Role of Technology in Changing Our Laws Regarding Sex Crimes and Our Defense of Those Accused of These Crimes*, 2015 WL 4975046, at *5.

27. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(4) (U.S. Sentencing Comm'n 2014).

28. *Id.* § 2G2.2(b)(2).

29. *Id.* § 2G2.2(b)(1).

of very young children is especially repulsive and should be met with a harsher penalty than a mere 2-level sentencing increase.³⁰ Additionally, the Guidelines have not kept up with the great increases in quantity of images due to the explosion of P2P programs.³¹ The Guidelines provide an aggravating factor for possession of 600 or more images, but do not differentiate between punishments for an offender who possesses 600 images or 6,000 images.³² A defendant in Texas recently admitted to possessing a staggering number of 5 million child pornography files on his computer, with pre-pubescent girls found in 47,000 images and 17,000 videos.³³

Some argue that P2P's capacity to quickly download large volumes of child pornography unfairly saddles offenders with a long sentence for a potentially minimal, single act. Although P2P allows users to download thousands of images at once, this does not mean that large numbers of images should be ignored or treated as the new norm for sentencing purposes; half of offenders possess fewer than 100 images and only 14% possess more than 1,000 images.³⁴ The more images an offender possesses, the more children were harmed for his sick gratification—offenders should be punished to vindicate every child that is “harm[ed] and debase[d]”³⁵ for their gratification. If quantity-based sentencing is to remain one of the Guidelines' central tenets, Congress must update the Guidelines to keep up with technology and punish offenders who download more than the average offender.

To highlight the failure of the Guidelines to punish offenders who possess images of very young children, consider a defendant with no prior criminal history³⁶ who possesses between 10-150 child pornography images.³⁷ The defendant's sentence calculation would begin at Level 18,

30. The suggested sentence ranges overlap such that a two-level increase could result in the same sentence as the base level, without requiring additional punishment for the aggravating criminal behavior. *See id.* § 5A.

31. Wolak et al., *supra* note 10, at 10. The authors discuss that child pornography on file sharing programs increased by 300% in 2014.

32. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (U.S. Sentencing Comm'n) (2014).

33. *Southeast Texas Man Admits Possessing More Than 5 Million Child Pornography Images on His Computer*, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT (Oct. 30, 2014), <https://www.ice.gov/news/releases/southeast-texas-man-admits-possessing-more-5-million-child-pornography-images-his>. The defendant received a sentence of 97 months in prison, followed by lifetime supervised release.

34. Wolak et al., *supra* note 19, at 6.

35. *United States v. Williams*, 553 U.S. 285, 307 (2008). The Court noted that “[c]hild pornography harms and debases the most defenseless of our citizens.”

36. The average defendant arrested for possession of child pornography has no prior criminal history. *United States v. Lychock*, 578 F.3d 214, 220 (3d Cir. 2009).

37. These are the features that would place a defendant at a base sentencing level for comparison.

which carries a sentence of 27-33 months. If the images contained images of 12 year olds or 2 year olds, the Guidelines call for a 2-level increase to Level 20,³⁸ which calls for a sentence of 33-41 months.³⁹ At both Level 18 and Level 20, a sentence of 33 months is within the Guidelines,⁴⁰ meaning that a defendant could receive the same sentence for pornographic images of toddlers or post-pubescent teenagers. It would seem reasonable to sentence a defendant who possessed images of small children to a longer sentence than one who possessed images of post-pubescent children. However, because both defendants' sentences fall within the Guidelines' suggested sentences, both sentences would enjoy a presumption of reasonableness on appeal.⁴¹

II. BOOKER AND THE JUDICIAL SHIFT AWAY FROM FEDERAL SENTENCING GUIDELINES

At first glance, the potential for inconsistency between sentences as illustrated in the hypothetical sentences of these defendants would suggest that the Guidelines are out of touch with the variable severities of criminal behavior that exist within child pornography possession. It is for this reason that, in 2005, the Supreme Court held in *United States v. Booker* that the Guidelines were merely advisory, rather than mandatory.⁴²

A. *Why Judges Are Frequently Issuing Downward Departures from the Guidelines*

The Court wrote that judges should consider the statutory sentencing factors listed in 18 U.S.C. § 3553(a), along with the Guidelines, when issuing a sentence.⁴³ In its opinion in *Rita v. United States*, the Court held that sentences which fall within the Guidelines enjoy a presumption of reasonableness.⁴⁴ However, a court may embark on a downward departure from the Guidelines if it makes factual findings for its departure, which is subject to an appellate standard of review for abuse of discretion or reasonableness.⁴⁵ When weighing 18 U.S.C. § 3553(a) factors, a court should sentence the defendant to sufficiently comply with the theories of punishment, but not sentence him or her greater than is

38. *Id.* § 2G2.2(b)(2).

39. *Id.* ch. 5, pt. A5A.

40. *See id.*

41. *Rita v. United States*, 551 U.S. 338, 347 (2007).

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

43. *Id.* at 249.

44. *Rita*, 551 U.S. at 347.

45. *Id.* at 350, 362.

necessary to effect the purpose of the theories of punishment.⁴⁶ The factors set forth in 18 U.S.C. § 3553(a) emphasize the importance of deterrence, incapacitation, rehabilitation, and retribution,⁴⁷ and provide a framework for the factual findings a court should make when departing from the Guidelines.⁴⁸

Some courts have utilized *Booker*'s analysis of 18 U.S.C. § 3553(a) to depart significantly from the Guidelines. In *United States v. Wachowiak*, the U.S. District Court for the Eastern District of Wisconsin sentenced Robert Wachowiak to seventy months' imprisonment⁴⁹ for possession of child pornography that merited 121-151 months' imprisonment under the Guidelines.⁵⁰ Wachowiak, a children's piano teacher, used the file-hosting site Limewire to download and distribute over 600 images of child pornography.⁵¹ Although Wachowiak possessed over 600 pornographic images of children under 12 years old, 9 of which were sadistic images portraying bondage,⁵² the District Court held that the Guidelines were too harsh and did not allow room to consider Wachowiak's "outstanding character."⁵³ The District Court drastically departed from the Guidelines because Wachowiak lacked a criminal record, benefited from strong family support, and had demonstrated remorse for his actions, and the court further noted that the sole reason it did not sentence Wachowiak to the statutory minimum of sixty months was the presence of significant aggravating factors—the large number of images, the depiction of very young children, and the images of sadistic bondage of children—as well as a statement from a victim's mother illustrating the severe harm her child endured.⁵⁴

46. 18 U.S.C. § 3553(a) (2014).

47. Among other factors, the court should consider:

(2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; [and] . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct . . .

Id. (emphasis added).

48. *United States v. Booker*, 543 U.S. 220, 224 (2005).

49. *United States v. Wachowiak*, 412 F. Supp. 2d 958, 964 (E.D. Wis. 2006), *aff'd*, 496 F.3d 744 (7th Cir. 2007).

50. *Id.* at 962.

51. *Id.* at 959.

52. *Id.*

53. *Id.* at 963.

54. *Id.* at 964.

Other courts are using *Booker* to depart entirely from the Guidelines.⁵⁵ In *United States v. Rowan*, the Fifth Circuit Court of Appeals affirmed Rowan's sixty-month probationary sentence, even though the Guidelines called for 46-57 months in prison.⁵⁶ The *Rowan* court explained that departures justified under § 3553(a) are presumptively reasonable.⁵⁷

The Sixth Circuit Court of Appeals held that a similar sentence was not unreasonable in *United States v. Stall*.⁵⁸ Because Stall had developed the habit of intelligently deleting images from his P2P program after directly viewing them, he possessed eighteen images at the time of his arrest, although he admitted to viewing many more images over the course of 5 years.⁵⁹ Stall pled guilty to 2 counts of possession; with the aggravating factors of pre-pubescent children and sadistic violence, his Guidelines range was 57-71 months in prison.⁶⁰ The court sentenced Stall to one day in prison with 10 years of supervised release.⁶¹ In addressing the collateral consequences of the crime, the court noted that Stall suffered significant losses, including his career and relationship with his fiancée.⁶² The court noted that child pornography is a very serious crime, but made no mention of the victim's collateral consequences and did not find the sadism aggravator persuasive.⁶³

Light sentences like Rowan's and Stall's have been imposed in nearly every federal jurisdiction, according to a 2013 list compiled by the Sentencing Resource Counsel, which lists seventy-two child pornography cases in which the defendant received either just one day in prison or a completely probationary sentence.⁶⁴ In *United States v. Wachowiak*, even with the aggravating factors that should have justified calculating the defendant's sentence within the Guidelines, the court

55. *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008).

56. *Id.* at 380-81.

57. *Id.* at 381 (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

When the District Court imposes a non-Guideline sentence, we "may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."

Even if we "might reasonably have concluded that a different sentence was appropriate, [this] is insufficient to justify reversal of the district court."

58. *United States v. Stall*, 581 F.3d 276, 289 (6th Cir. 2009).

59. *Id.* at 278.

60. *Id.* at 279.

61. *Id.* at 277-78.

62. *Id.*

63. *See id.* at 288.

64. *See List of Child Pornography Cases in Which Defendant Received a Sentence of Probation or One Day*, NAT'L FED. DEFENDER SENTENCING RES. PROJECT (2013), <http://www.fd.org/docs/default-source/select-topics-sentencing/list-of-child-pornography-cases-in-which-defendant-received-sentence-of-probation-or-one-day.pdf?sfvrsn=9>.

chose to ignore those factors and instead embarked on a downward departure.⁶⁵ The court made sympathetic, subjective findings under 18 U.S.C. § 3553(a)(1), writing that Wachowiak had been an honors student in high school, that he unfortunately began watching his father's adult pornography collection at age twelve and became addicted to it, staying up all night watching adult pornography, and that eventually, he became entangled in child pornography.⁶⁶ These circumstances, the court found, meant that the sentencing range imposed a punishment greater than necessary to effect the purposes of sentencing under 18 U.S.C. § 3553(a)(2).⁶⁷ Under *Booker*, courts can weigh 18 U.S.C. § 3553(a) factors to create a wider sentence range than its proponents anticipated.

B. Reasoning Behind the Judicial Trend Toward Downward Departures

Author John Grisham, whose friend was prosecuted for and convicted of possession of child pornography, expressed his view on the topic during an interview last year:

We have prisons now filled with guys my age. Sixty-year-old white men in prison who've never harmed anybody, would never touch a child There's so many "sex offenders" – that's what they're called – that they put them in the same prison. Like they're a bunch of perverts We've gone nuts with this incarceration⁶⁸

Grisham, who later recanted his statement,⁶⁹ highlighted a policy argument recognized by many in the judiciary—offenders who view child pornography are much less culpable than those who actually commit the abuse.⁷⁰ Diminished culpability of downloading child pornography, compared to committing child sexual abuse, allows defendants to argue that they are not predatory offenders, but rather are just harmless people caught up in child pornography.⁷¹

65. *United States v. Wachowiak*, 412 F. Supp. 2d 958, 964 (E.D. Wis. 2006).

66. *Id.* at 960.

67. *Id.* at 962.

68. Natalie Robehmed, *Millionaire Author John Grisham Says Not All Men Who Watch Child Porn Are Pedophiles*, FORBES (Oct. 16, 2014, 11:12 AM), <http://www.forbes.com/sites/natalierobehmed/2014/10/16/millionaire-author-john-grisham-says-not-all-men-who-watch-child-porn-are-pedophiles/>.

69. John Grisham, *A Statement from John Grisham* (Oct. 16, 2014), <http://www.jgrisham.com/a-statement-from-john-grisham-2/>.

70. Stephanie Francis Ward, *Courts Are Giving Reduced Terms to Many Child-Porn Defendants*, A.B.A. J. (Aug. 1, 2015), http://www.abajournal.com/magazine/article/courts_are_giving_reduced_terms_to_many_child_porn_defendants.

71. *See id.*

The widespread accessibility of child pornography, as well as convenient P2P programs, adds a deeper component to the argument of diminished culpability. Defendants can argue that they did not knowingly download child pornography because P2P makes it possible to download images in large batches at once, without opening each individual image to see what it contains. P2P users can easily copy the entire contents of another user's folder, whether it contains 5 images or 5,000. According to the American Bar Association (ABA), some studies indicate that as much as eighty-five percent of child pornography convictions stem from P2P.⁷² Instead of viewing P2P programs as fuel for the child pornography problem, some courts view P2P as an unofficial mitigating factor due to the ease of access.⁷³ The ABA article told the story of defendant Richard Bistline, who used P2P sharing to obtain 305 images and 56 videos of child pornography, mostly of adult men raping girls 8-10 years old.⁷⁴ The trial judge, who said Bistline drank from the stream of commerce but did not contribute to the stream of commerce, sentenced Bistline to just one day in prison and 10 years supervised release.⁷⁵

P2P programs also present a problem for courts that differ in their understandings of how P2P programs operate and ultimately, the level of culpability that should attach to P2P sharing. Florida's Fifth District Court of Appeal reversed an appellant's conviction for transmission of child pornography under section 847.0137(2), *Florida Statutes*, because the court found merit in the appellant's argument that keeping child pornography on a shared P2P folder did not constitute transmission, even though the appellant knew that other users would access the images.⁷⁶ However, Florida's Fourth District Court of Appeal recently upheld a defendant's conviction of transmission of child pornography via P2P sharing, writing that "the use of the file-sharing program, where the originator affirmatively grants the receiver access to his files, who can then download the pornographic images . . . constitutes 'transmission' of pornography."⁷⁷

Another reason for downward departures is the members of the judiciary who feel that the Guidelines are too harsh for possessory offenders.⁷⁸ In *Overmyer*, the Sixth Circuit Court of Appeals reviewed Overmyer's sentence of eighty-seven months' imprisonment, which was already at the bottom of the Guideline's range of eighty-seven months to

72. See *id.*

73. See *id.*

74. *Id.*

75. *Id.*

76. *Biller v. State*, 109 So. 3d 1240, 1241 (Fla. 5th DCA 2013).

77. *Smith v. State*, No. 4D14-438, 2015 WL 1334323, at *2 (Fla. 4th DCA (Mar. 25, 2015)).

78. See *United States v. Overmyer*, 663 F.3d 862, 866 (6th Cir. 2011).

108 months.⁷⁹ Overmyer, who possessed ninety images of child pornography, including aggravating images of children in pain and bondage, argued that his lenient sentence was substantively unreasonable and requested the statutory minimum of sixty months' imprisonment.⁸⁰ In his dissent, Judge Merritt criticized the Guidelines for the excessively long and "unconscionably harsh" sentences imposed on possessory defendants.⁸¹

C. Problems with the Reasoning Behind Downward Departures

The reasoning behind downward departures in cases like *Bistline*'s, where defendants possess hundreds of sadistic, pornographic images of young children, is problematic for several reasons. Courts are weakening deterrence by sending the troubling message to offenders that the crime is not serious, normalizing the culture of abuse and exploitation by recognizing "diminished culpability," ignoring congressional intent that possession of sadistic images be punished more severely, and failing to vindicate victims under retributive theory. Offenders who seek out child pornography are not consumers partaking in the stream of commerce, as the *Bistline* court suggested.⁸² There is no legitimate stream of commerce in child pornography and its viewers are far from other consumers who drink from the stream by buying life's necessities.

Courts that engage in drastic downward departures are ignoring a central tenet of the Guidelines. When the Guidelines were revised in 1995 to include an aggravating factor for use of the computer as a two-level sentencing increase, Congress stated that the intent for the increase was to (1) punish offenders more severely in order to combat the dissemination and instantaneous transmission in computer-assisted trafficking of child pornography and (2) combat the increased hardship

79. *Id.* at 863.

80. *Id.* at 864. The majority opinion rejected Overmyer's collateral consequence of loss of his family as a reason to depart from the Guidelines, but recognized his loss as a reason to sentence him at the low end of the Guidelines.

81. *Id.* at 866-67.

The problem in this pornography case is the gross disparity, inequality, and unfairness that exists in sentencing generally, but even more so in these child pornography viewer cases. . . . I would limit the sentence in such cases to the mandatory minimum of 5 years . . . [W]e should remember that in sentencing what is most important is the result: how many years will the defendant spend in prison, how long will his liberty be foreclosed. The Guidelines in this case, as in many cases, are too harsh, here "unconscionably" harsh. . . ."

Id.

82. Ward, *supra* note 70.

that computers posed to investigation and arrest.⁸³ Although P2P allows offenders to quickly obtain child pornography in large quantities and is more difficult for law enforcement to detect—the very behavior that Congress sought to punish in 1995⁸⁴—the courts are now allowing the use of P2P to justify downward departures.

This “ease of access” rationale behind downward departures not only departs from the spirit of congressional intent, but it is recognized nowhere else in criminal law. Ease of access is not a viable excuse for other possessory crimes. Compare the federal sentencing rationales for drug possession and possession of child pornography: like child pornography sentencing, two major components of drug sentencing are the kind of drug and quantity of drug a defendant possesses.⁸⁵ Courts may consider mitigating factors such as the defendant’s role or lack of prior criminal history,⁸⁶ but nowhere in the Guidelines or its case law progeny do courts sympathize with defendants because of the widespread accessibility of drugs and ease with which drugs can be obtained. Perhaps this difference is due to the fact that many, including prosecutors, believe that child pornography offenders are troubled individuals who need to undergo therapy and who may never completely overcome their desire to view child pornography.⁸⁷ For those offenders, a long sentence does little to deter, and may even hurt, their chances at rehabilitation.⁸⁸

However, the same argument could be made for defendants convicted of drug possession. Drug abuse causes the defendants’ bodies to crave the drug in order to function, and drug abusers often need both medical and psychological treatment in order to overcome their addiction.⁸⁹ Unlike possessors of child pornography, drug users do not benefit from the excuse that they did not fully comprehend their actions because the drug was easily accessible in large quantities.

Although *Booker* sought to decrease disparities among sentences,⁹⁰ downward departures are actually creating sentencing disparities. Even offenders themselves are recognizing the disparity. In 2015, a sex offender convicted of possession and distribution of child pornography

83. Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, NAT’L FED. DEFENDER SENTENCING RES. PROJECT, 15, <https://www.fd.org/docs/select-topics---sentencing/child-porn-july-revision.pdf>.

84. *See id.*

85. U.S. SENTENCING COMM’N, DRUG PRIMER 1 (2013), http://www.ussc.gov/sites/default/files/pdf/training/primers/Primer_Drug.pdf.

86. *See* 18 U.S.C. § 3553(a) (2014).

87. Karen Kersting, *New Hope for Sex Offender Treatment*, 34 AM. PSYCHOLOGICAL ASS’N 52, 52 (2003), <http://www.apa.org/monitor/julaug03/newhope.aspx>.

88. *Id.*

89. NAT’L INST. ON DRUG ABUSE, DRUG ABUSE AND ADDICTION, https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/soa_2014.pdf (last updated July 2014).

90. *See* *United States v. Booker*, 543 U.S. 220, 223 (2005).

wrote a letter to the U.S. District Court presiding over Jared Fogle's case.⁹¹ Fogle, a former Subway spokesperson, was charged with possession of child pornography, as well as traveling to meet 2 minors in order to engage in commercial sexual activity. In Fogle's presentencing plea agreement, his attorneys and the Government agreed to seek a sentence of no fewer than 5 years, but no more than 12½ years. Scott Petrie, sentenced to the maximum 40 years in prison for distributing child pornography wrote: "I did not even have sex with a minor as Mr. Fogle has and yet because he has money he is getting a slapp [sic] on the wrist."⁹²

By engaging in departures as in *Wachowiak* and *Rowan*,⁹³ courts appear to write off the lasting psychological harm inflicted upon children and appear to favor rehabilitation of the offender over retribution for the victim. In fact, since *Booker*, only 30% of sentences for possession of child pornography fell within the Guidelines, down from 88% of sentences that fell within the Guidelines pre-*Booker*.⁹⁴

D. Implicit Bias May Explain Lenient Sentencing of Defendants Convicted of Possession of Child Pornography

Implicit bias refers to the negative perceptions that are unconsciously associated with distinct groups of people.⁹⁵ Implicit bias is not racism, and differs from explicit bias or prejudice.⁹⁶ Explicit bias requires either some level of awareness or an embrace of one's bias, but implicit bias is a negative bias that forms quickly without a conscious, negative thought.⁹⁷ Implicit bias was discovered in a 1998 Harvard study that used the implicit-association test (IAT) to compare and analyze participants' positive associations with majority groups and negative associations with minority groups.⁹⁸ The research established the concept of in-group favoritism, the tendency to favor one's own group over the others, as well

91. Letter from Scott Petrie to Judge Tonya Walton Pratt (Aug. 29, 2015) (on file with author).

92. *Id.*

93. See *United States v. Wachowiak*, 412 F. Supp. 2d 958, 964 (E.D. Wis. 2006); *United States v. Rowan*, 530 F.3d 379, 380 (5th Cir. 2008) (giving substantially shorter sentences than suggested in the Guidelines in a 2008 case) (where both defendants possessed child pornography, including pornography with aggravating factors of sadism).

94. U.S. SENTENCING COMM'N, ANALYSIS OF CHILD PORNOGRAPHY OFFENSES 115 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C11_Child_Pornography_Offenses.pdf.

95. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010).

96. See A.B.A. & NAACP LEGAL DEF. & EDUC. FUND, INC., *ABA-LDF Joint Statement on Eliminating Bias in the Criminal Justice System* (July 16, 2015).

97. Kang & Lane, *supra* note 95, at 469-70.

98. *Id.* at 473.

as the tendency for all participants—including minority participants—to associate good things with popular majority groups rather than less popular minority groups.⁹⁹ Various types of implicit bias other than race have been identified—young, slim, able-bodied, heterosexual, light-skinned individuals are unconsciously perceived as more desirable in IAT tests.¹⁰⁰ In the racial bias study, participants are shown either black or white faces, in addition to positive or negative words.¹⁰¹ Participants who quickly associate positive words with white faces and negative words with black faces have a level of implicit bias.¹⁰² Critics of implicit bias research, however, argue that the test merely shows that participants are aware of a bias, and cannot distinguish between those who are aware of the stereotypes and those who are making snap decisions based on their recognition of the stereotypes.¹⁰³

1. How Implicit Bias Can Affect Judges

Judges are entrusted with the responsibility to remain free of bias that would affect their judgments. Some of the participants of the IAT acknowledged that they worked in areas that required them to be impartial, yet still they exhibited implicit bias.¹⁰⁴ Of course, this does not mean that judges are biased individuals; quite the contrary, judges most likely are more aware of the special need to be impartial. Despite their vow to remain unprejudiced, a majority of white judges and a minority of black judges exhibited implicit bias against black people.¹⁰⁵ Judges can be affected by implicit bias just as anyone else; after all, judges are human beings susceptible to the same flawed mental thought processes as the rest of the population.

The President of the American Bar Association, Paulette Brown, is leading the effort to raise awareness and provide training to erode the effects of implicit bias.¹⁰⁶ Ms. Brown is joined by Judge Dana Marks,

99. *Id.* at 476.

100. *Id.* at 474.

101. Matthew Hutson, “Blindspot: Hidden Biases of Good People” by Mahzarin R. Banaji and Anthony G. Greenwald, WASH. POST (Feb. 8, 2013), https://www.washingtonpost.com/opinions/blindspot-hidden-biases-of-good-people-by-mahzarin-r-banaji-and-anthony-g-greenwald/2013/02/08/4c42d6b8-6a1b-11e2-ada3-d86a4806d5ee_story.html.

102. *Id.*

103. *Id.*

104. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES, 14 (2014) http://sentenceingproject.org/doc/publications/rd_Race_and_Punishment.pdf.

105. *Id.*

106. *Judicial Division’s Judges Journal Issue Highlights Implicit Bias*, AMERICAN BAR ASS’N (Dec. 8, 2015), http://www.americanbar.org/news/abanews/aba-news-archives/2015/12/judicial_divisions.html.

who began raising awareness of implicit bias after taking Harvard's online implicit bias test herself.¹⁰⁷ The two women suggest that "raising awareness among judges, training judges to identify and consciously acknowledge implicit bias, making routine checks of one's thought processes and decisions, reducing or removing distractions and sources of stress, reducing sources of ambiguity in decision-making, instituting feedback mechanisms and increasing exposure to stigmatized groups" are good strategies to combat this problem in the future.¹⁰⁸

2. How Implicit Bias Contributes to Racial Disparities within Possessory Child Pornography Sentencing

Scholars have previously recognized racial disparity in the criminal justice system. Racial bias, both conscious and unconscious, is present within every stage of the criminal justice process.¹⁰⁹ Implicit bias explains part of the large race disparity within the criminal justice system.¹¹⁰ Race is the most important factor in whether a defendant receives a death sentence, and it appears to be a motivating factor for victim retribution as well.¹¹¹ Convicted defendants are punished more harshly for the same crime on a white victim than on a black victim.¹¹² Author John Grisham, who criticized the harsh sentencing of child pornography defendants,¹¹³ has worked extensively to highlight and combat these racial disparities within the criminal justice system.¹¹⁴ It is certainly difficult to learn of these findings without realizing that bias of all kinds, including implicit bias, is likely much more pervasive within the criminal justice system than we would think.

According to a U.S. Sentencing Commission Survey, 70% of federal district judges feel that sentences are too harsh on possessors of child pornography.¹¹⁵ From the perspective of those who recognize implicit

107. *Id.*

108. *Id.*

109. JENNIFER K. ELEK & PAULA HANNAFORD-AGOR, CAN EXPLICIT INSTRUCTIONS REDUCE EXPRESSIONS OF IMPLICIT BIAS?: NEW QUESTIONS FOLLOWING A TEST OF A SPECIALIZED JURY INSTRUCTION, NAT'L CTR. FOR STATE CTS. 4 (2014), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/What%20We%20Do/Can%20Explicit%20Instructions%20Reduce%20Expressions%20of%20Implicit%20Bias.ashx>.

110. *Id.* at 3.

111. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 13 (2013), http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf.

112. *Id.*

113. See Robehmed, *supra* note 68.

114. Radley Bradko, *In Defense of John Grisham*, WASH. POST (Oct. 16, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/10/16/in-defense-of-john-grisham/>.

115. U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES, JANUARY 2010 THROUGH MARCH 2010, question 8: Appropriateness of Guideline Ranges (2010),

bias and its effects, it is not surprising to learn that 70% of federal court judges are white men.¹¹⁶ Additionally, most federal judges are at least 50 years old and do not have a mandatory retirement age as most state court judges do.¹¹⁷ In fact, the average age of President Barack Obama's 214 federal court nominees was 54.1 years old.¹¹⁸ This data quantifies the rather obvious observation that most federal judges are older, white men.

Compare the older, white male stereotype of federal judges to that of the average child pornography defendant: 99% are male, nearly 89% are white, over 50% have some level of college education,¹¹⁹ and their average age is 41.¹²⁰ In addition, most child pornography defendants do not have a criminal record.¹²¹ Their demographic closely resembles that of federal judges.

Implicit bias research demonstrates that most people have more empathy and mercy for defendants who look like them, and take more time to consider the circumstances of the crime.¹²² However, when viewing someone of a different race, people are more likely to react with anger and outrage.¹²³ This explains how the same criminal justice system can be enthusiastic about creating a "War on Drugs" that has disproportionately affected black defendants,¹²⁴ but enthusiastically rallies around white defendants convicted of child pornography offenses in an effort to save them from the harsh sentencing they await. Implicit bias research also explains why the judges in *Wachowiak*, *Rowan*, *Stall*, and *Overmyer* engage in a thorough, detailed analysis of the circumstances surrounding the crime and make an effort to weigh mitigating factors more heavily than aggravating factors. Arguably, loss

available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf (last visited Dec. 1, 2015).

116. Russell Wheeler, *The Changing Face of the Federal Judiciary*, BROOKINGS INST. (2009), http://www.brookings.edu/~media/research/files/papers/2009/8/federal-judiciary-wheeler/08_federal_judiciary_wheeler.pdf.

117. Herman Schwartz, *Obama's Federal Judiciary Failures*, NATION (Jan. 2, 2013), <http://www.thenation.com/article/obamas-federal-judiciary-failures/>.

118. *Id.*

119. Spearlt, *Child Pornography Sentencing and Demographic Data: Reforming Through Research*, 24 FED. SENT'G REP. 102, 103 (2011).

120. U.S. SENTENCING COMM'N, 2014 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS TABLE 6 (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table06.pdf>.

121. Spearlt, *supra* note 119, at 103.

122. NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES 18 (2014), http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf.

123. *Id.*

124. NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 753-54 (3d ed. 2013).

of a fiancée is a collateral consequence of a crime,¹²⁵ not a mitigating factor that should result in an easier sentence, and treating it as such appears to be an attempt to turn any viable excuse into an effort to impute a more lenient sentence. Implicit bias asks us whether the same allowance would be made for black defendants, and the great racial disparity within the criminal justice system provides the answer—that the system would not make and has not made the same allowances, but rather it picks and chooses which crimes and racial groups to sentence harshly.

III. *PAROLINE* HOLDS POSSESSORY OFFENDERS ACCOUNTABLE FOR ABUSE OF CHILD VICTIMS

Recently, the Supreme Court analyzed the roles of victim and offender in *Paroline v. United States*.¹²⁶ *Paroline* examined the claim of the victim, “Amy,” for damages against Doyle Paroline, who was convicted of possessing 150-300 images of child pornography, including two images of Amy, who was abused as a young girl by her uncle.¹²⁷ After Amy’s uncle was convicted and imprisoned, Amy underwent therapy to recover from the trauma and experienced marked improvement.¹²⁸ However, when she was 17 years old, Amy realized that images of her abuse were still being circulated on the Internet and her recovery regressed; Paroline was one of thousands who witnessed Amy’s abuse, and Amy asked for \$3.4 million in restitution. The issue in *Paroline* was whether the Government must establish proximate cause for all losses in order to collect restitution for the victim.¹²⁹ However, *Paroline*’s analysis of possessory offenders’ causation role is extraordinarily helpful in justifying Guidelines sentences.

Images are a permanent memorial to the child’s sexual abuse.¹³⁰ Because the pornography is produced with the intent of being preserved, shared, and viewed repeatedly, offenders harmfully exploit children every time they view it.¹³¹ The Court noted that harms of this sort are a major reason why child pornography is outlawed and why restitution to victims should be made more frequently: “The unlawful conduct of everyone who reproduces, distributes, or possesses the images of the victim’s abuse—including Paroline—plays a part in sustaining and

125. *United States v. Stall*, 581 F.3d 276, 279 (6th Cir. 2009).

126. *See Paroline v. United States*, 134 S. Ct. 1710, 1713 (2014).

127. *Id.* at 1716.

128. *Id.* at 1717-18 (Amy sued under 18 U.S.C. § 2259, which allows for victims of sex crimes to collect restitution for medical costs, therapy, lost income, attorney’s fees, and other losses suffered as a proximate cause of the crime).

129. *Id.* at 1719.

130. *United States v. McGarity*, 669 F.3d 1218, 1269 (11th Cir. 2012).

131. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

aggravating this tragedy.”¹³² The Court suggested that Paroline pay Amy restitution proportional to his role in the abuse, in order to aid her process of recovery and teach offenders that their possession affects real victims for years after the actual abuse is over.¹³³

Paroline is a refreshing analysis that recognizes the contribution that mere possessors of child pornography make to child victims’ horrific abuse. The tone of *Paroline*, while recognizing that possessory offenders should be punished in proportion to their contribution to the abuse, contrasts with the *Bislone* court’s opinion that offenders are merely “[drinking] from the stream of commerce.”¹³⁴ The *Paroline* Court recognized that the polluted stream of child pornography continues to flow and flourish because of the downstream “consumers” who eagerly drink from it, knowing that innocent children were exploited to whet their deplorable thirst.¹³⁵

IV. THE EFFECTS OF CHILD SEXUAL ABUSE JUSTIFY SENTENCES WITHIN THE GUIDELINES

Child sexual abuse is just one of many negative childhood experiences that are collectively referred to as an adverse childhood experience (ACE), which consists of traumas such as physical abuse, neglect, witnessing domestic violence, and having an incarcerated parent.¹³⁶ ACEs gained recognition in a study which presented several ACEs and asked the 17,337 participants to note if they had ever experienced that ACE, but did not ask participants how many times they had experienced the ACE or for how long.¹³⁷ The results were staggering—out of the 17,337 participants, 28.3% had been physically abused, 20.7% had been sexually abused, and 36.1% had no ACEs.¹³⁸ The study unveiled medical data that had generally been understood, but had been difficult to quantify. The more ACEs a person has, the more likely he or she will experience psychiatric and physical disease as an adult, due to the

132. *Paroline*, 134 S. Ct. at 1726-27.

133. *Id.* at 1727.

134. Ward, *supra* note 70.

135. *Paroline*, 134 S. Ct. at 1726 (“The unlawful conduct of everyone who reproduces, distributes, or possesses the images of the victim’s abuse—including *Paroline*—plays a part in sustaining and aggravating this tragedy.”).

136. Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiology*, 256 EUR. ARCHIVES OF PSYCHIATRY & CLINICAL NEUROSCIENCE 174, 176 (2006).

137. *Id.* (The 17,337 participants were insured employees of Kaiser Permanente, a California healthcare provider, and suggests that a comparatively high proportion of the subjects were well-educated, middle-class individuals).

138. *Id.* at 177.

continually increased level of stress hormones that destroy a child's developing neural pathways.¹³⁹

A. How Do Adverse Childhood Experiences Harm Children?

As an ACE, child sexual abuse plays a complex role in childhood development. There were 80,000 American children who were victims of sexual abuse in 2006, but not all have developed mental and physical illness.¹⁴⁰ Children raised in a stable family have a better chance to receive proper counseling and to work through the feelings of hopelessness and loss of control that are associated with sexual abuse.¹⁴¹ However, not all children have an adult who will report abuse to the authorities, and sexual abuse is almost always concurrent with other ACEs.¹⁴²

Child sexual abuse increases the risk of mental and physical disease. Child sexual abuse increases the chances of developing a psychiatric disorder by twenty-four percent for women and thirteen percent for men, not including the increased potential for post-traumatic stress disorder, suicidal thoughts, depression, substance abuse, obesity, and repeat victimization as an adult.¹⁴³ Other studies have found a strong correlation between the severity of child sexual abuse and the mean ACE score—multiple episodes or perpetrators and violent sexual abuse all correlate to multiple ACEs, a higher mean ACE score, and a much greater risk of mental and physical disease.¹⁴⁴ After they are sexually abused, children are more likely to experience unintended pregnancies, liver problems, alcoholism, drug addiction, and nicotine addiction.¹⁴⁵ Neurodevelopmental disruptions that occur when a child is sexually abused increases the risk of disease.¹⁴⁶

Sexual abuse particularly affects a child's neurodevelopment through epigenetics, the study of how and when external stressors affect an individual's phenotype—that is, the study of changes in gene function,

139. *Id.* at 180.

140. Gail Horner, *Child Sexual Abuse: Consequences and Implications*, 24 J. PEDIATRIC HEALTH CARE 358, 358 (2010).

141. *Id.* at 359.

142. *Id.* at 358. (Child sexual abuse is frequently accompanied by emotional or physical abuse, parental violence, household substance abuse, or household mental illness).

143. *Id.* at 360-61.

144. Maxia Dong et al., *The Relationship of Exposure to Childhood Sexual Abuse to Other Forms of Abuse, Neglect, and Household Dysfunction During Childhood*, 27 CHILD ABUSE & NEGLECT, 625, 635 (2003).

145. Shanta R. Dupe et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREVENTATIVE MED. 430, 431 (2005).

146. *Id.* at 435.

even though gene structure remains unchanged.¹⁴⁷ Genes that code for serotonin transportation in the brain are particularly affected by child sexual abuse.¹⁴⁸ Child sexual abuse increases methylation of serotonin transporter genes,¹⁴⁹ preventing the transporters from interacting with receptors meant to receive serotonin, and producing psychiatric symptoms like aggressiveness and poor impulse control due to a lack of serotonin.¹⁵⁰

B. Sentencing Courts Should Consider Adverse Childhood Experiences

Child abuse and neglect cost \$124 billion each year, according to the Centers for Disease Control and Prevention (CDC).¹⁵¹ If courts recognize the medical significance of ACEs and the effect abuse has on children, courts can attach another layer of blame to possessory offenders in the same manner that the Court attached liability to the offender in *Paroline*, and can recognize that part of a child victim's psychological harm extends into adulthood. For victims, adulthood brings renewed shame and stigma due to the awareness that their sexual abuse has been preserved and shared around the world, with some victims admitting that they are afraid of common tasks like grocery shopping or job interviews because they are afraid that the men with whom they interact may have viewed their abuse.¹⁵²

C. The Effects of Child Sexual Abuse Relate to the Purposes of Punishment

18 U.S.C. § 3553(a) should ultimately govern any downward departures from the Guidelines.¹⁵³ However, sentencing courts should

147. *Id.* at 434.

148. See Meeshanithini Vijayendran et al., *Effects of Genotype and Child Abuse on DNA Methylation and Gene Expression at the Serotonin Transporter*, 3 FRONTIERS IN PSYCHIATRY 1, 1 (2012).

149. Properly functioning serotonin transporters are crucial to psychiatric health. *Id.*

150. Steven R. H. Beach et al., *Methylation at 5HTT Mediates the Impact of Child Sex Abuse on Women's Antisocial Behavior: An Examination of the Iowa Adoptee Sample*, 73 PSYCHOSOMATIC MED. 83, 83 (2011). Although epigenetic expression was once thought to not be hereditary, further research has shown that parents can pass epigenetic expression to their children, further propagating the great societal harm that child sexual abuse causes. Vijayendran et al., *supra* note 148, at 4.

151. *Child Abuse and Neglect Cost the United States \$124 Billion*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 1, 2012), http://www.cdc.gov/media/releases/2012/p0201_child_abuse.html.

152. *Public Hearing on Federal Child Pornography Offenses Before the United States Sentencing Comm'n*, 4 (Feb. 15, 2012) (statement of Susan Howley, Chair, Victims Advisory Group).

153. *United States v. Booker*, 543 U.S. 220, 224 (2005).

keep ACEs in mind when weighing the factors because every child pornography victim suffers from the sexual abuse ACE. ACEs lend strength to 18 U.S.C. § 3553(a)(2)(A), the seriousness of the offense and just punishment; child sexual abuse causes lasting damage to child neurodevelopment and reduces victims' abilities to cope with life's normal stressors.¹⁵⁴

18 U.S.C. § 3553(a)(2)(C) could also be viewed differently—protecting the public from future crimes of the defendant surely would become a heftier factor if courts recognized the fiscal,¹⁵⁵ medical,¹⁵⁶ and emotional¹⁵⁷ cost of child sexual abuse, especially considering the severe emotional trauma that plagues child pornography victims throughout their lives, knowing that more offenders are viewing their abuse.¹⁵⁸ Further possession exacerbates the initial harm of abuse and prevents victims from healing; possessory defendants keep victims trapped in a world of constant stress, humiliation, and shame.¹⁵⁹ Every time a defendant views the abuse, he contributes to the problem of child pornography and re-victimizes the now-adult victim.

D. The Trauma-Informed Court Movement Supports Recognition of Adverse Childhood Experiences in the Legal System

Child sexual abuse is just one of many unfortunate childhood experiences that can lead to lasting harm for the victim.¹⁶⁰ A sound or smell can trigger a memory that reignites the victim's trauma.¹⁶¹ Unfortunately, child sexual abuse can lead the victim to engage in substance abuse, risky behaviors, and even criminal activity as coping mechanisms for his or her abuse.¹⁶² Instead of recognizing the abuse and providing treatment, children are often medicated and misdiagnosed with mental illnesses:

154. Gail Horner, *Child Sexual Abuse: Consequences and Implications*, 24 J. PEDIATRIC HEALTH CARE 358, 360-61 (2010).

155. *Child Abuse and Neglect Cost the United States \$124 Billion*, *supra* note 151, at 23.

156. Dube et al., *supra* note 145, at 431.

157. Beach et al., *supra* note 150, at 83.

158. *Paroline v. United States*, 134 S. Ct. 1710, 1717 (2014).

159. *APSAC Statement on the Harm to Child Pornography Victims*, AMERICAN PROF'L SOC'Y ON THE ABUSE OF CHILD., 1, 22 (Oct. 18, 2013), <http://www.apsac.org/assets/documents/apsac%20statement%20on%20harm%20to%20child%20pornography%20victims%2010.29.13.pdf>.

160. *Essential Components of Trauma-Informed Judicial Practice*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN. 1, 2 (Apr. 2011), http://www.nasmhpd.org/sites/default/files/JudgesEssential_5%201%202013finaldraft.pdf.

161. *Id.*

162. *Id.* at 3.

I was in the mental health system for 14 years before somebody thought to ask me if I'd been hit, kicked, punched, slapped, or knocked out. When they asked those kinds of questions, I said, "Oh, yeah, sure." But when they asked if I'd been abused, I said, "No." It was just my life.¹⁶³

The criminal justice system has already failed victims like these. However, the trauma-informed court movement is working to highlight the effects of lasting stress and trauma that defendants inflict upon their victims, and provide courts with the understanding necessary to prevent re-victimization.¹⁶⁴ Much of this research includes recognition of ACEs as being legitimate, scientific, and quantifiable results of abuse, and acknowledges that this harm never completely goes away and can be made worse by triggering events.¹⁶⁵

Part of this problem can be prevented by attorneys who are mindful of trauma when interviewing child clients. Many abused children end up in the family or juvenile courts at some point during their lives.¹⁶⁶ Attorneys who incorporate trauma-centered screenings into their interviews with child clients can proactively seek out children who have been abused and help them get the help that they need.¹⁶⁷ Early recognition and treatment for childhood abuse can assist these children in obtaining counseling services while they are still young enough to learn positive coping mechanisms.

V. CRITICISMS OF *PAROLINE*

Not surprisingly, there are individuals who criticize the emphasis on victims that *Paroline* employs. Their criticism, however, highlights a valid point: not all child sexual abuse victims are aware that their images are circulating, and therefore, are not experiencing any stress and harm due to possessory offenders.¹⁶⁸ Critics of the Guidelines also argue that some victims who are recorded while performing sexual acts on

163. *Id.*

164. *Id.* at 1.

165. *Id.* at 2.

166. Karen A. Reitman, *Attorneys for Children Guide to Interviewing Clients: Integrating Trauma Informed Care and Solution Focused Strategies*, at 2 (2011), https://s3.amazonaws.com/PHR_other/guide-to-interviewing-child-clients.pdf.

167. *Id.* at 3.

168. *On Behalf of the Federal Public and Community Defenders: United States Sentencing Comm'n Public Hearing on Child Pornography Sentencing*, 41 (Feb. 15, 2012) (statement of Deirdre D. von Dornum), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meeting_s/20120215-16/Testimony_15_vonDornum.pdf [hereinafter *On Behalf of the Federal Public and Community Defenders*].

themselves are not victims of sexual abuse and may not even be aware that they were recorded.¹⁶⁹ Victims may be difficult to locate because many images, especially those of violent sexual abuse, purposefully do not depict the victim's face.¹⁷⁰ Critics also argue that the advent of sexting and self-produced child pornography lessens the harm victims experience from its subsequent possession and distribution among strangers online.¹⁷¹

It is true that victims will not experience subsequent stress from defendants' possession if they are unaware their images are circulating online. As *Paroline* stressed, however, victims' stress from their awareness should be compensated by restitution, which is a proportional aspect of a defendant's sentence.¹⁷² Additionally, the argument that children who are not touched while committing a sexual act on themselves are not victims of child abuse is flawed. Children who appear to be at ease being recorded during sexual acts have most likely been groomed by their abuser.¹⁷³ Whether or not contact is involved, these children are exploited for the sexual gratification of both the producer and the possessor. Lastly, children who self-produce child pornography by sexting are of the age to experience significant embarrassment and stress from the knowledge that an image has traveled beyond its intended recipient. Children who sext may initially waive their rights as victims as to the intended recipient, but do not waive their right to be distressed when the image goes beyond its intended recipient.

VI. THE GUIDELINES CAN BE IMPROVED TO ELIMINATE SOME ASPECTS OF HARSH SENTENCING WHILE MAINTAINING A SERIOUS STANCE ON PUNISHMENT DUE TO THE EXTENSIVE HARM INFLICTED BY EVEN POSSESSORY OFFENDERS

The current Guidelines are not perfect, and could certainly be improved to be fairer to possessory offenders. For example, use of a computer to access child pornography is a two-level increase,¹⁷⁴ but critics argue that nearly every American has a computer and uses it

169. Ethel Quayle & Terry Jones, *Sexualized Images of Children on the Internet*, 23 SEXUAL ABUSE: J. RES. & TREATMENT 7, 10 (2011).

170. *On Behalf of the Federal Public and Community Defenders*, *supra* note 168.

171. *Id.*

172. See *Paroline v. United States*, 134 S. Ct. 1710, 1727 (2014).

173. ANTONIA QUADARA ET. AL., AUSTRALIAN INST. OF FAMILY STUDIES, CONCEPTUALISING THE PREVENTION OF CHILD SEXUAL ABUSE, at 27, <https://aifs.gov.au/sites/default/files/publication-documents/r33.pdf>.

174. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (U.S. SENTENCING COMM'N 2014).

extensively within every aspect of his or her own life.¹⁷⁵ While the use of a computer certainly makes it easier to access and share large amounts of pornography at once, it is no longer a rare departure from the typical criminal behavior—ninety-seven percent of 1,012 child pornography defendants used a computer to obtain the images.¹⁷⁶ Aggravating factors are meant to punish more rare or dangerous criminal behaviors that are beyond the scope of the average criminal behavior, not meant to enhance punishment for the average criminal behavior.¹⁷⁷

A. The Use of a P2P Program Should Replace the Enhancement for Use of a Computer

Instead of keeping the two-level increase for use of a computer, the Sentencing Commission should consider replacing it with use of a P2P program. Arguably, P2P is the most technologically advanced method to date for quickly sharing large amounts of pornography at once,¹⁷⁸ and the Guidelines should specifically address how to handle P2P because courts clearly need guidance on how to approach P2P within sentencing. The Eighth Circuit Court of Appeals treats the installation of P2P software as distribution for non-pecuniary gain, a five-level increase,¹⁷⁹ while the Eleventh Circuit Court of Appeals has held that installation of P2P does not constitute distribution for non-pecuniary gain.¹⁸⁰ Florida state courts are split on whether P2P even constitutes transmission.¹⁸¹

Although use of P2P is on the rise, it is still not part of the average criminal behavior because not all child pornography defendants use P2P,¹⁸² and installing P2P on a computer does require some additional action, planning, and culpability. P2P is not the same as clicking a button on a link for a pornographic picture or video. P2P requires installation of the software, setting one's folders to be either public or private, allowing

175. See *On Behalf of the Federal Public and Community Defenders: United States Sentencing Comm'n Public Hearing on Child Pornography Sentencing*, 8, 10, 17, 20, 23–24, 58 (Feb. 15, 2012) (statement of Deirdre D. von Dornum), available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_vonDornum.pdf (last visited Dec. 10, 2015).

176. Mark Motivans & Tracey Kyckelhahn, *Federal Prosecution of Child Sex Exploitation Offenders, 2006*, BUREAU OF JUSTICE STATISTICS BULL. 6 (Dec. 2007), <http://www.ojp.usdoj.gov/bjs/pub/pdf/fpcseo06.pdf>.

177. DEMLEITNER ET AL., *supra* note 124, at 169.

178. See INTERNET WATCH FOUNDATION, *Annual Report 2014*, at 10 fig. 3, https://www.iwf.org.uk/assets/media/annual-reports/IWF_Annual_Report_14_web.pdf.

179. *United States v. Stults*, 575 F.3d 834, 840 (8th Cir. 2009).

180. *United States v. Spriggs*, 666 F.3d 1284, 1288 (11th Cir. 2012).

181. See *Biller v. State*, 109 So. 3d 1240, 1241 (Fla. 5th DCA 2013); *Smith v. State*, No. 4D14-438, 2015 WL 1334323, at *2-3 (Fla. 4th DCA Mar. 25, 2015).

182. Janis Wolak et al., *Child Pornography Possessors: Trends in Offender and Case Characteristics*, 23 *SEXUAL ABUSE: A J. OF RES. & TREATMENT* 37 (2011).

access to folders, and obtaining access to others' folders. Once a defendant accomplishes all that, the amount of child pornography that can be downloaded at once is extensive and can be accomplished quickly and easily. This does present problems for a defendant who is faced with a quantity-based sentencing scheme.

The overall ease at which defendants obtain such a large amount of illegal images is criticized, but the process to initially engage in this activity is not as easy as critics claim,¹⁸³ and requires some degree of technical knowledge, planning, and intent. Presence of P2P software certainly indicates a higher level of culpability and should be punished accordingly. Therefore, Congress should consider eliminating the increase for use of a computer and replacing it with an increase for use of a P2P program.

B. Videos of Child Pornography Should Be Sentenced According to Length and Content

Currently, all videos depicting child pornography are treated as 75 images within the sentencing scheme.¹⁸⁴ This means that a defendant could receive the maximum sentence under the Guidelines if he possesses a few videos and no still images. England categorizes child pornography videos into content levels: "1) images depicting erotic posing with no sexual activity; 2) sexual activity between children, or solo masturbation by a child; 3) non penetrative sexual activity between adults and children; 4) penetrative sexual activity between children and adults, and 5) sadism or bestiality."¹⁸⁵ Australian courts disagree as to how to appropriately sentence videos to begin with and question whether a video is more serious than a picture.¹⁸⁶

Those courts have also discussed sentencing based on the number of still images that can be made from a video, or the length of the video.¹⁸⁷ Both length and number of stills that can be made from the video are relevant to sentencing because videos are often scanned and organized

183. See *On Behalf of the Federal Public and Community Defenders: United States Sentencing Comm'n Public Hearing on Child Pornography Sentencing*, 19–20 (Feb. 15, 2012) (statement of Deirdre D. von Dornum), http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_vonDornum.pdf.

184. JOHN RICHARD MURPHY, *THE ROLE OF TECHNOLOGY IN CHANGING OUR LAWS REGARDING SEX CRIMES AND OUR DEFENSE OF THOSE ACCUSED OF THESE CRIMES* 2015 WL 4975046, at *5.

185. Robert Bryan, *Sentencing Guidelines Council – Indecent Images of Children*, ONE PAPER BUILDINGS 2 (2014), http://www.onepaper.co.uk/wp-content/uploads/2014/07/N12_Indecent_images_of_children.pdf.

186. ALISDAIR A. GILLESPIE, *CHILD PORNOGRAPHY LAW AND POLICY* 253–55 (2011).

187. *Id.*

into collections of still images for further distribution.¹⁸⁸ Possessors can then selectively obtain the images from the most graphic scene of the video, rather than possess the video in its entirety.¹⁸⁹

A good solution would be to sentence child pornography videos based on length and content—to recognize that an hour-long rape of a child should be punished more severely than a five-minute-long video that does not depict violence or penetration. The current Guidelines stance on videos is easy to apply, but it does not reflect the range of video lengths that each defendant could have. The solution, however, is more difficult to apply. Grading each video according to length and content requires an independent crime laboratory employee to actually watch the entire video and grade it accordingly. Not only is this a repulsive task, but one that would be expensive and time-consuming.

C. Better Forensic Analysis of Defendants' Computers Could Effectively Evaluate Their Culpability to Produce Sentences that Fairly Reflect Individual Degrees of Culpability

P2P offenders could be more fairly sentenced with a full forensic analysis of their computers, but doing so would require scarce and costly forensic analysis, the extent of which is usually determined by accredited law enforcement laboratories.¹⁹⁰ Forensic analysis of computer metadata—which could reveal information on how many times the images were viewed, whether the images were categorized, what sort of searches were performed to obtain the images, and the amount of time spent searching for and viewing images—could be helpful to reveal a defendant's level of intentionality, but it is costly, time-consuming, and already in high demand.¹⁹¹ Because law enforcement laboratories are inundated with work and lack the time and manpower necessary to run a full forensic analysis on each computer, they often provide enough evidence to obtain a conviction and move on to the next case.¹⁹² This is not due to lack of diligence, but rather a limited budget and the need to triage cases in order to identify and locate victims, prevent further harm, and meet the deadlines of each case as it progresses through the criminal justice system.¹⁹³

188. MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY AN INTERNET CRIME 45 (2003).

189. *Id.*

190. Wendy Walsh et al., *Prosecution Dilemmas and Challenges for Child Pornography Crimes: The Third National Juvenile Online Victimization Study (NOV03)*, CRIMES AGAINST CHILDREN RESEARCH CENTER, 5, 7–9 (2013), http://www.unh.edu/ccrc/pdf/CV266_Walsh_Prosecution%20Dilemmas%20for%20CP%20Crimes_FINAL_1-22-13.pdf.

191. *Id.* at 5.

192. *Id.* at 5, 7.

193. *Id.*

D. Victims' Harm and Need for Retribution Will Not Be Minimized with Sensible Changes to the Guidelines

Substantial downward departures from the Guidelines, though they are probably well-intentioned attempts to correct the supposed harshness of the Guidelines, seem to diminish the pervasive and lasting harm inflicted on these child victims. If courts feel that the Guidelines are too harsh, it would be better to adjust flawed Guidelines policies on the front end of the crime, rather than heavily weighing defendant's mitigating factors against victim harm at the end of the case. Correcting the harshness of the sentence at the end sends a message to victims that their loss is not as important as the losses of the defendant and does little to make victims feel whole again.

This idea was illustrated in *Wachowiak*, where the court acknowledged the victim's harm as described in the impact statement from her mother, but instead focused on the defendant's losses as a reason to issue a downward departure.

[T]he guidelines failed to account for the significant collateral consequences defendant suffered as a result of his conviction. His future career as a teacher was ruined, and he was compelled to resign as piano teacher of children and as a church musician. He will also be forced to live with the stigma of being a convicted sex offender.¹⁹⁴

What does this mean for the unfortunate defendants who do not have a sympathetic job, such as teaching, and what sort of message does this reasoning send to the victim? These collateral consequences should remain a well-deserved, personal consequence of the defendant's criminal act, rather than becoming a legal justification for leniency from the court.

VII. DOWNWARD DEPARTURES FROM THE GUIDELINES SHOULD BE THE EXCEPTION FOR POSSESSORY OFFENDERS, NOT THE NEW NORM

The predominate sentencing theory of rehabilitation in issuing a downward departure is misplaced because even possessory offenders are unlikely to be completely rehabilitated.¹⁹⁵ In *Wachowiak*, the defendant's own expert placed him at the lowest risk of recidivism: "a 9% chance of

194. *United States v. Wachowiak*, 412 F. Supp. 2d 958, 963-64 (E.D. Wis. 2006), *aff'd*, 496 F.3d 744 (7th Cir. 2007).

195. *Id.*

recidivism in five years, 13% in 10 years, and 16% in 15 years.”¹⁹⁶ Wachowiak had strong family support,¹⁹⁷ yet still the rates increase noticeably as time progresses. Within 2-8½ years after sentencing, possessory offenders’ overall recidivism rate is 30%, and 7.4% recidivate sexually.¹⁹⁸ An offender with large quantities of child pornography, images of especially young children, or violent sexual images should not feel entitled to a downward departure. Children are too important to allow their exploitation by treating criminals like consumers. Lasting harm, documented by ACEs and digital preservation of the abuse, justifies a Guidelines sentence.

[Pornography] poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.¹⁹⁹

196. *Id.* at 961.

197. *Id.* at 962 (Wachowiak’s girlfriend forgave and agreed to marry him even after his conviction, and he exhibited deep remorse for his actions.).

198. U.S. SENTENCING COMM’N, *RECIDIVISM BY CHILD PORNOGRAPHY OFFENDERS*, 299-300 (2012). *See id.* at 300–01. Statistics show that 2.3% are arrested or convicted for another child pornography offense, 3.6% for a contact sexual offense, and the remaining 1.5% are arrested or convicted for obscenity or commercial sex.

199. *New York v. Ferber*, 458 U. S. 747, 759 n.10 (1982) (quoting David P. Shouvin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981)).

University of Florida Journal of Law and Public Policy

VOLUME 27

AUGUST 2016

NUMBER 2

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The *Journal* thanks Marjorie A. Niblack and the Office of Instructional Resources, University of Florida, for the use of the Century Tower graphic on the back cover.

ACKNOWLEDGMENT

This issue of the *University of Florida Journal of Law and Public Policy* is a direct result of the collaboration and hard work of the *Journal* members, staff, advisors, sponsors, and contributing authors.

The *Journal* extends its deep appreciation for the generosity of the University of Florida Fredric G. Levin College of Law and the Huber C. Hurst Fund in supporting and assisting the *Journal* in its publication of this issue and for supporting our multidisciplinary journal concept.

Special thanks to our faculty advisor, Teresa J. Reid, and our staff editor, Victoria A. Redd.



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The *University of Florida Journal of Law and Public Policy* (ISSN# 1047-8035) is published three times per year and is sponsored by the Warrington College of Business Administration and the Levin College of Law, University of Florida. Printed by Western Newspaper Publishing Co., Indianapolis, IN.

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Subscriptions: \$55.00 U.S. domestic per volume plus sales tax for Florida residents and \$60.00 U.S. international. Single issues are available for \$20.00 U.S. domestic and \$25.00 U.S. international.

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