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LOSING OUR SOUL: JUDICIAL DISCRETION IN SENTENCING
CHILD PORNOGRAPHY OFFENDERS

*Kathryn A. Kimball**

Abstract

Child pornography offenders capitalize on the vulnerability of children and find pleasure in their victims' humiliation. In *United States v. Irey*, the defendant sadistically raped, sodomized, and tortured more than fifty prepubescent girls and then broadcast this abuse across the Internet; yet the court characterized Irey as a "victim" and granted him a downward departure, sentencing him to 12.5 years below the minimum of the range set by the Federal Sentencing Guidelines.

This Note argues that when courts depart from the sentences recommended by the Guidelines for child pornography offenses by improperly weighing the § 3553(a) factors, courts create grossly unjust sentencing disparities for similarly situated defendants, fail to sufficiently prevent recidivism, and underestimate the importance of retribution and deterrence for child pornography offenses. Part I follows the history of the Guidelines before and after the Supreme Court's decision in *Booker*. Part II provides an example of a district court improperly balancing the § 3553(a) factors and the U.S. Court of Appeals for the Eleventh Circuit demonstrating the appropriate method of appellate review. Part III discusses the purposes of punishment in the child pornography context, explores the empirical psychological research (including the controversial Butner Study) that validates the severity of the Guidelines, and demonstrates courts' misplaced reliance on pedophilia as a mitigating factor in sentencing. Finally, Part IV critiques common remedies for these sentencing problems caused by inadvertent judicial activism and offers three novel solutions for child pornography sentencing.

* J.D. Candidate, 2012, University of Florida Levin College of Law; B.A. in Economics, 2009, Covenant College. Foremost, I would like to thank my mom, dad, and sister for their faithful support, patience, and love through every phase of life. I am also deeply grateful to Professor Michael Seigel and Professor Dennis Calfee for their invaluable insights and encouragement during my law school tenure. Special thanks go to the members and editorial staff of the *Florida Law Review* for their relentless hard work. It has been an honor and pleasure to serve as an editor alongside such talented people. Finally, I also dedicate this Note to my Covenant College professors and close friends who gave me grace when I needed it most and who continue to inspire me to make Christ preeminent in all things. "But let justice roll down like waters, and righteousness like an ever-flowing stream." Amos 5:24.

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“*There can be no keener revelation of a society’s soul than the way in which it treats its children.*’ *Given the current statistics surrounding child pornography, we are living in a country that is losing its soul.*”¹

INTRODUCTION

Child pornography offenders fuel a booming \$20 billion Internet industry by turning the abuse of countless child victims into a lucrative commodity.² The repeated viewing of their exploitation causes victims to feel violated long after their initial abuse and to fear being recognized by

1. *United States v. Cunningham*, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010) (footnote omitted) (quoting a statement commonly attributed to Nelson Mandela).

2. Michael L. Bourke & Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-On Child Victimization by Child Pornography Offenders*, 24 J. FAM. VIOLENCE 183, 183–84 (2009) (citing congressional testimony by Ernie Allen, President and CEO of the National Center for Missing and Exploited Children).

those who find pleasure in their humiliation.³ In addition, courts dehumanize child victims by keeping them nameless during prosecutions against their predators⁴—those who produce, distribute, and possess the degrading and vile images.⁵

In *United States v. Irey*,⁶ the defendant sadistically raped, sodomized, and tortured more than fifty prepubescent girls and then broadcast this abuse across the Internet; yet the court characterized Irey as a “victim” and granted him a downward departure, sentencing him to 12.5 years below the minimum of the range set by the Federal Sentencing Guidelines.⁷ When courts fail to recognize the gravity of these offenses by instead focusing upon defendants’ characteristics, courts sterilize the despicable nature of these crimes, misapply the letter and spirit of the law, and ignore the true victims—the children.⁸

As early as 1977, Congress and the Department of Justice realized the long-lasting detrimental effects on children caused by the production, distribution, and possession of child pornography.⁹ In the 1980s, the Supreme Court upheld state statutes banning the possession and distribution of child pornography to control the child abuse necessarily caused by child pornography production.¹⁰ In 2003, Congress passed the

3. *United States v. Diaz*, 720 F. Supp. 2d 1039, 1040–41 (E.D. Wis. 2010); *see, e.g.*, *New York v. Ferber*, 458 U.S. 747, 759 (1982) (stating that “the materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation”); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 501(2)(D), 120 Stat. 587, 624 (2006) (codified as amended at 18 U.S.C. § 2251) (“Every instance of viewing images of child pornography represents a renewed violation of the privacy of the victims and a repetition of their abuse.”).

4. *Cunningham*, 680 F. Supp. 2d at 847.

5. *See, e.g., id.* at 847 (“Child pornography is a vile, heinous crime.”); *United States v. Sarras*, 575 F.3d 1191, 1220 (11th Cir. 2009) (“Child sex crimes are among the most egregious and despicable of societal and criminal offenses . . .”).

6. 612 F.3d 1160 (11th Cir. 2010) (en banc).

7. *See infra* notes 105–13, 123–28, 146, and accompanying text.

8. *See Cunningham*, 680 F. Supp. 2d at 847 (“The sterilization goes far beyond properly removing emotion from sentencing decisions. Images are described in the most clinical sense. Victims all too often remain nameless. The only emotions on display are those of defendants, sorry that their actions were discovered by law enforcement.”). *But see, e.g., Irey*, 612 F.3d at 1178, 1199–1203, 1205–06 (describing how the district court improperly relied upon the defendant’s illness of “pedophilia” and his age upon release).

9. Giannina Marin, Note, *Possession of Child Pornography: Should You Be Convicted when the Computer Cache Does the Saving for You?*, 60 FLA. L. REV. 1205, 1208 (2008) (showing Congress’ concern as early as the passage of the Protection of Children Against Sexual Exploitation Act of 1977).

10. *New York v. Ferber*, 458 U.S. 747, 761, 778 (1982) (allowing New York’s ban on distribution of nonobscene images due to the long-term impact on children); *Osborne v. Ohio*, 495 U.S. 103, 109, 111 (1990) (validating Ohio’s statute that proscribed both possession and viewing of child pornography because of the state’s strong interest in protecting young victims); *see also* Marin, *supra* note 9, at 1208–09.

Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, due to concerns that the growing number of downward departures and unwarranted sentencing disparities for sex offenses against children failed to deter crime.¹¹ Child pornography statutes are currently codified at 18 U.S.C. §§ 2251–2260.¹² Specifically, §§ 2252 and 2252A ban the possession and distribution of child pornography,¹³ while § 2260 prohibits the use of minors to “engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.”¹⁴ In response to the congressional concern that child sex offenses were not being sufficiently punished, the U.S. Attorney’s Office has continuously increased the number of these prosecutions—from 423 cases in 1994 and 1995 combined, to 1,566 cases in 2008 alone.¹⁵ Prosecutors have particularly focused on child pornography offenses,¹⁶ and the average sentence for such offenders has subsequently increased from 36 months in 1995 to 120 months in 2008.¹⁷ Due to these targeted efforts, child pornography offenses currently constitute the largest portion of *all* sexual exploitation cases prosecuted by the U.S. Attorney’s Office.¹⁸

Before the PROTECT Act, courts regularly disregarded congressional and prosecutorial priorities and instead granted downward departures for sexual exploitation offenses against children.¹⁹ Even though Congress has clearly attempted to restrain judicial activism in this arena by specifying a list of factors that should influence sentencing decisions in 18 U.S.C. § 3553(a), courts continually grant significant departures from the Guidelines,²⁰ especially since the Supreme Court made the Guidelines merely “advisory” in *United States v. Booker*.²¹

This Note argues that when courts depart from the sentences recommended by the Guidelines for child pornography offenses by

11. U. S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 52, 115 (2006) [hereinafter FINAL REPORT], available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Submissions/200603_Booker/Booker_Report.pdf.

12. 18 U.S.C. §§ 2251–2260 (2006); see also Marin, *supra* note 9, at 1209.

13. 18 U.S.C. §§ 2252, 2252A (2006).

14. 18 U.S.C. § 2260 (2006) (defining what is commonly referred to as the production of child pornography).

15. *United States v. Cunningham*, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010).

16. Kristin Carlson, Commentary, *Strong Medicine: Toward Effective Sentencing of Child Pornography Offenders*, 109 MICH. L. REV. FIRST IMPRESSIONS 27, 27 (2010), <http://www.michiganlawreview.org/assets/fi/109/carlson.pdf> (stating that child pornography cases constituted 69% of all child exploitation cases in 2006).

17. *Cunningham*, 680 F. Supp. 2d at 847.

18. Anita Lam, Jennifer Mitchell & Michael C. Seto, *Lay Perceptions of Child Pornography Offenders*, 52 CAN. J. CRIMINOLOGY & CRIM. JUST. 174, 174 (2010).

19. FINAL REPORT, *supra* note 11, at 52.

20. *Id.* at 122.

21. 543 U.S. 220, 250 (2005).

improperly weighing the § 3553(a) factors, courts create grossly unjust sentencing disparities for similarly situated defendants, fail to sufficiently prevent recidivism, and underestimate the importance of retribution and deterrence for child pornography offenses.²² Part I follows the history of the Guidelines before and after the Supreme Court's decision in *Booker*. Part II provides an example of a district court improperly balancing the § 3553(a) factors and the U.S. Court of Appeals for the Eleventh Circuit demonstrating the appropriate method of appellate review. Part II concludes by surveying other federal district courts that overinflate the importance of defendants' backgrounds and characteristics at the expense of the other § 3553(a) factors. Part III discusses the purposes of punishment in the child pornography context, exploring the empirical psychological research validating the severity of the Guidelines and demonstrating the misplaced reliance upon pedophilia as a mitigating factor. Finally, Part IV critiques common remedies for the aforementioned sentencing problems caused by inadvertent judicial activism and offers three novel solutions for child pornography sentencing.

I. FEDERAL SENTENCING HISTORY

The current federal sentencing structure²³ empowers federal judges with significant sentencing discretion, and appellate review on substantive grounds remains extremely deferential.²⁴ Despite congressional efforts to limit disparities in sentencing due to judicial freedom,²⁵ the Supreme Court reinstated the historical rights of judges to select from a wide array of sentencing options after successful constitutional challenges to the mandatory Guidelines.²⁶ This Part traces the historical transition from pure judicial discretion in to mandated sentencing per the Guidelines back to judicial freedom once the Court made the Guidelines merely advisory.

22. *Contra* Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 907 (2007) (advocating that judicial discretion in sentencing “lead[s] to greater fairness and equality”).

23. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(3) (2008).

24. *United States v. Irely*, 612 F.3d 1160, 1180 (11th Cir. 2010) (en banc).

25. FINAL REPORT, *supra* note 11, at 52 (explaining that the PROTECT Act's most radical impact was reinstating de novo appellate review of sentencing, thereby undoing the abuse-of-discretion standard established by *Koon v. United States*, 518 U.S. 81, 100 (1996)); *see also* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21 § 401(m)(2)(a), 117 Stat. 650, 675 (2003) (codified as amended in scattered sections of 18, 21, 28, 42, and 47 U.S.C.) (instructing the U.S. Sentencing Commission to amend the Guidelines to prevent more downward departures).

26. *Booker*, 543 U.S. at 250–56.

A. Sentencing Reform Act of 1984

Before the Sentencing Reform Act of 1984 (SRA),²⁷ federal judges possessed virtually unfettered sentencing discretion, provided that they imposed sentences within the statutory boundaries.²⁸ Appellate review was limited to ensuring that sentences did not exceed statutory maximums or fall below statutory minimums.²⁹ This sentencing structure inevitably created widespread disparities in sentencing for similarly situated defendants,³⁰ giving rise to congressional concern and criticism.³¹ A district judge and strong advocate for reform³² described the scheme as “a non-system in which every judge is a law unto himself or herself and the sentence a defendant gets depends on the judge he or she gets.”³³ Because of these arbitrary sentencing disparities and public demand for more certain and severe punishments, a determinate sentencing system ultimately emerged.³⁴

The SRA established a mandatory framework for federal sentencing primarily to reduce the disparities and to increase fairness and uniformity for criminals with similar backgrounds who commit similar crimes.³⁵ The

27. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3559, 3561–3566, 3571–3574, 3581–3586, 3601–3607, 3611–3615, 3621–3625, 3673, 3742 & 28 U.S.C. §§ 991–998 (2006)).

28. Adam Denver Griffin, Note, *The Federal Sentencing Guidelines’ Abuse of Trust Enhancement: An Argument for the Professional Discretion Approach*, 63 FLA. L. REV. 457, 463–64 (2011); U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1–2 (2005) [hereinafter SENTENCING COMM’N], available at http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf.

29. *Irey*, 612 F.3d at 1180–81 (quoting *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (“[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”); *United States v. Tucker*, 404 U.S. 443, 447 (1972) (“[A] sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review.”); see also Griffin, *supra* note 28.

30. Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 3–5 (2005); *Irey*, 612 F.3d at 1181.

31. See, e.g., *Irey*, 612 F.3d at 1181 (citing S. Rep. No. 98-225, at 38–39 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3221–22 (criticizing the “unjustifiably wide range of sentences” that like defendants received)); Griffin, *supra* note 28.

32. Griffin, *supra* note 28, at 463 & n.52; *Irey*, 612 F.3d at 1181 (describing Marvin Frankel as a “leading champion[]” of the reform movement).

33. *Irey*, 612 F.3d at 1181 (quoting Marvin E. Frankel, *Jail-Sentence Reform*, N.Y. TIMES, Jan. 15, 1978, at E21) (internal quotation marks omitted); see also Griffin, *supra* note 28, at 463–64 (quoting MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972) (“[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”)).

34. See Dhammika Dharmapala, Nuno Garoupa & Joanna M. Shepherd, *Legislatures, Judges, and Parole Boards: The Allocation of Discretion Under Determinate Sentencing*, 62 FLA. L. REV. 1037, 1044–45 (2010) (interpreting the successful establishment of determinate sentencing reforms as a result of the coalition between liberal and conservative interests).

35. U.S. DEP’T OF JUSTICE, FACT SHEET: THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL

SRA created the U.S. Sentencing Commission,³⁶ designed to develop and promulgate the Guidelines.³⁷ Under the SRA, courts must first calculate a “base offense level” to measure the seriousness of the crime and then combine it with a “criminal history category” that assesses the defendant’s prior criminal record.³⁸ Together, these scores produce a presumptive sentencing range, expressed in months, which is then subject to upward and downward departures, depending on specific factual findings.³⁹

The binding Guidelines severely limited the ranges of possible sentences judges could impose⁴⁰ and required courts to state reasons for the particular sentences given.⁴¹ Departures from the ranges set by the Guidelines were permissible only if “there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.”⁴² Courts could consult only the Guidelines themselves and the official policy statements of the Commission when ruling on departures,⁴³ and “[i]n most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible.”⁴⁴

The SRA encouraged district courts to “impose a sentence sufficient, but not greater than necessary” to achieve the goals of punishment.⁴⁵ It mandated judges to consider the following § 3553(a) factors: (1) “the nature and circumstances of the offense and the history and characteristics of the defendant;” (2) the need for the sentence to bolster the purposes of punishment; (3) the available kinds of sentences; (4) the Guidelines’ range; (5) the Guidelines’ policy statements; (6) the need to prevent sentencing disparities; and (7) the necessity of restitution to victims.⁴⁶ Additionally,

SENTENCING 1 (2006) [hereinafter FACT SHEET], available at http://www.usdoj.gov/opa/documents/United_States_v_Booker_Fact_Sheet.pdf; Griffin, *supra* note 28, at 464 (explaining Congress’s three goals in federal sentencing: “(1) establishing honesty; (2) creating reasonable uniformity; and (3) achieving proportionality”).

36. See generally Griffin, *supra* note 28, at 464 (stating that the Commission was composed of nine members, seven voting and two nonvoting, and that the Commission’s first set of Guidelines became effective November 1, 1987).

37. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION: CASES, STATUTES, AND EXECUTIVE MATERIALS 372 (3d ed. 2007).

38. *Id.*; SENTENCING COMM’N, *supra* note 28, at 2.

39. MILLER & WRIGHT, *supra* note 37, at 372.

40. *Id.*

41. 18 U.S.C. § 3553(c) (2006).

42. 18 U.S.C. § 3553(b)(1) (2006).

43. *Id.*; United States v. Irey, 612 F.3d 1160, 1181 (11th Cir. 2010) (en banc).

44. United States v. Booker, 543 U.S. 220, 234 (2005); see also Griffin, *supra* note 28, at 464–65 (discussing the limitations placed on district courts following the imposition of the mandatory Guidelines).

45. 18 U.S.C. § 3553(a) (2006).

46. *Id.* § 3553(a)(1)–(7).

the SRA provided limited appellate review to vacate sentences that were “unreasonable” in light of the considerations enumerated under § 3553(a) and the district courts’ stated reasons for the departures.⁴⁷

Conflict over the power of sentencing between the judicial and legislative branches persisted. In 1996, the Supreme Court diminished the role of appellate review in sentencing by lowering the standard to an abuse of discretion,⁴⁸ thereby reclaiming some district court judges’ discretion and allowing for more departures from the Guidelines because of the “due deference” given to district courts.⁴⁹ In response to increased downward departures for sex offenses against children, Congress passed the PROTECT Act in 2003 to reestablish de novo appellate review.⁵⁰ Under the new statute, an appellate court could vacate a departure from a Guideline range if the sentence was based on a factor that did not comport with the § 3553(a) factors.⁵¹ The Guidelines significantly limited departures in sexual exploitation cases by precluding any downward departure other than those specifically detailed in the Guidelines.⁵² The PROTECT Act demonstrated Congress’ desire that the Guidelines should be mandatory⁵³ and that courts should depart from the Guidelines only because of extreme mitigating or aggravating circumstances that the Commission failed to consider when formulating the ranges.⁵⁴

B. *The Booker Era*

In *United States v. Booker*,⁵⁵ the Supreme Court wrenched sentencing power back to district court judges by declaring that the mandatory nature

47. *Id.* § 3742(a)–(b); *Koon v. United States*, 518 U.S. 81, 96 (1996) (stating specifically that § 3742(a)–(b) allow a defendant to appeal an upward departure and the government to appeal a downward departure); *United States v. Booker*, 543 U.S. 220, 261 (2005) (discussing the appellate court’s role of determining whether a sentence is unreasonable “with regard to § 3553(a)”).

48. *Koon*, 518 U.S. at 97.

49. *Id.* (quoting *Williams v. United States*, 503 U.S. 193, 205 (1992)) (stating that the Act “did not alter a court of appeals’ traditional deference to a district court’s exercise of its sentencing discretion . . . [and] ‘it is not the role of an appellate court to substitute its judgment for that of the sentencing court.’” (quoting *Solem v. Helm*, 463 U.S. 277, 290 n.16 (1983))).

50. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 401(d)(1)–(2), 117 Stat. 650, 670 (2003) (codified as amended in scattered sections of 18 U.S.C.).

51. Alan Vinegrad, *The Feeney Amendment: Proposed Sentencing Reforms*, 229 N.Y. L.J., Apr. 8, 2003, available at <http://www.cov.com/files/Publication/65656da5-23b0-4ced-aad9-94e218413e2f/Presentation/PublicationAttachment/5c388c0e-9269-4bf2-a1e3-952c6c406f75/oid6621.pdf>.

52. 18 U.S.C. § 3553(b) (2006); U.S. SENTENCING GUIDELINES MANUAL § 5K2.0(b) (2010).

53. David P. Mason, Note, *Barking Up the Wrong Tree: The Misplaced Furor Over the Feeney Amendment as a Threat to Judicial Independence*, 46 WM. & MARY L. REV. 731, 733 (2004).

54. 18 U.S.C. § 3553(b)(2) (2006).

55. 543 U.S. 220 (2005).

of the Guidelines violated the Sixth Amendment.⁵⁶ The Court held the SRA unconstitutional insofar as the Guidelines permitted a judge to increase the sentence by relying upon facts not established by a jury conviction or guilty plea.⁵⁷ Ironically, the very act of exercising discretion within a sentencing range requires a judge to make implicit findings of fact at sentencing, yet the Court did not address this logical discrepancy.⁵⁸ In an effort to salvage the Guidelines, the Court excised two provisions,⁵⁹ making the Guidelines merely advisory⁶⁰ and establishing a “reasonableness” standard of appellate review.⁶¹ Although the Court recognized that it destroyed the uniformity in sentencing sought by Congress in the SRA,⁶² it relied upon the reasonableness standard of appellate review “to iron out sentencing differences.”⁶³ Furthermore, the Court emphasized the role of the § 3553(a) factors for both district courts’ sentencing decisions and the appellate courts’ reviews for reasonableness.⁶⁴

In *Rita v. United States*,⁶⁵ the Supreme Court emphatically stated that courts of appeals should vacate federal sentences if unreasonable,⁶⁶ a standard that “merely asks whether the trial court abused its discretion.”⁶⁷ The Court specifically held that courts of appeals could presume sentences were reasonable if the sentences fell within the Guidelines’ prescribed ranges.⁶⁸

56. *Id.* at 250–56.

57. *Id.* at 244 (“Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”).

58. Michelle Reiss Drab, Comment, *Constitutional Law: Fact or Factor: The Supreme Court Eliminates Sentencing Factors and the Federal Sentencing Guidelines*, 57 FLA. L. REV. 987, 996 (2005).

59. *Booker*, 543 U.S. at 259 (excising § 3553(b)(1), (e)); *see also* 18 U.S.C. § 3553(b)(1) (2006); 18 U.S.C. § 3742(e) (2006).

60. *Booker*, 543 U.S. at 264 (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”); *see also* Daniel Ryan Koslosky, Comment, *Constitutional Law: Predictability as Fairness and the Possible Return to Federal Indeterminate Sentencing*, 57 FLA. L. REV. 999, 1008 (2005) (explaining how the Court maneuvered the Guidelines to make them merely advisory while not abolishing them with the intent of increasing judicial sentencing discretion).

61. *Booker*, 543 U.S. at 260–61 (establishing “a practical standard of review already familiar to appellate courts: review for ‘unreasonable[ness]’” (quoting 18 U.S.C. § 3742(e)(3) (1994))).

62. *Id.* at 263.

63. *Id.*

64. *Id.* at 261 (“Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.”).

65. 551 U.S. 338 (2007).

66. *Id.* at 341.

67. *Id.* at 351.

68. *Id.* at 347.

More significantly, in *Gall v. United States*,⁶⁹ the Supreme Court faced the issue of “whether a court of appeals may apply a ‘proportionality test,’ and require that a sentence that constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances.”⁷⁰ The Court answered this question with an ambiguous no: all sentences must be reviewed “under a deferential abuse-of-discretion standard,”⁷¹ but “appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines.”⁷² District courts remain compelled to consider the § 3553(a) factors when departing from the Guidelines.⁷³ However, the *Gall* Court expressly limited an appellate court’s review in that “the court may not apply a presumption of unreasonableness. It 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.”⁷⁴

The same day the Court released *Gall*, it also issued its decision in *Kimbrough v. United States*.⁷⁵ The *Kimbrough* Court addressed the controversy surrounding the large sentencing differential under the Guidelines for crack cocaine offenses versus powder cocaine offenses. As prescribed under the recommended Guidelines, there was a 100-to-1 weight ratio, yielding sentences three to six times longer for crack offenses than for powder offenses involving the same quantity of drugs.⁷⁶ In yet the most drastic display of disregard for the Guidelines, the *Kimbrough* Court allowed a district judge’s disagreement with the crack-to-powder ratio to serve as a basis for a downward departure in an otherwise “unremarkable drug-trafficking offense.”⁷⁷ After considering the § 3553(a) factors, the sentencing court found the Guideline-suggested sentence of nineteen years unreasonable and imposed a sentence of fifteen years because it found that

69. 552 U.S. 38 (2007).

70. *Id.* at 40–41.

71. *Id.* at 41.

72. *Id.* at 47.

73. *Id.* at 49–50.

74. *Id.* at 51.

75. 552 U.S. 85 (2007).

76. *Id.* at 94–95. The Court explained that Congress believed the 100-to-1 ratio appropriate because crack cocaine is significantly more dangerous than its powder counterpart for several reasons:

(1) crack was highly addictive; (2) crack users and dealers were more likely to be violent than users and dealers of other drugs; (3) crack was more harmful to users than powder, particularly for children who had been exposed by their mothers’ drug use during pregnancy; (4) crack use was especially prevalent among teenagers; and (5) crack’s potency and low cost were making it increasingly popular.

Id. at 95–96.

77. *Id.* at 110.

sufficient to accomplish the purposes of punishment.⁷⁸ The U.S. Court of Appeals for the Fourth Circuit reversed on the ground that a variance based solely on disagreement with the Guidelines' ratio of crack-to-powder cocaine was per se unreasonable.⁷⁹ The Supreme Court reversed the Fourth Circuit and reinstated the lower court's sentence on the logic that the sentence was reasonable because the district court went through the motions of considering the § 3553(a) factors.⁸⁰

Similarly, in *United States v. Spears*,⁸¹ the Supreme Court, per curiam, granted summary reversal for another ratio of crack-to-powder cocaine sentence.⁸² The U.S. Court of Appeals for the Eighth Circuit had vacated a downward departure because the district court "categorically reject[ed]" the Guidelines' ratio of 100:1, adopting its own 20:1 ratio.⁸³ The Court emphatically drew the new battle line by declaring "that district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines." Overall, *Kimbrough* and *Spears* created a precedential legacy that enables district court judges to categorically reject a Guideline range simply because they believe it yields too severe a result.⁸⁴

C. Booker's Aftermath: Current Sentencing Disparities, Guidelines, and Policy Statements

Predictably, the rate at which courts imposed non-government-sponsored, below-range sentences for child exploitation offenses decreased following the PROTECT Act and increased after *Booker*.⁸⁵ For child pornography production offenses, the percentage of downward departures fell slightly from 3.8% to 1.8% following the PROTECT Act, but they sharply rose to 11.3% after *Booker*.⁸⁶ For distribution and trafficking offenses, the percentage rose from 12.2% to 19.1% following *Booker*.⁸⁷ Perhaps most dramatic, departures for charges involving child pornography possession ping-ponged with the passage of the PROTECT Act and *Booker*: from 25% to 12.3% and to a new high of 26.3%.⁸⁸ Clearly, *Booker*

78. *Id.* at 92–93.

79. *Id.* at 93.

80. *Id.* at 110–11.

81. 555 U.S. 261 (2009).

82. *Id.* at 262–63.

83. *United States v. Spears (Spears II)*, 533 F.3d 715, 717 (8th Cir. 2008) (en banc).

84. *Kimbrough*, 552 U.S. at 110 (holding that "it would *not* be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, *even in a mine-run case*" (emphasis added)).

85. FINAL REPORT, *supra* note 11, at 122.

86. *Id.*

87. *Id.*

88. *Id.*

emboldened federal judges to grant downward departures more freely than under both the mandatory Guidelines' system and the PROTECT Act's requirements.

Even though *Booker* diminishes the Guidelines' potency, the sentencing court must first calculate the appropriate Guideline range and consider the § 3553(a) factors before considering a downward departure.⁸⁹ In evaluating reasons for downward departures for sexual abuse of children offenses, the Guidelines' policy statements specify narrow grounds when downward departures are warranted based on diminished capacity⁹⁰ and aberrant behavior.⁹¹ Unless present to an unusual degree that would justify a departure compared to typical Guidelines' cases, the policy statements encourage courts to disregard factors such as the defendant's age,⁹² health (unless so ill that home confinement is an effective alternative to incarceration),⁹³ and mental or emotional condition.⁹⁴ Moreover, they instruct courts to focus on the primary issue—criminal culpability—and generally to ignore irrelevant factors: the defendant's charitable donations, public service, or prior good works,⁹⁵ family ties and responsibilities,⁹⁶ and substance abuse problems.⁹⁷

Inversely, the Guidelines provide policy statements advising appropriate grounds for upward departures, such as when the offense involves more than ten minors⁹⁸ or the "conduct [is] unusually heinous, cruel, brutal, or degrading to the victim."⁹⁹ These policy statements also urge lifetime terms of supervised release following incarceration for all cases of sex offenses against minors.¹⁰⁰

II. GUIDELINE GUESSING

A. *Eleventh Circuit Archetype*: *United States v. Irey*

In *United States v. Irey*,¹⁰¹ the Eleventh Circuit characterized the defendant's criminal conduct as "virtually unparalleled in a 'most egregious and despicable' field of crime."¹⁰² Beginning in 2001, Irey traveled to brothels in Asian countries to indulge in "sexually disordered

89. *United States v. Booker*, 543 U.S. 220, 259 (2005).

90. U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2010).

91. *Id.* § 5K2.20.

92. *Id.* §§ 5K2.22, 5H1.1.

93. *Id.* § 5H1.4.

94. *Id.* § 5H1.3.

95. *Id.* § 5H1.11.

96. *Id.* § 5H1.6.

97. *Id.* § 5H1.4.

98. *Id.* § 2G2.1 cmt.6.

99. *Id.* § 5K2.8.

100. *Id.* § 5D1.2(b).

101. 612 F.3d 1160 (11th Cir. 2010) (en banc).

102. *Id.* at 1206 (quoting *United States v. Sarras*, 575 F.3d 1191, 1220 (11th Cir. 2009)).

behavior.”¹⁰³ Early in Irey’s Asian debut, he explored sex with Cambodian children and discovered an appetite for raping, sodomizing, and sexually torturing young girls.¹⁰⁴ His debauchery continued over a four- or five-year period, and he recounted engaging in sexual encounters “many many times” with over fifty girls.¹⁰⁵

Irey’s victims were underage and “abjectly impoverished” Cambodian children, some as young as four years old and “perhaps the most vulnerable of the world’s society.”¹⁰⁶ Unlike the children, Irey was in his forties, stood five feet ten inches tall, weighed 200 pounds, and was wealthy enough to purchase these little girls’ bodies.¹⁰⁷ He became “more and more obsessed and was returning to Asia more and more often” to buy sex from these young victims—at one point paying up to \$1,500 per child and usually purchasing multiple children at the same time.¹⁰⁸ When Irey’s business in China prevented him from traveling to them, he would pay to have girls flown to him so that he could abuse them in his free time.¹⁰⁹

Irey, dissatisfied that his repeated sexual predation remained private, “scripted, cast, starred in, produced, and distributed worldwide some of the most graphic and disturbing child pornography that has ever turned up on the [I]nternet.”¹¹⁰ Irey memorialized his abuse both in videos and photographs displaying his wide array of depravity: performing and receiving oral sex from multiple prepubescent females, engaging in anal and vaginal intercourse with prepubescent Asian females, marking girls’ bodies with arrows pointed toward their vaginal areas, binding children with duct tape while raping them, and posing with nude prepubescent children as trophies.¹¹¹

Apparently these acts lacked sufficient vulgarity for Irey. He also enjoyed sadistically torturing the children by inserting various objects such as glow sticks, dildos, and candy into their vaginal cavities.¹¹² Some of the worst torture of the children included “Irey inserting a plastic tube into the vagina of a prepubescent Asian female. Several of the images show the plastic tube containing cockroaches crawling into the vagina of these children [sic].”¹¹³ An accompanying image was titled, in all capital letters, “Big Cock Push Bug Deep Into 9 Yo Girl, She Hurt in Pane” as it shows

103. *Id.* at 1166 (internal quotation marks omitted).

104. *Id.*

105. *Id.* (internal quotation marks omitted).

106. *Id.* (internal quotation marks omitted).

107. *Id.*

108. *Id.* (internal quotation marks omitted).

109. *Id.*

110. *Id.*

111. *Id.* at 1167.

112. *Id.*

113. *Id.* (internal quotation marks omitted).

Irey vaginally penetrating a prepubescent girl.¹¹⁴ This sexually suggestive title exhibits Irey's intent to widely distribute the image.¹¹⁵ Lest one assume Irey felt guilt, several images show him smiling while inflicting the sexual abuse.¹¹⁶

Irey traded his images to gain access to other purveyors' child pornography collections, disseminating his materials around the world.¹¹⁷ Irey's shocking images were infamously dubbed the "pink wall series" due to the pink walls seen in the background; the fact that they earned a sordid nickname belies the widespread viewing of the children's sexual torture.¹¹⁸ When agents seized over 1,200 images from Irey's computer and reported these images to the National Center for Missing and Exploited Children, more than 100 separate law enforcement agencies identified these images in their investigations.¹¹⁹

On July 2, 2007, Irey pleaded "guilty to one count of violating 18 U.S.C. § 2251(c)."¹²⁰ Irey voluntarily admitted he "[w]ent to—overseas [sic], visited numerous brothels where they had underage children and photographed them, had sex with them, and had them on [his] laptop when [he] entered the United States."¹²¹ The Presentence Report calculated the final offense level at forty-three, producing a range of life imprisonment according to the Guidelines.¹²² Unfortunately, because the government

114. *Id.* at 1168 (internal quotation marks omitted).

115. Child pornography offenders typically embed this sort of rhetoric into images in order to increase Internet seekers' access when searching for this disturbing content. *See, e.g.*, Alison Bonelli, Comment, *Computer Searches in Plain View: An Analysis of the Ninth Circuit's Decision in United States v. Comprehensive Drug Testing, Inc.*, 13 U. PA. J. CONST. L. 759, 784 (2011) (describing how a police officer found several files on a defendant's computer saved under sexually suggestive titles and, upon opening the files, discovered child pornography).

116. *Id.*

117. *Id.*

118. *Id.* (internal quotation marks omitted).

119. *Id.*

120. *Id.* at 1168–69 ("The indictment alleged that he 'did knowingly employ, use, persuade, induce, entice, and coerce minors to engage in sexually explicit conduct outside the United States, for the purpose of producing visual depictions of such conduct, and transporting such visual depictions to the United States by any means'").

121. *Id.* at 1169 (internal quotation marks omitted).

122. *Id.* The base offense level was thirty-two under U.S. Sentencing Guidelines Manual § 2G2.1(a) because the offense involved sexually exploiting minors to produce child pornography. In addition to the base offense level of thirty-two, § 2G2.1(b)(1) added four more levels because the minors were under age twelve, § 2G2.1(b)(2)(A) added two more levels because the defendant committed sexual acts himself, § 2G2.1(b)(3) added two more levels for distributing child pornography, § 2G2.1(b)(4) added four more levels for portraying sadistic conduct, and § 3D1.4 added two more levels because of the grouping of multiple victims. After a three-level reduction, two levels under § 3E1.1(a) for acceptance of responsibility and a single level under § 3E1.1(b) for timely notification of intent to plead guilty, the Guidelines produced a final offense level of forty-three—the Guidelines' maximum level. *Id.*

only charged one count, the statutory maximum was thirty years,¹²³ making the new Guideline-recommended sentence 360 months (thirty years).¹²⁴ The statute required a minimum of fifteen years incarceration.¹²⁵

In anticipation of Irey's defense of uncontrollable pedophilia, the government urged the court that, although he may have "experience[d] self-deceptive thought processes," he "has horribly sexually abused numerous children over a period of years" and any variance would be unreasonable due to the serious nature of his offense.¹²⁶ The defense presented two expert witnesses, Dr. Fred Berlin and Dr. Ted Shaw.¹²⁷ Dr. Berlin testified that Irey is a pedophile and that "to the best of [his] knowledge and belief, [Irey] has never coerced an unwilling person against their [sic] will."¹²⁸ Most pertinently, he advised that, although pedophilia develops outside of a volitional decision, Irey still had the capability and responsibility to control his deviant sexual abuse of children, noting "[e]ven without treatment, in the past, he had been able to refrain from any sexual contact with children within the United States."¹²⁹

After doing a psychosexual evaluation of Irey, Dr. Shaw testified that Irey had a low to moderate risk of recidivism.¹³⁰ The court focused Dr. Shaw's attention on pedophilia and asked, "[F]rom a standpoint of criminology, is a person who acts out as a result of this condition acting totally of rational free will or is that person acting out as a result of something that is in essence an illness that he at that point has no control over?"¹³¹ Skillfully evading a definite answer, Dr. Shaw responded, "I think that the fact [is] that pedophilia is not an underlying element for competency or sanity—it is an Axis I, *treatable disorder*."¹³² He explained that pedophiles can control themselves: "[p]edophiles are capable of not re-offending, even if they have an urge, in the same way that compulsive dessert eaters can choose to not eat dessert."¹³³

123. 18 U.S.C. § 2251(c), (e) (2006). The government could have easily avoided the opportunity for an unreasonably low sentence by charging several counts of production, placing the mandatory minimum Guideline sentence well above fifteen years.

124. U.S. SENTENCING GUIDELINES MANUAL § 5G1.1(a) (2010) ("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.").

125. 18 U.S.C. § 2251(c).

126. *Irey*, 612 F.3d at 1170 (internal quotation marks omitted).

127. *Id.* at 1170, 1172.

128. *Id.* at 1171 (internal quotation marks omitted). The Eleventh Circuit explained that, given the uncontroverted facts that Irey raped, sodomized, and tortured over fifty Cambodian children, Irey obviously failed to disclose the full extent of his sexual escapades to Dr. Berlin. *Id.* at 1171 n.6.

129. *Id.* at 1171 (internal quotation marks omitted).

130. *Id.* at 1173.

131. *Id.* at 1174 (internal quotation marks omitted).

132. *Id.* (emphasis added) (internal quotation marks omitted).

133. *Id.* (internal quotation marks omitted).

In closing, defense counsel presented character witnesses—Irey’s wife, daughter, and sons—who praised him as “a loving and wonderful husband and father” and selfless member of the community.¹³⁴ Counsel urged the court to consider Irey’s actions in context of his “exemplary life.”¹³⁵ Considering Dr. Shaw’s testimony, defense counsel contradictorily argued “the behavior of a pedophile is not totally volitional, that is, it is dictated in some degree by the disease itself.”¹³⁶ Counsel concluded by asking the court to consider that the defendant would be in his seventies upon release if sentenced the full thirty years.¹³⁷

The district court proceeded by observing the advisory nature of the Guidelines and then reflected upon each § 3553(a) factor.¹³⁸ The court agreed with the prosecutor that the seriousness of the defendant’s offense “rises to the very top” in terms of its horrific nature and impact.¹³⁹ But the court then made several remarkable comments about the characteristics of the defendant: “Mr. Irey and his family and friends are also victims” of the epidemic of internet child pornography; Irey has been “a good person to his community”; Irey’s acts “were not purely volitional . . . [and] were due in substantial part to a recognized illness [pedophilia]”; Irey has a low risk of recidivism because his age upon release will prevent recidivism from a “physiological standpoint”; and Irey’s loving family “says a lot . . . about Mr. Irey himself.”¹⁴⁰ The court diminished the value of deterrence as an irrational consideration for those suffering from pedophilia,¹⁴¹ and it stated that the government does not need to protect society from Irey beyond the minimum sentence.¹⁴² In concluding the sentencing hearing, the court stated, “It comes down to my view of what promotes respect for the law and provides just punishment,” and imposed a 210-month (17.5-year) sentence.¹⁴³

The Eleventh Circuit initially affirmed the sentence¹⁴⁴ and then, upon a rehearing en banc, vacated the sentence and remanded with instructions to impose the required thirty-year sentence.¹⁴⁵ It explained that the

134. *Id.* at 1175 (internal quotation marks omitted).

135. *Id.* at 1176 (internal quotation marks omitted). Defense counsel urged that these actions were “a compartmentalized area of his whole being that is a result of his pedophilia.” *Id.* at 1175 (internal quotation marks omitted).

136. *Id.* at 1175 (internal quotation marks omitted).

137. *Id.* at 1176.

138. *Id.* at 1177.

139. *Id.* at 1178 (internal quotation marks omitted); *see also* 18 U.S.C. § 3553(a)(1) (2006).

140. *Irey*, 612 F.3d at 1178 (internal quotation marks omitted); *see also* 18 U.S.C. § 3553(a)(1) (2006).

141. *Irey*, 612 F.3d at 1179; *see also* 18 U.S.C. § 3553(a)(2)(B) (2006).

142. *Irey*, 612 F.3d at 1179; *see also* 18 U.S.C. § 3553(a)(2)(C) (2006).

143. *Irey*, 612 F.3d at 1179 (internal quotation marks omitted); *see also* 18 U.S.C. § 3553(a)(2)(A) (2006).

144. *United States v. Irey*, 563 F.3d 1223, 1224 (11th Cir. 2009).

145. *Irey*, 612 F.3d at 1224–25 (holding that because no downward departure is reasonable

appropriate abuse-of-discretion standard of review “allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.”¹⁴⁶ Accordingly, that standard requires the court of appeals to affirm a district court even when it would have imposed a different sentence, so long as the district court’s decision was reasonable.¹⁴⁷ The Eleventh Circuit articulated three ways a district court abuses its discretion: “when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.”¹⁴⁸ This abuse may occur when a district court improperly balances the factors or weighs the factors unreasonably.¹⁴⁹ The reasonableness of the sentence depends on the totality of the facts and circumstances in light of the § 3553(a) factors, which is a question of law, not fact.¹⁵⁰ The sentence will be vacated only if the court of appeals is “left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.”¹⁵¹

The Eleventh Circuit recognized the sentence as a breach of substantive reasonableness, not procedural reasonableness—that is, even though the district court’s sentence was procedurally reasonable because the court nominally took into account the § 3553(a) factors, the sentence was still substantively unreasonable when considered independently and holistically.¹⁵² Consistent with its test for substantive reasonableness, it considered each § 3553(a) factor anew in light of the district court’s factual findings to determine whether there was an abuse of discretion. The court flatly rejected characterizing Irey as a “victim,” both because the facts showed he started viewing child pornography *after* having sex with children and because “[c]hild molesters and the children who are their victims do not occupy the same moral plane.”¹⁵³ It found that the district

under the circumstances, the only available sentence is the Guideline range of thirty years).

146. *Id.* at 1189 (internal quotation marks omitted).

147. *Id.* (distinguishing abuse of discretion from de novo review).

148. *Id.* (quoting *United States v. Campa*, 459 F.3d 1121, 1174 (11th Cir. 2006) (en banc)) (internal quotation marks omitted).

149. *Id.*

150. *Id.* at 1189–90 (explaining that explicit findings of fact by the district court will be accepted, but that the importance of ignored, uncontroverted facts in the evaluation of § 3553(a) factors is a question of law).

151. *Id.* at 1190 (quoting *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008)) (internal quotation marks omitted).

152. *Id.* at 1194. Judge Tjoflat, writing separately, criticized the district court’s procedural failure to make specific findings on the § 3553(a)(2)(A) factors. *Id.* at 1234 (Tjoflat, J., concurring in part and dissenting in part). However, the majority explicitly rejected this criticism and focused instead on substantive reasonableness. *Id.* at 1195 (majority opinion).

153. *Id.* at 1198–99.

court's viewing of Irey as a victim tainted the court's ability to properly weigh the § 3553(a) factors, in particular "the nature and circumstances of the offense and the history and characteristics of the defendant."¹⁵⁴

Next, the court found that the record did not support the finding that pedophilia forced the defendant to rape these children.¹⁵⁵ Rather, both Dr. Shaw's testimony and Irey's consistent lack of offenses in the United States, where detection is high, proved that Irey was capable of controlling his lust for children.¹⁵⁶ The court disagreed "with the apparent weighty consideration that the sentencing judge gave to the notion that this defendant acted on account of some type of "sickness." The defendant acted deliberately, cunningly and with obvious delight."¹⁵⁷

Regarding the defendant's family and community standing, the court equated the district court's findings to "saying that other than the fact he had an 'illness' that made him want to kill young women, Ted Bundy was a pretty nice guy."¹⁵⁸ The Eleventh Circuit held that any mitigation this might suggest was heavily outweighed by the seriousness of Irey's criminal acts.¹⁵⁹ Additionally, his age was an inappropriate factor to weigh against the advisory sentence of the Guidelines.¹⁶⁰

The Eleventh Circuit's weighing of the § 3553(a) factors shows that an appropriate balancing would focus on the purposes of punishment over the defendant's characteristics for this type of offense.¹⁶¹ Three purposes seem controlling here: retribution for the egregious sex crimes against impoverished children, deterrence of other child molesters regardless if the district court disagrees with the policy, and incapacitation because of the high risk to society of recidivism.¹⁶² In conclusion, the Eleventh Circuit found that the district court afforded almost no consideration to the Guidelines and policy statements as directed in § 3553(a).¹⁶³ Therefore, it

The more fundamental problem with the district court's recasting of Irey-the-criminal as Irey-the-victim is the legal premise behind it, one that suggests the criminal is like his victims. Irey is the wrongdoer, the predator, the victimizer. The little girls in Cambodia are the wronged, the prey, the victims. The district court should have kept the two separate and not commingled them in its thinking. . . . Suggesting that Irey, like those little children, was a victim is absurd.

Id. at 1199.

154. *Id.* at 1199 (quoting 18 U.S.C. § 3553(a)(1) (2006)) (internal quotation marks omitted).

155. *Id.* at 1200.

156. *Id.*

157. *Id.* at 1201–02 (quoting *United States v. Irey*, 563 F.3d 1223, 1227 (11th Cir. 2009) (Hill, J., concurring)).

158. *Id.* at 1203.

159. *Id.* at 1205.

160. *Id.* at 1205–06.

161. *Id.* at 1206–17.

162. *Id.*

163. *Id.* at 1217–22.

vacated the district court's sentence and remanded with the direction to impose the only legally reasonable sentence: the statutory maximum thirty-year term.¹⁶⁴

B. *Sentencing Confusion Across the Federal System*

The district court in *Irey* joined many other district courts that disproportionately emphasized the history and characteristics of a defendant at the expense of the other § 3553(a) factors, thereby granting erroneous downward departures. In *United States v. Goldberg*,¹⁶⁵ the defendant was convicted of child pornography possession, resulting in a recommended Guideline sentence of sixty-three to seventy-eight months.¹⁶⁶ Instead of discussing the heinous nature of the images (some showing adult males vaginally penetrating two- or three-year olds), the district court heavily weighed the defendant's psychological treatment needs, deliberated at length about the impact prison would have upon the defendant's life, and focused on the "possibility here that his life can go in a different way."¹⁶⁷ In the end, the district court sentenced him to a single day in prison.¹⁶⁸

In *United States v. Polito*,¹⁶⁹ the defendant was convicted of possession of child pornography; the U.S. Court of Appeals for the Fifth Circuit affirmed the district court's sentence of five years probation, including one year of house arrest,¹⁷⁰ even though the Guidelines recommended a twenty-seven to thirty-three month sentence.¹⁷¹ In discussing its reasons for imposing a sentence below the Guidelines recommended range, the sentencing court highlighted the defendant's age and immaturity at the time of the crime, finding that he "[n]ever intended to conduct predatory sexual activities with children," had no prior convictions, and would suffer mentally from imprisonment.¹⁷² This probationary sentence supposedly would deter similarly situated defendants.¹⁷³

District judges also improperly allow their own personal psychological views about child pornography offenses to affect their sentencing decisions. In *United States v. Goff*,¹⁷⁴ a middle-aged elementary school teacher possessed 360 images of child pornography on his computer, some

164. *Id.* at 1224–25. *But see* *United States v. Irey*, 746 F.2d 1232 (M.D. Fla. 2010) (responding to the Eleventh Circuit's critique of the district court's sentencing and explaining the justifications for the below-range sentence).

165. 491 F.3d 668 (7th Cir. 2007).

166. *Id.* at 669.

167. *Id.* at 669–70.

168. *Id.* at 669.

169. 215 F. App'x 354 (5th Cir. 2007).

170. *Id.* at 355.

171. *Id.* at 356.

172. *Id.* at 356–57.

173. *Id.* at 357.

174. 501 F.3d 250 (3d Cir. 2007).

displaying child rape and oral sex on prepubescent girls.¹⁷⁵ “Interrupting the prosecutor’s argument that child pornography possession is ‘a serious matter and should be punished seriously,’” the sentencing court insisted the offense was “truly a psychological crime. It is not a taking crime . . . almost one might say a psychiatric crime.”¹⁷⁶ The district court proceeded to sentence Goff to only four months in prison, seventeen months below the minimum sentence suggested by the Guidelines.¹⁷⁷

In *United States v. Pugh*,¹⁷⁸ the defendant pleaded guilty to possessing sixty-eight images of child pornography, some including infants being penetrated by adult males and little girls performing oral sex on adults.¹⁷⁹ The advisory sentencing range placed the defendant between 97 and 120 months; however, the district court imposed a sentence of five years of probation, finding Pugh’s possession to be “passive” and “incidental” to his real goal of grooming online relationships with minors.¹⁸⁰ The Eleventh Circuit once again applied an appropriately stringent “reasonableness” review to the district court’s sentence, vacating the probationary sentence due to the lower court’s failure to consider *all* of the § 3553(a) factors in favor of focusing primarily on “the nature and circumstances of the offense and the history and characteristics of the defendant.”¹⁸¹

Lest it be assumed these instances are anomalies, many district courts simply embrace the view that their policy disagreements with the Guidelines suffice as legitimate reasons to discard the recommended sentences for child pornography offenses.¹⁸² Under § 2G2.2, the U.S.

175. *Id.* at 251, 252 n.1, 258.

176. *Id.* at 258 (internal quotation marks omitted). The U.S. Court of Appeals for the Third Circuit vehemently disagreed:

Children are exploited, molested, and raped for the prurient pleasure of Goff and others who support suppliers of child pornography. These small victims may rank as “no one else” in Goff’s mind, but they do indeed exist outside his mind. Their injuries and the taking of their innocence are all too real. There is nothing “casual” or theoretical about the scars they will bear from being abused for Goff’s advantage. Far from persuading us that Goff’s crime was relatively minor, his efforts to downplay the harm his actions have inflicted on others serve chiefly to highlight the concern the District Court should have had with Goff’s failure to appreciate the seriousness of his offense.

Id. at 259.

177. *Id.* at 253 & n.5.

178. 515 F.3d 1179 (11th Cir. 2008).

179. *Id.* at 1182.

180. *Id.* at 1187.

181. *Id.* at 1192, 1194 (quoting 18 U.S.C. § 3553(a)(1) (2006)) (internal quotation marks omitted).

182. *United States v. Diaz*, 720 F. Supp. 2d 1039, 1041 (E.D. Wis. 2010) (citing *United States v. Tews*, No. 09-CR-309, 2010 WL 1608951, at *3 (E.D. Wis. Apr. 20, 2010); *United States v. Manke*, No. 09-CR-172, 2010 WL 307937, at *4 (E.D. Wis. Jan. 19, 2010); *United States v.*

Sentencing Guidelines Manual authorizes sentencing enhancements if the pornography offense involved pecuniary gain, more than ten images, the use of the Internet, or sadistic and masochistic conduct.¹⁸³ District courts that disagree with these policies blatantly ignore them, calling § 2G2.2 “an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.”¹⁸⁴ Whether the sentencing courts openly dismiss the Guidelines’ policies or simply focus upon the characteristics of the defendant while disregarding the other § 3553(a) factors, the three purposes of punishment in the child pornography context—retribution, deterrence, and incapacitation—should trump these erroneous considerations to confirm the severity of the Guidelines’ sentences.¹⁸⁵ In Part III, this Note addresses the three controlling purposes of punishment in the child pornography context: retribution, deterrence, and incapacitation. While rehabilitation is a valid § 3553(a) factor, it does not seem to be lacking in many sentencing courts’ rationales; rather, rehabilitation is often elevated above the other three purposes of punishment and dominates these courts’ reasoning in granting downward departures.

III. PURPOSES OF PUNISHMENT

Child pornography offenders pose a unique pragmatic and moral threat to our society because they pose a high risk of recidivism and their heinous crimes demand retribution.¹⁸⁶ The Guidelines respond to this threat by providing a structured method of punishment that accurately reflects Americans’ moral beliefs concerning the seriousness of these offenses.¹⁸⁷

Johnson, 588 F. Supp. 2d 997, 1001 (S.D. Iowa 2008); *United States v. Baird*, 580 F. Supp. 2d 889, 890–92 (D. Neb. 2008); *United States v. Hanson*, 561 F. Supp. 2d 1004, 1005–07 (E.D. Wis. 2008)).

183. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2010).

184. *Diaz*, 720 F. Supp. 2d at 1041 (quoting *United States v. Dorvee*, 604 F.3d 84, 98 (2d Cir. 2010)) (internal quotation marks omitted).

185. *Pugh*, 515 F.3d at 1194–1200 (discussing how the court failed to weigh sufficiently the need for retribution, deterrence, and incapacitation).

186. For an argument that views sentencing as a political process in order “to deploy both practical wisdom and empirical analysis” and thereby to prevent arbitrary sentences, see Alice Ristorph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 728 (2009).

187. President Bush, speaking on behalf of the American people, emphasized the important retributive and deterrent value of strengthening laws (including those against child pornography) which protect children:

Protecting our children is our solemn responsibility. It’s what we must do. When a child’s life or innocence is taken it is a terrible loss—it’s an act of unforgivable cruelty. Our society has a duty to protect our children from exploitation and danger. By enacting this law we’re sending a clear message across the country: those who prey on our children will be caught, prosecuted and punished to the fullest extent of the law.

Yet many federal judges disagree with the severity of these recommended sentences for child pornography offenses, and they express this frustration with the policy objectives of the Guidelines by granting downward sentencing departures.¹⁸⁸ In doing so, courts fail to consider appropriately the § 3553(a) factors related to the purposes of punishment—the very procedure the Supreme Court emphasized in *Booker* as necessary to maintain balanced sentencing.¹⁸⁹ Justice requires that courts adhere to the democratically decided Guidelines which express the high moral culpability of these crimes, deter other potential offenders, and prevent the realistic threat of recurring sexual offenses.¹⁹⁰

A. Retribution

The gravity of child pornography offenses can hardly be overstated: “[it] is a vile, heinous crime”¹⁹¹ and “among the most egregious and despicable of societal and criminal offenses.”¹⁹² The Guidelines serve retribution by punishing defendants who exploit children through producing, possessing, and distributing child pornography.¹⁹³ Nevertheless, some district courts believe that the possession and distribution of child pornography are victimless crimes with overinflated Guidelines

Press Release, Statement by President George W. Bush upon signing H.R. 4472, P.L. 109–248, Adam Walsh Child Protection and Safety Act of 2006 (July 27, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/print/20060727-6.html>.

188. See *supra* Section II.B. For an example of a judge increasing a sentence based on an extraneous finding of a “child pornography gene,” see Debra Cassens Weiss, *Federal Judge’s Theories About a Child Porn Gene Get Him Tossed from Case*, A.B.A. J. (2011) (reporting that, after reviewing U.S. District Court Judge Gary Sharpe’s theory of a child pornography gene, the Second Circuit Court of Appeals found it “impermissible for the court to base its decision of recidivism on its unsupported theory of genetics” (quoting *United States v. Cossey*, 632 F.3d 82, 88 (2d Cir. 2011)) (internal quotation marks omitted)), available at http://www.abajournal.com/news/article/2nd_circuit_tosses_judge_from_case_because_of_his_theories_about_a_child_po/; Elie Mystal, *Judge of the Day: Sentence Based on Judge’s Genetic Theory Overturned*, ABOVE THE LAW (Jan. 31, 2011, 2:07 PM) (arguing that “the issue of recidivism when it comes to child porn ‘aficionados’ is a serious one. . . . [and] [w]e don’t need rogue judges going off on their own pet theories”), <http://abovethelaw.com/2011/01/judge-of-the-day-sentence-based-on-judges-genetic-theories-overturned/#>.

189. 18 U.S.C. § 3553(a)(2)(A)–(D) (2006); *United States v. Booker*, 543 U.S. 220, 260–61 (2005).

190. See generally U.S. DEP’T OF JUSTICE, FACT SHEET: PROTECT ACT (2003), available at http://www.justice.gov/opa/pr/2003/April/03_ag_266.htm (explaining how the “PROTECT Act of 2003” protects American children by better equipping law enforcement, increasing penalties for child sex offenses, and strengthening laws against constitutionality attacks).

191. *United States v. Cunningham*, 680 F. Supp. 2d 844, 847 (N.D. Ohio 2010).

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

193. Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 PACE L. REV. 847, 855 (2008) (explaining the two primary rationales behind child pornography laws: “(1) to punish for the harm inflicted by the production, distribution and possession of child pornography and (2) to protect against future harm that may occur if child pornography is not stamped out”).

sentences.¹⁹⁴ Aside from the obvious physical injuries the children suffer,¹⁹⁵ the children endure permanent psychological and emotional damage knowing that predators are continuously circulating and enjoying these heinous images.¹⁹⁶ Moreover, the ease of acquiring and distributing these illegal images does not reduce the culpability of defendants.¹⁹⁷ Therefore, the severity of the recommended Guidelines appropriately fulfills the retributive purpose of punishment,¹⁹⁸ and courts should recognize the seriousness of these offenses when weighing the § 3553(a) factors.¹⁹⁹

B. Deterrence

“The more serious the crime and the greater the defendant’s role in it, the more important it is to send a strong and clear message that will deter others.”²⁰⁰ The Guidelines recommend high sentences for child pornography offenders to adequately deter other potential criminals.²⁰¹ Some courts, however, doubt the deterrent value for potential child pornography offenders on the theory that many would be psychologically diagnosed as “pedophiles” and would lack some volitional control.²⁰²

194. See, e.g., *United States v. Johnson*, 588 F. Supp. 2d 997, 1004 (S.D. Iowa 2008) (stating that Congress’ “tinkering with the [G]uidelines” wrongly places most defendants near the statutory maximum). *But see* Rogers, *supra* note 193 (advocating the view that possession of child pornography hurts real victims and debunking the misperception of it as a victimless crime).

195. Rogers, *supra* note 193, at 853 (describing the physical injuries related to sexual abuse as including “genital bruising, cuts, lacerations and sexually transmitted diseases”).

196. *Id.* “At a more fundamental level, child pornography victims’ rights of privacy and human dignity are violated when their images are circulated and viewed by others.” *Id.* at 854.

197. *United States v. Cunningham*, 680 F. Supp. 2d 844, 853 (N.D. Ohio 2010) (“[T]he [c]ourt has never before seen an argument that because a crime is easy to commit, it should be punished less severely.”). *Contra* TROY STABENOW, DECONSTRUCTING THE MYTH OF CAREFUL STUDY: A PRIMER ON THE FLAWED PROGRESSION OF THE CHILD PORNOGRAPHY GUIDELINES 26–27 (2009) (suggesting that the “common, first-time offender” unfairly reaches the statutory maximum because it is so easy to use the Internet to download and share images), available at http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf.

198. 18 U.S.C. § 3553(a)(2)(A) (2006).

199. Ironically, even when courts do not fully weigh the retributive function, American inmates express their disgust with these crimes by subjecting violent sexual offenders to greater instances of inmate-on-inmate sexual victimization, both in prisons and jails across the country. ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09 16 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf> (finding that an estimated 4.6% of prisoners held for violent sexual offenses reported being sexually victimized by another inmate, while only 2.2% of other violent prisoners reported inmate-on-inmate sexual victimization, with successively lower percentages for nonviolent offenders).

200. *United States v. Irely*, 612 F.3d 1160, 1212 (11th Cir. 2010) (en banc).

201. See 18 U.S.C. § 3553(a)(2)(B) (2006).

202. See, e.g., *Irely*, 612 F.3d at 1179. See Weiss, *supra* note 188, and Mystal, *supra* note 188, for a discussion of the U.S. Court of Appeals for the Second Circuit vacating a district court finding that an immutable characteristic of the defendant was a “child pornography gene.”

Contrary to these judicial findings, both expert psychologists who testified in *Irey* flatly refuted this “illness causation” theory.²⁰³ Dr. Shaw equated potential defendants’ control over pedophilic urges to the control compulsive dessert eaters must exercise.²⁰⁴ Dr. Berlin stated that Irey (diagnosed with pedophilia) had the ability to refrain from sexual contact, an ability he exhibited while living in the United States, as well as the responsibility to control his conduct.²⁰⁵ The Eleventh Circuit echoed this expert testimony, finding that pedophilia does not force people to rape children.²⁰⁶ In fact, forensic psychologists confirm that, although pedophilia might be a permanent condition, it does not absolve the person from accountability for his actions nor render him incapable of managing his pedophilic tendencies.²⁰⁷ Consequently, pedophiles control their volitional ability and possess their rational faculties and therefore will be deterred by the severity of the Guidelines.

C. Incapacitation

Exactly how is the sentencing court to know which factors accurately predict recidivism, thereby “protect[ing] the public from further crimes of the defendant”?²⁰⁸ The Eleventh Circuit defined adequate protection as a function of two variables: “the level of risk that conduct will occur and the level of harm that will be inflicted if that conduct does occur.”²⁰⁹ Regarding the level of harm, all nine Justices on the U.S. Supreme Court agreed that “[l]ong-term studies show that sexual abuse is grossly intrusive in the lives of children and is harmful to their normal psychological, emotional and sexual development in ways which no just or humane society can tolerate.”²¹⁰ Therefore, only the level of risk remains to be determined.

1. Recidivism Rates and Undetected Contact Offenses

A great amount of public debate centers upon the recidivism rates and undetected sexual contact offenses of those convicted of possession, distribution, and production of child pornography.²¹¹ There is no

203. *Supra* Section II.A.

204. *Irey*, 612 F.3d at 1174.

205. *Id.* at 1171.

206. *United States v. Irey*, 563 F.3d 1223, 1227 (11th Cir. 2009) (Hill, J., concurring).

207. Ryan C.W. Hall & Richard C.W. Hall, *A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues*, 82 MAYO CLINIC PROC. 457, 465 (2007); Telephone Interview with Howard R. Bernstein, Ph.D., Forensic Psychologist and Expert Witness (Oct. 20, 2010).

208. 18 U.S.C. § 3553(a)(2)(C) (2006).

209. *Irey*, 612 F.3d at 1217.

210. *Id.* at 1207 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 468 (2008)) (internal quotation marks omitted).

211. Michael C. Seto & Angela W. Eke, *The Criminal Histories and Later Offending of Child*

publication documenting the actual recidivism rates of these offenders,²¹² primarily because their offenses are hidden from law enforcement or require self-reporting by the offenders themselves.²¹³

The highly controversial Butner Study²¹⁴ strongly indicates that the vast majority of child pornographers have already committed contact offenses.²¹⁵ In the Butner Study, clinical psychologists Michael Bourke and Andres Hernandez analyzed data from 155 sexual offenders who voluntarily participated in an eighteen-month, intensive treatment program at the medium-security federal prison in Butner, North Carolina.²¹⁶ The participant pool drew solely from inmates whose instant offenses involved possession, distribution, or receipt of child pornography (production and contact offenses were eliminated), and the study excluded an additional forty-six subjects who failed to complete at least six months in the program.²¹⁷ At the time of sentencing, 74% of the subjects had no prior documented contact offenses as identified by the Presentence Investigation Report (PSIR),²¹⁸ defining a “contact offense” as a previous conviction, self-reported acknowledgment, or substantiated allegation of a sexual contact offense.²¹⁹ Also at the time of sentencing, the number of known victims totaled seventy-five, or 1.88 victims per offender.²²⁰ By the conclusion of treatment, 85% of the participants admitted they had committed at least one hands-on offense and reported victimizing a total of

Pornography Offenders, 17 *SEXUAL ABUSE: J. RES. & TREATMENT* 201, 201 (2005); see also Hall & Hall, *supra* note 207, at 460 (“It is unknown how many individuals have pedophilic fantasies and never act on them or who do act but are never caught.”).

212. Seto & Eke, *supra* note 211, at 201–02; Hall & Hall, *supra* note 207, at 467 (reporting that “the rate of recidivism against a child is also unknown”).

213. Although no data directly indicate the likelihood of future offending, the study conducted by Seto and Eke evaluated the post-release criminal records of child pornography offenders. Their analysis found that the average risk time was 2.5 years, where 17% of the sample committed the offense again during this period and 4% committed a new contact sexual offense. Seto & Eke, *supra* note 211, at 205–06.

214. Some defendants and courts have criticized the Butner Study findings on the reasoning that evidence of other individuals’ contact offenses does not establish the particular defendant’s likelihood of recidivism, as well as on the belief that the Butner Study was potentially coercive. See, e.g., *United States v. Johnson*, 588 F. Supp. 2d 997, 1006 (S.D. Iowa 2008).

215. Bourke & Hernandez, *supra* note 2, at 183.

216. *Id.* at 185.

217. *Id.* at 186. The directors explained that they excluded the additional forty-six inmates because “offenders seldom disclose their entire sexual offense history upon initial participation in treatment programs.” *Id.* Additionally, the program included approximately fifteen hours per week of “structured and unstructured therapeutic activities. . . . Inmates participate[d] in a comprehensive psychosexual evaluation that include[ed] objective psychological tests, psychophysiological examination (polygraph), and phallometric assessment.” *Id.* at 185.

218. *Id.* at 187.

219. *Id.* at 186.

220. *Id.* at 187.

1,777 children, an average of 13.56 victims per offender.²²¹ This dramatic difference between what the sentencing judges knew through the PSIRs and what actually occurred bolsters the authors' finding that "[t]he vast majority of the participants in our treatment program report that they committed acts of hands-on abuse *prior* to seeking child pornography via the Internet."²²²

Furthermore, findings from the National Institute of Justice indicate that child molesters sexually assault 8.1% of adolescents in the United States,²²³ while other studies report up to 31% of females and 16% of males encounter "unwanted sexual contact" before reaching age eighteen.²²⁴ Even more alarming, only "[a]n estimated 1 in 20 cases of child sexual abuse is reported or identified."²²⁵ The Butner Study and these other statistics strongly imply that many child pornography offenders have already committed, or will commit upon release, sexual offenses that will likely remain undetected. Consequently, downward departures from the Guidelines predicated on a low level of recidivism or the lack of victim impact are substantially unwarranted, even for defendants with no prior criminal record.

2. Pedophilia and Predictive Risk Factors

Although no verifiable recidivism rates exist for child pornography offenders as a general population,²²⁶ there are established risk factors that increase the likelihood of repeat offending. Pedophilia, defined as "a persistent sexual interest in prepubescent children,"²²⁷ is perhaps the best predictive risk factor.²²⁸ "[C]hild pornography offenses are a valid

221. *Id.*

222. *Id.* at 189; *see also* United States v. Irey, 612 F.3d 1160, 1198–99 (11th Cir. 2010) (en banc) (showing that prior to sentencing, "Irey stated that he did not start viewing child pornography on the internet until after he had begun having sex with the little girls in Cambodia").

223. DEAN G. KILPATRICK, BENJAMIN E. SAUNDERS & DANIEL W. SMITH, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS 4 (2003) [hereinafter YOUTH VICTIMIZATION]. In addition to the 8.1% national statistic, the authors estimate that there are 1.8 million victims of actual sexual assaults. *Id.*

224. Hall & Hall, *supra* note 207, at 460.

225. *Id.*; *see also* YOUTH VICTIMIZATION, *supra* note 223, at 6 (confirming that 86% of adolescent sexual assault victims do not report these attacks).

226. Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCHOL. 610, 614 (2006).

227. *Id.* at 610 (citing the American Psychiatric Association for the definition of pedophilia). "[A] pedophile is an individual who fantasizes about, is sexually aroused by, or experiences sexual urges toward prepubescent children (generally <13 years) for a period of at least 6 months." Hall & Hall, *supra* note 207, at 457.

228. In a statistical study comparing the re-offense rates over time of child molesters (not synonymous with pedophiles) and rapists, researchers discovered that "child molesters were 100 percent more likely than rapists to commit a new sexual crime by year 25." TORI DEANGELIS, NEW RESEARCH REVEALS WHO MAY MOLEST AGAIN, www.angelfire.com/mi/collateral/research8.html

diagnostic indicator of pedophilia,”²²⁹ and these offenders “showed significantly greater sexual arousal to children than did hands on sexual offenders (child molesters).”²³⁰ Published recidivism rates for a pedophile range from 10% to 50% depending on the individual’s sexual proclivities.²³¹ Yet these statistics underestimate the true figure because “many treatment studies do not include treatment dropout figures, cannot calculate the number of repeated offenses that are not reported, and do not use polygraphs to confirm self-reports.”²³² These rates apply only to individuals during active follow-up treatment periods.²³³

Pedophilia is interrelated with other predictive risk factors, including sadism and age.²³⁴ Fifty to seventy percent of pedophiles are also diagnosed with other paraphilia,²³⁵ and such “deviant sexual preferences may be the strongest prediction for new sexual offense[s].”²³⁶ The Guidelines’ policy statements encourage sentencing departures based on age only when present to an “unusual degree” and suggest the motivation for age departures is that other forms of punishment, such as home confinement for the elderly, are just as efficient.²³⁷ Accordingly, the Eleventh Circuit recently reaffirmed that “[a]lthough recidivism ordinarily decreases with age, we have rejected this reasoning as a basis for a sentencing departure for certain classes of criminals, namely sex offenders.”²³⁸ Yet some courts perceive age as a mitigating factor on the theory that an offender’s physiological deterioration decreases his sexual arousal towards children. However, studies show that a sex offender’s age does not slow commission of his crimes, and he is likely to begin or continue offending in his elder years.²³⁹ When analyzed in a group with rapists and sexual sadists, pedophiles constitute 60% of all older sexual offenders (ages forty to seventy).²⁴⁰ Other predictive factors include: antisocial personality traits “characterized by callousness, cynicism, and

(last visited Sept. 19, 2011).

229. Seto, Cantor & Blanchard, *supra* note 226, at 610.

230. Howard Bernstein, *The Case of the United States of America v. Jeremy Mohr* 6 (2010) (unpublished records review of the Psychosexual Evaluation Report prepared by Dr. Ted Shaw, on file with author) (citing to MICHAEL C. SETO, *ASSESSING THE RISK POSED BY CHILD PORNOGRAPHY OFFENDERS* 5 (2009), available at http://www.iprc.unc.edu/G8/Seto_Position_Paper.pdf).

231. Hall & Hall, *supra* note 207, at 467.

232. *Id.*

233. *Id.*

234. *Id.* at 458.

235. *Id.*

236. Bernstein, *supra* note 230, at 5.

237. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2010).

238. *United States v. Jayyousi*, No. 08-10494, 2011 WL 4346322, at *21 (11th Cir. Sept. 19, 2011).

239. Matt Hart, Note, *The Geriatric Sex Offender: Senile or Pedophile?*, 32 L. & PSYCHOL. REV. 153, 153 (2008).

240. Hall & Hall, *supra* note 207, at 458.

contempt for the feelings, rights, and suffering of others;”²⁴¹ previous sexual offenses;²⁴² denial, rationalization, and projection of guilt;²⁴³ and prior adult convictions.²⁴⁴

In sum, courts should consider the graphic nature of the child pornography the defendant actually possessed, distributed, or produced. Unlike other crimes, child pornography offenses open a window into the mind of a defendant: the court can literally see what sort of images a defendant intentionally sought out to sexually gratify himself. Masochistic and sadistic acts pose a greater threat to society, necessitating incapacitation; sexual victimization of numerous children is more culpable, demanding retribution; and intentional delight in a victim’s suffering displays cognitive rationality, requiring deterrence. Taken together, these purposes of punishment validate the severity of the Guidelines’ sentences.

IV. REACHING REFORM

To honor the spirit of *Booker* and preserve sentencing uniformity across the federal system, district courts should routinely sentence defendants within the calculated Guidelines range instead of inserting their own personal views into the equation.²⁴⁵ To ensure balance, sentencing departures should be made only for grievous circumstances that the Commission has failed to take into account because the Commission has already factored in the likely value of deterrence, moral culpability, and detrimental impact on society.²⁴⁶ By disregarding the Guidelines and its policy statements, district courts discount the accumulated institutional knowledge of the Commission.²⁴⁷ However, because the Supreme Court is

241. *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (citing AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701–06 (4th ed. 2000)).

242. *Seto & Eke*, *supra* note 211, at 207 (finding that child pornography offenders who had committed prior contact offenses were the *most* likely to repeat offend, either sexually or generally).

243. *Bernstein*, *supra* note 230, at 4.

244. Naomi J. Freeman & Jeffrey C. Sandler, *Female and Male Sex Offenders: A Comparison of Recidivism Patterns and Risk Factors*, 23 J. INTERPERSONAL VIOLENCE 1394, 1397 (2008); *Bernstein*, *supra* note 230, at 4–6 (discussing risk recidivism and recidivism research).

245. *See generally* SENTENCING COMM’N, *supra* note 28, at 1 (identifying the U.S. Sentencing Commission as an independent agency in the judicial branch).

246. *Cf. United States v. Irej*, 612 F.3d 1160, 1210–11 (11th Cir. 2010) (en banc) (“The sentencing judge’s skepticism about deterring these types of crimes is not shared by Congress, the Sentencing Commission, the Supreme Court, this Court, or other courts of appeals.”).

247. Although the *Irej* en banc panel provides a good estimation of “reasonableness review,” the Guidelines still provide a more perceptible estimation of justice in sentencing than the ambiguous instruction of “reasonableness”:

[A]fter nearly twenty years of guidelines sentencing, after hundreds of judicial opinions construing the guidelines, after scores of scholarly articles appraising the supposed virtues and claimed vices of the guidelines, after the accumulation and evaluation of volumes of data by the Sentencing Commission, and after protracted deliberation by Congress, including the investment of a mountain of public

unlikely to reverse itself and suddenly declare mandatory Guidelines constitutional, and district courts continue to grant downward departures, alternative approaches are needed to implement the policies supporting the Guidelines.

This Part analyzes the weaknesses of some current suggestions for redressing sentencing disparities and then presents three workable solutions: one legislative solution and two judicial solutions. The legislative solution, which would narrow the statutory sentencing range for child pornography offenses, is tenable, except that political constraints make it unlikely to occur. The first judicial solution, which would reverse the reasoning of *Kimbrough* and *Spears*, fulfills the goal of uniform sentencing according to the Guidelines' policies; however, judicial preferences also make its implementation unlikely. The second judicial solution, which would enforce a more stringent appellate review as illustrated by the Eleventh Circuit, proves the only feasible solution to remedy unwarranted sentencing departures from the Guidelines that courts of appeals might implement in the near future.

A. *Incomplete Responses*

Some potential solutions focus on the sentencing judge: judges should give great significance to the nature of the offense, strictly conform to the goals of punishment, and avoid sentencing disparities for defendants convicted of similar offenses.²⁴⁸ If followed, these suggestions would strengthen sentencing. Realistically, however, earnestly admonishing judges to consider the § 3553(a) factors falls utterly short of a viable solution, given that federal courts already claim to weigh all the factors.

Other solutions focus on the appellate court: for instance, Lindsay C. Harrison argues that when a court of appeals reviews a sentence to determine whether it is substantively unreasonable, it should give great deference to the district court's "institutional competence" in sentencing.²⁴⁹ This "special expertise" arises from the trial judge's immediate perception

resources, the Supreme Court abruptly disengaged the most thorough and carefully considered regime of criminal sentencing in history and (by the margin of one vote) substituted a two-word regime of criminal sentencing (perhaps the most abbreviated in history)—the regime of the "reasonable sentence," now informed only to some indeterminate and controversial extent by the Sentencing Guidelines.

Griffin, *supra* note 28, at 467–68 n.92 (quoting *United States v. Valencia-Aguirre*, 409 F. Supp. 2d 1358, 1364–65 (M.D. Fla. 2006)).

248. Loren Rigsby, Comment, *A Call for Judicial Scrutiny: How Increased Judicial Discretion Has Led to Disparity and Unpredictability in Federal Sentencings for Child Pornography*, 33 SEATTLE U. L. REV. 1319, 1341–45 (2010).

249. Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. MIAMI L. REV. 1115, 1156–57 (2008).

of the defendant.²⁵⁰ Harrison urged that the judge's sentence, based upon individualized facts, should trump an appellate court's balancing of general principles against the particular defendant.²⁵¹ However, because 92% of child pornography defendants plead guilty,²⁵² sentencing hearings frequently furnish district court judges with their first meaningful encounter with these defendants. In designing the Guidelines, the Commission analyzed a broad range of information with the goal of establishing fair and uniform sentencing policies that incorporate the purposes of punishment and avoid unwarranted sentencing disparities.²⁵³ Thus, the Guidelines should presumptively apply over an "individualized" assessment in the vast majority of child pornography cases, as there is little opportunity for personal exposure by the judge to the defendant before the actual sentencing.²⁵⁴

In a different direction, some commentators have suggested alternative methods of punishment to better reduce recidivism and to fulfill the purposes of punishment. Chemical castration, accomplished through periodic medical injections, offers the benefit of reducing offenders' testosterone levels,²⁵⁵ attempting to suppress deviant sexual urges and thus lower recidivism rates upon release.²⁵⁶ However, it presents drawbacks, as well: besides possibly violating the Eighth Amendment's prohibition against cruel and unusual punishment,²⁵⁷ government-forced medication

250. *Id.* at 1157 & n.218 (citing Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 182 (1978)). Professor Maurice Rosenberg describes the special expertise as a "you are there" rationale, elaborating:

As one trial judge pungently phrased it, he "smells the smoke of battle" and can get a sense of the interpersonal dynamics between the lawyers and the jury. That is a sound and proper reason for conferring a substantial measure of respect to the trial judge's ruling *whenever it is based on facts or circumstances that are critical to [the] decision and that the record imperfectly conveys.*

Rosenberg, *supra*, at 183.

251. Harrison, *supra* note 249, at 1157–58.

252. MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS, 2006, at 5 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>.

253. SENTENCING COMM'N, *supra* note 28, at 1.

254. *Cf.* Harrison, *supra* note 249, at 1156–58 (advocating that "you are there" rationales support deference to district court sentences based on their special expertise in imposing sentences on individualized facts and defendants).

255. Carlson, *supra* note 16, at 30.

256. Loretta J. Stalans, *Adult Sex Offenders on Community Supervision: A Review of Recent Assessment Strategies and Treatment*, 31 CRIM. JUST. & BEHAV. 564, 568–69 (2004).

257. Carlson, *supra* note 16, at 31–32. Compare *State v. Perry*, 610 So. 2d 746, 747, 758 (La. 1992) (holding that forced medication of an insane death row prisoner to render him competent was unconstitutional and "the intrusion represents an *extremely severe* interference with that person's liberty"), with *Singleton v. Norris*, 319 F.3d 1018, 1026–27 (8th Cir. 2003), *cert. denied*, 540 U.S. 832 (2003) (holding that a "State does not violate the Eighth Amendment" by forcibly medicating

also requires reliable probationers who willingly receive weekly injections.²⁵⁸ Further, chemical castration coupled with less severe sentences emphasizes incapacitation at the expense of retribution and deterrence.

Dr. Robert Prentky, a clinical researcher, believes that long-term, intensive supervision and treatment offer the best remedies for reducing recidivism rates.²⁵⁹ While post-conviction treatment reduces the risk of recidivism, “a significant percentage of sex offenders are prematurely expelled from or drop out of treatment. . . . Termination rates in the United States outpatient treatment programs have ranged from one quarter to more than one half of adult sex offenders. . . .”²⁶⁰ More alarming still, “[i]ndividuals can offend again while in active psychotherapy, while receiving pharmacologic treatment, and even after castration.”²⁶¹ Accordingly, although treatment might reduce recidivism for the participants who willingly complete it, it cannot replace the role of retribution and deterrence that sufficient sentences, in accordance with the Guidelines, guarantee.

B. A Legislative Solution

Following *Booker*, legislative efforts to curb judicial activism in sentencing have been handicapped. The current Guidelines’ policy statements already direct courts that community involvement, as measured through family ties and responsibilities, are ordinarily irrelevant when determining criminal culpability.²⁶² They also discourage courts from considering issues such as age,²⁶³ physical condition,²⁶⁴ and mental or emotional condition,²⁶⁵ unless present to an “unusual degree” that would necessitate a departure compared to other cases covered by the Guidelines. If Congress were to enact legislation stating that such factors are impermissible considerations, then one of two alternatives would occur: either judges would simply avoid referencing these factors in sentencing while continuing to impose lesser sentences than recommended by the Guidelines, or judicial determinations of certain facts would fail as violating the Sixth Amendment, as the Supreme Court held in *Booker*.²⁶⁶ The only effective legislative response is to raise the statutory minimum

death row inmates to render them competent to be executed because the “due process interests in life and liberty . . . have been foreclosed by the lawfully imposed sentence”).

258. Carlson, *supra* note 16, at 31–32.

259. DEANGELIS, *supra* note 228.

260. Stalans, *supra* note 256, at 573, 576.

261. Hall & Hall, *supra* note 207, at 465.

262. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2010).

263. *Id.* § 5H1.1.

264. *Id.* § 5H1.4.

265. *Id.* § 5H1.3.

266. *United States v. Booker*, 543 U.S. 220, 234, 267–68 (2005).

sentences in child pornography offenses, preventing rogue courts from giving unreasonably low sentences.²⁶⁷

C. Judicial Solutions

The U.S. Supreme Court and courts of appeals could respond to the current trend of downward departures by limiting the application of *Kimbrough*²⁶⁸ and *Spears*.²⁶⁹ In both cases, the Court held that district courts could replace the Guidelines' 100:1 ratio for crack-to-powder cocaine offenses with its own evaluation of the appropriate ratio.²⁷⁰ Some courts point to these decisions as authorizing district court judges to grant downward departures based solely on other policy disagreements with the Guidelines.²⁷¹ In the summer of 2010, Congress passed the Fair Sentencing Act of 2010, which legislatively reduced the ratio from 100:1 to 18:1 for crack-to-powder cocaine.²⁷² Hence, Congress resolved the highly publicized debate over the racially charged issue of crack-to-powder cocaine,²⁷³ and appellate courts could return to finding that policy disagreements with the Guidelines do not ordinarily constitute valid reasons for sentencing reductions.²⁷⁴ Indeed, judicial disagreement over the

267. See *United States v. Johnson*, 588 F. Supp. 2d 997, 1004 (S.D. Iowa 2008) (suggesting that “[i]f Congress does not want the courts to sentence individual defendants throughout that range based on the facts and circumstances of each case, then Congress should amend the sentencing statute, rather than manipulate the advisory guidelines”).

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

269. *Spears v. United States*, 555 U.S. 261 (2009).

270. *Id.* at 264–65; *Kimbrough*, 552 U.S. at 110–11.

271. See, e.g., *United States v. Ruiz-Apolonio*, No. 10-50306, 2011 WL 4060803, at *8 (9th Cir. Sept. 14, 2011) (stating that “[a] sentencing court, of course, has the discretion to grant a variance from the Guidelines . . . based on its policy disagreement with the existing Guidelines provision”); *United States v. Fumo*, No. 09-3388, 2011 WL 3672774, at *31 (3d Cir. Sept. 15, 2011) (explaining that policy disagreements with the Guidelines may support a valid departure, but noting that the sentencing court should explain the reasoning behind the disagreement).

272. Pub. L. No. 111-220, 124 Stat. 2372 (2010) (codified as amended in scattered sections of 21 and 28 U.S.C.) (amending 21 U.S.C. § 841(b)(1)); see also Scott Wilson, *Obama Signs Fair Sentencing Act*, WASH. POST, Aug. 3, 2010, <http://voices.washingtonpost.com/44/2010/08/obama-signs-fair-sentencing-ac.html>.

273. See Wilson, *supra* note 272; see also Editorial, *Crack Breakthrough: The Fair Sentencing Act of 2010 Corrects a Long-Time Wrong in Cocaine Penalties*, WASH. POST, Aug. 3, 2010, at A14, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html>.

274. See *United States v. Cossey*, 632 F.3d 82, 87–88 (2d Cir. 2011). The Second Circuit reversed the district court’s sentence of a child pornography possession offense because it was erroneously based upon the judge’s “unsupported belief that Cossey was prevented from controlling his behavior due to a genetic inability [to do so] . . .” *Id.* at 85–89. The sentencing judge rejected the plea agreement’s recommended sentence and discarded the findings of two psychological evaluations because of his personal views of recidivism. *Id.* at 87. In the district court’s words, therapy “can only lead, in my view, to a sincere effort on your part to control, but you can’t get rid of it. You are what you’re born with. And that’s the only explanation for what I see here.” *Id.* (internal quotation marks omitted).

relative seriousness of particular crimes and sentencing policy objectives, coupled with the personal biases of individual judges, originally caused the vast sentencing disparities that prompted Congress to create the Guidelines.²⁷⁵ Although policy disagreements prove to be the source of the troublesome sentencing disparities,²⁷⁶ it is likely that the precedential value of *Kimbrough* and *Spears* will not be lightly abandoned by district courts.²⁷⁷

For the above reasons, this Note urges courts of appeals to follow the Eleventh Circuit's lead in evaluating downward sentencing departures, particularly by doing their own independent evaluations of sentences in light of the § 3553(a) factors and requiring specific § 3553(a) factors to justify any variance. As the Eleventh Circuit stated, "We will not quit the post that we have been ordered to hold in sentencing review and the responsibility that goes with it."²⁷⁸ The Eleventh Circuit vacated the original sentence in *Irey* that significantly departed downward from the Guidelines,²⁷⁹ employing a much more rigorous and independent evaluation of "reasonableness" than previous panels from the Eleventh Circuit or other courts of appeals have utilized.²⁸⁰ In *United States v. Jayyousi*, the Eleventh Circuit again vacated a sub-Guideline sentence because the district court failed to give appropriate weight to the defendant's criminal history and his risk of recidivism, compared the defendant to defendants in dissimilar terrorism cases, and based the sentence on otherwise inappropriate factors.²⁸¹ By individually reweighing and reevaluating the § 3553(a) factors anew in light of the district court's factual findings to establish a benchmark from which to determine whether the sentence was reasonable, the Eleventh Circuit has consistently provided a model of true reasonableness review. Courts of appeals should emulate this method of reasonableness review in order to provide a legitimate check to otherwise unfettered district courts' discretion.

275. R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 740–41 (2001).

276. *See id.*

277. *See, e.g.*, *United States v. Diaz*, 720 F. Supp. 2d 1039, 1040–42 (E.D. Wis. 2010) (stating that through *Kimrough*, the Supreme Court has authorized district courts to disregard Guideline policies).

278. *United States v. Irey*, 612 F.3d 1160, 1225 (11th Cir. 2010) (en banc).

279. *Id.*

280. Harrison, *supra* note 249, at 1139 (arguing that different panels within the Eleventh Circuit take more or less rigorous approaches to evaluating "reasonableness" of district courts' sentences).

281. *United States v. Jayyousi*, No. 08-10494, 2011 WL 4346322, at *21 (11th Cir. Sept. 19, 2011).

CONCLUSION

Many district court judges improperly balance the § 3553(a) factors by replacing the importance of retribution, deterrence, and incapacitation for child pornography offenses with their personal proclivities regarding the importance of defendants' backgrounds and characteristics, including inaccurately analyzed findings of pedophilia. To remedy these persistent wrongs, this Note urges courts of appeals to follow the Eleventh Circuit's "reasonableness" review that independently reweighs and reevaluates the § 3553(a) factors to establish a calculus by which to compare the district courts' sentences. This calculus provides courts of appeals with an orientation from which they can independently evaluate the reasonableness of district courts' sentences. Without impartial appellate review, deference absconds into acquiescence, and the entire criminal justice system falls captive once again to the moralization of individual judges.