The moral panic over sexual predators targeting young children is often expressed in the punishment of child pornography offenders. The federal government’s involvement began with its seminal statute criminalizing the commercial production of child pornography in the Protection of Children Against Sexual Exploitation Act of 1977. Since then, Congress has continued to express concern that child pornography remains a national problem that harms children and society. To that end, Congress has enacted numerous additional criminal statutes to cover nonproduction acts such as transportation, distribution, receipt, and possession of child pornography. Leveraging its constitutional power to regulate interstate commerce, the federal criminal justice system has expanded its jurisdictional grasp over these crimes, which now are largely accomplished using online technologies and computer resources. The number of nonproduction child pornography offenders sentenced in the federal system has increased exponentially, from six dozen in the year 1992 to almost 1,800 in 2013.

This book has outlined many areas in law and society in which crimes involving child pornography operate in special and usually contested manners. This observation remains true in sentencing, in which the punishment for child pornography represents perhaps the most controversial sentencing scheme in the federal criminal system today. The dispute has pitted several robust institutions against each other. Congress and the federal judiciary are vying for control over sentencing, and the agency created to foster mutual respect and uniform sentencing practices is struggling to
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maintain its authority. Congress created that agency, the United States Sentencing Commission (the “Commission”), almost thirty years ago. While Congress delegated significant policy authority to it and expected the agency to act as an independent expert body, Congress has since reminded everyone that the Commission is a subordinate operation. The legislature and the judiciary have a different, though equally complex, relationship in which each operates as a check against the authority of the other, with neither obtaining primary authority in sentencing law. The question about whether sentences should be founded upon empirical study—meaning the result of skillfully calculating actual sentencing practices—is also eliciting debate in legal circles. This chapter explores these political and empirical controversies, points out differences in ideologies and legal conclusions that underlie them, and provides descriptive information about recent federal child pornography offending and resulting sentences. The overall inconsistency in sentencing across federal courts and, as will briefly be addressed, state sentencing schemes reflects differing definitional suppositions concerning the dangers child pornography viewers pose and the harms suffered by children and thus lead to differences in determining the appropriate proportionality of just punishments.

Federal Sentencing Basics

Three important governmental organizations are at odds over the power to manage sentencing practices in the federal criminal justice system. Congress, the United States Sentencing Commission, and the federal judiciary is each convinced of its own unique abilities to best judge culpability and to determine just punishments. As shall be addressed below, the debate is at a head with respect to nonproduction child pornography crimes. To begin, though, a summary of the history of federal sentencing is necessary to set up the reasons for the recent controversy.

In the federal system, child pornography offenses have the potential to elicit long-term prison sentences. Transportation, distribution, and receipt offenses each trigger five-year mandatory minimum sentences and twenty-year maximums. Possession of child pornography does not trigger a mandatory minimum but carries a maximum of ten years; if the material involves a prepubescent child or a minor under the age of twelve, the maximum increases to twenty years. These sentences ratchet upward further if the defendant has a history of criminal sexual abuse. The selection of a particular federal defendant’s sentence within those ranges is determined
by a district judge subject to the constraints of statutory sentencing goals, the Commission’s sentencing policies and guidelines, and constitutional law. All these provide standards that are designed to assist district judges in determining reasonable sentences to impose upon offenders.

The current federal sentencing system was established by legislation aptly named the Sentencing Reform Act of 1984, which overhauled what was an indeterminate system in which judges had great discretion to a more determinative system limiting such flexibility. This law created the United States Sentencing Commission, an agency to be staffed with professionals who would use their special expertise to craft uniform sentencing policies and guidelines. District court judges, essentially trial judges in the federal system,\textsuperscript{10} would retain the authority to assign sentences in individual cases, but they were to be substantially influenced by guidelines issued by the Commission concerning the severity of the appropriate punishment for the relevant crime. To this end, the Commission crafted guidelines intended to encompass a reasonable sentencing range based on the idea that not all crimes are committed alike. For example, not all robberies are the same for the purpose of determining an appropriate punishment to match the level of the resulting harm and the offender’s relative culpability. The goal was for the Commission to craft discrete sentencing ranges based on the offense committed, as modified by relevant facts or circumstances which the Commission determined either aggravated or mitigated culpability. These offense-related facts or circumstances are called specific offense characteristics (“SOCs”). Thus, under the guidelines the sentence calculation begins with a numeric base offense level for each type of crime (essentially a starting number), which represents the typical crime. Then points are added or subtracted for applicable SOCs, which increase or reduce the offense level based on facts related to the severity of the offense or the culpability of the offender. Basically, guidelines provide precise numerical methods for calculating final point totals, which are then matched against the defendant’s criminal history score on a guideline table to determine the relevant sentencing range. Thus, the guidelines are expected to normalize sentencing practices by offering a regimented process to determine a recommended range of sentence. For example, the guidelines might indicate that a sentencing range of 100 to 125 months’ imprisonment (approximately 8 to 10 years) was proper for a defendant who committed a certain type of robbery; it would arrive at that calculation by adjusting the base offense level for robbery using relevant SOCs, and then matching the final offense level with the defendant’s criminal past on the guideline table.
Originally, Congress intended that the Commission’s policies and guidelines would be presumptively binding on the courts. Yet the reform legislation itself contained two provisions that gave judges some flexibility. First, the law provided that federal judges retained some discretion to vary from a guidelines’ recommended range for a fact or circumstance that had not already been considered by the Commission. Second, the Commission’s policies and guidelines would not embody the only criteria to be considered. Another statutory provision instructed that in determining a reasonable sentence, the sentencing judge must consider not only the guideline range, but also the nature and circumstances of the offense; the history and characteristics of the defendant; the need for the sentence imposed considering the seriousness of the offense, retribution, deterrence, and protecting the public; and the need to avoid unwarranted sentencing disparities among like offenders (collectively, “sentencing factors”). This flexibility notwithstanding, federal judges complied with guidelines’ recommendations and abided by Commission policies a substantial majority of the time for nearly twenty years. Then, in 2005, the United States Supreme Court dealt the guidelines system a significant blow.

In the landmark case of United States v. Booker, the United States Supreme Court rendered the guidelines advisory in nature, rather than presumptive, in order to remedy a constitutional issue with the mandatory nature of the federal guidelines structure. Pursuant to Booker, a district judge now can now deviate from a guideline’s recommended sentencing range if she determines that a different sentence is justified after consideration of the sentencing factors. The Supreme Court in the Booker decision clearly permitted a sentencing judge to vary for a reason related to the particular facts and circumstances in the individual case. A couple years thereafter, the Supreme Court went a step further when it approved the ability of a district judge to vary from a guideline’s recommended range not due to any particular fact or circumstance relevant to the case at hand, but if the individual judge has a disagreement with a policy underlying that guideline. For example, the Supreme Court allowed a sentencing judge in Kimbrough v. United States to categorically disagree with the guideline for crack cocaine trafficking, which was far more punitive than the guidelines for other drugs, including powder cocaine.

Together, Booker and Kimbrough might be construed to render the Commission itself, as well as its policies and guidelines, largely irrelevant. To the contrary, in a series of cases since then, the Supreme Court has reaffirmed that federal judges remain significantly circumscribed by the Commission’s policies and guidelines, though the ability to vary for the reasons...
just mentioned survive. Thus a district judge is still required in the first instance to correctly calculate the guidelines’ range and also to consider Commission policies before considering whether to diverge from them after considering all of the sentencing factors.

As a result of Booker and Kimbrough, the compliance rate of issuing within-guideline sentences has continued to decrease in federal courts. The overall rate for within-range sentences fell from 72 percent to 51 percent from 2004 to 2013. Notably, within-guideline sentences have decreased dramatically for child pornography offenses. The percentage of within-range sentences for child pornography offenses fell much farther, from 82 percent in 2004 to 31 percent in 2013. The direction of variances for child pornography sentencing is decidedly in one direction: downward variances in issuing sentences (often, very far) lower than guidelines recommendations. The rate of below-guideline penalties in child pornography cases was 13 percent in 2004 and increased substantially to 68 percent in 2013.

The current debate about child pornography sentencing has attracted widespread attention from various constituencies. In the last few decades Congress has regularly increased statutory maximum sentences and established higher mandatory minimums specifically for child pornography crimes. Yet even with such numerical increases, Congress continues to be unsatisfied with the reduced sentences imposed by the judiciary in many cases. Thus, Congress has, on several occasions, statutorily required the Commission to make modifications specifically to the child pornography guideline. These have included mandates of specific offense level increases and changes to particular SOCs to enhance punishment. Sentencing experts claim this is an unfortunate legislative intrusion into the operation of a purportedly independent agency and its expertise, an encroachment unique to child pornography crimes.

The Commission itself is equally frustrated with the practices of courts and Congress in this regard. It has indicated its displeasure both with congressional edicts, which have changed the child pornography guideline, and with federal judges disregarding its mastery, which is exemplified by both the decreasing rate of within-guideline sentences and the criticism expressed in sentencing opinions. For their part, numerous federal judges regularly balk at the increasing length of sentences that the child pornography guideline has produced over the years; many now perceive this guideline as glaringly unhelpful in guiding the judge in determining a reasonable sentence. To understand the judges’ frustration, it is necessary to outline the common reasons among the judiciary
and others for finding that the child pornography guideline’s recommendations have become untenable.

Challenges to the Child Pornography Guideline

The controversies concerning the validity of the child pornography guideline converge upon several criticisms that are now oft repeated, at least by those who find fault. The discussion here will outline these common critiques, supplemented by certain numerical information derived from statistical analyses of the Commission data files for fiscal 2012 sentences. First, the source of the child pornography guideline is at the heart of perhaps the most visible complaint. Judges who have varied downward often criticize the guideline as not resulting from the Commission’s normal role as an independent agency conducting empirical study. Therefore, the argument continues, it cannot provide normative information about reasonable and consistent sentences. Instead, the starting offense level and several of the SOCs were forced on the Commission by Congress. Indeed, the Commission concisely describes this history in a comprehensive report on the evolution of the child pornography guideline:

Congress has repeatedly expressed its will regarding appropriate penalties for child pornography offenders. Congress has specifically expressed an intent to raise penalties associated with certain child pornography offenses several times through directives to the Commission and statutory changes aimed at increasing the guideline penalties and reducing the incidence of downward departures for such offenses.

Congress’ penchant over the years to enact laws requiring fundamental changes to a specific offense guideline is virtually unprecedented. Its fixation on child pornography, a crime that has never made up more than 3 percent of the federal system’s sentencing docket, is remarkable. Perhaps the allure of sex and violence involving the most protected segment of society—children—offers political advantage to support increasing sanctions for people perceived as child sex offenders. Even though such direct congressional influence over the guidelines is unusual, the fact that numerous judges eschew a guideline because of Congress’ role in its development is not uncontroversial. That is because, as will be discussed further below, others believe that the ultimate authority over sentencing policy
ought to be reserved to Congress, whose judgments should overrule any contrary views of the Commission or individual judges.

The second dispute concerns adjustments to the child pornography offense level. The current guidelines for child pornography offenses contain six categories of SOCs, which, if applied, can substantially increase the recommended length of imprisonment. Significantly, all the SOCs in this guideline are enhancements (rather than reductions). They include additional points for material involving prepubescent children or minors under age twelve; the use of a computer; sadistic or violent content; distribution activity; the number of images; and a history of prior sexual abuse. One of the most common complaints among critics is that several of the SOCs apply in virtually every case. This is because most child pornography offenders use a computer to download and trade images, and the advancement of technology permits the collection of a large trove of material that likely will include very young children and violent content—even if the individual does not necessarily intend to collect those types of images. One problem with the high rate of applicability for multiple SOCs is that instead of acting as aggravating factors that isolate more heinous criminals, they merely represent the typical offender in contemporary times. Thus, the guideline fails to differentiate between more and less culpable offenders.

The observation that some of the SOCs are almost universally applied is borne out by 2012 sentencing statistics. At least 96 percent of defendants received points related to the enhancements for the material involving a minor, the use of a computer, and the number of images. Four out of five defendants received an enhancement for the sadistic or violent content of the images. Just over half of defendants were assigned a distribution-related enhancement. However, just one in ten received points for a pattern of activity of sexual abuse with children.

The problems associated with the SOCs exemplify the political and empirical focus of this chapter. Those SOCs that derive from Congress are not supported by any empirical study of actual sentencing practices. Further, as the Commission’s report on the development of the child pornography guideline attests, even those SOCs not required directly by Congress are likewise not based upon any empirical analysis. Instead, the Commission appears open to embracing SOCs that derive merely from various commentators’ proposals. For example, the first two SOCs adopted in the child pornography guideline, involving material depicting a minor under twelve and distribution activity (which remain in existence today), evidently were made simply at the request of a Department of Jus-
tice representative. Another SOC change made shortly thereafter to trigger an enhancement for material involving a prepubescent minor came from a suggestion by a lawyer for an antipornography interest group, without debate or discussion.

Third, a related problem with many of the SOCs commonly invoked is that they act to ratchet up sentencing ranges significantly. This leads to recommendations for lengthy sentences, which many judges find to be unreasonably high. It has been observed that the resulting ranges tend toward statutory maximums, meaning that the guideline fails to adequately cover the full spectrum of potential minimum and maximum penalties, which again results in a failure to distinguish between various kinds of offending behavior. Some say it seems illogical that Congress would provide a statutory range of five to twenty years for most child pornography offenses, yet the guideline routinely leans toward recommendations around the maximum. Another method of articulating this criticism is that the child pornography guideline results in unwarranted similarity (i.e., extremely harsh penalties) for dissimilar cases and, as mentioned earlier, fails to adequately distinguish the worst (justifying twenty years) from the least culpable offenders (deserving five years).

The final category of complaint is that, overall, the child pornography guideline tends to yield recommendations that are higher than other guidelines would provide for actual sexual molestation of children. Judges adopting this view argue that it is senseless to punish offenses involving visual material more severely than actual contact crimes against children. They also often believe that the child pornography guideline is disproportionate with guidelines’ recommendations for other offenses. The guideline ranges tend to be longer for child pornography offenses than for such crimes as homicide, drug trafficking, and bank robbery.

Individually and collectively, these criticisms have caused many federal judges to lose respect for this particular guideline, and the 2012 dataset analyses illustrate the problematic results. The 2012 sentencing data highlight the practice of varying from guideline recommendations, while also showing the result of disparities nationwide. Overall, 35 percent of child pornography sentences in 2012 were within guideline range. Almost two-thirds of child pornography sentences actually issued (approximately 62 percent) were below range. At the other extreme, slightly less than 3 percent were above range. While the sentencing guideline itself would seem to assure similar sentences across all types of offenders, Booker and Kimbrough have disrupted that result. Both decisions allow judges to reject the application of otherwise applicable SOCs and to vary from final ranges.
Several additional statistical measures highlight the result of variances. The mean prison sentence of for child pornography crimes in 2012 was ten years, which is not insignificantly lower than the mean guideline minimum sentence of over twelve years. Yet there was great variation in individual sentences, ranging from a low of probation to a maximum of a life sentence. On the low end of this punishment spectrum, one-third of defendants in 2012 were sentenced to five years or less. Three percent received one year or less of prison time, with 2 percent receiving sentences of probation only. On the other end of the spectrum, 13 percent received sentences of at least twenty years. Separate regression analyses, not presented herein, also provide evidence of widespread disparities across the country even after controlling for relevant factors. Thus, perhaps because of the criticisms that the guideline improperly tends toward maximum penalties across the board, federal judges are using their newfound powers to achieve gradations in culpability and sentencing.

There are further statistics suggesting that many sentencing judges—but not all—find that the guideline produces punishments that are routinely too high. Even for the 35 percent of sentences in 2012 that complied with the guideline recommendation, most were oriented toward the lower end of the range. Of those sentences that were within range, 70 percent were exactly at the absolute guideline minimum sentence, while another 12 percent were within the lower half of the ranges. The combination of these statistical measures reveals two competing conclusions: First, there is a trend of deviating downward from this guideline. Second, there is also a lack of uniformity nationwide in complying with the guideline and, possibly, with the length of sentences actually issued.

Based usually on one or more of the foregoing complaints, judges often explain the basis of their downward variances as justified when considering all of the sentencing factors and the greater discretion afforded by the Booker ruling. The other common legal justification is that the child pornography guideline specifically deserves less deference and ought to be rejected as a matter of policy. This argument is tied to the Kimbrough decision referenced earlier. But whether Kimbrough legally permits such a policy rejection has resulted in inconsistent, indeed contradictory, conclusions by district judges across the country. Many, but certainly not all, judges find that the child pornography guideline is faulty and therefore unreliable. To make matters worse, the circuit courts of appeal are divided on the relevant legal issue, which partly explains the lack of uniformity in sentencing.
A Disputed Legal Question

Significant disparities in child pornography sentences may be related to an important legal disagreement among the federal courts that has emerged. The question is whether it is lawful for a district judge to vary from the guideline range based on a policy disagreement with the child pornography guideline. This legal question arose after the Kimbrough decision, in which the Supreme Court permitted a district judge to disregard the guideline for crack cocaine offenses because the judge disagreed with the principal policy on which that guideline was based. The sentencing judge in Kimbrough thought that the Commission’s policy was unfounded because it was based not on any empirical study but on a highly questionable generic metric based on the weight of the drug. The Supreme Court’s Kimbrough decision did not resolve two major issues that are now at the heart of the legal dispute in child pornography sentencing. One was whether a Kimbrough-type policy rejection is permissible for any other guideline that is not the product of the Commission’s own policy conclusion. More specifically, the question is whether a court may reject a guideline policy when the disputed policy was mandated by Congress itself. The other issue is whether courts may reject only those guidelines that have not benefited from the Commission’s empirical analysis. The reference to empirical analysis here refers to the expectation that the Commission would derive policies and guidelines only after undertaking statistical compilations of average sentencing practices across the country for the offense or SOC at issue. To be sure, the formative legislation did not compel the Commission to write guidelines that merely replicated past practices; the agency was also tasked with considering whether such sentences properly reflected the culpability and harm caused by the relevant offense. Still, many believe the Commission ought to at least study judges’ decisions. To state this issue another way, the question is whether the ability to reject a guideline based on a categorical policy disagreement is limited to guidelines that do not reflect the Commission’s study of normative experiences.

Legal rulings about the legal authority for a sentencing judge to reject the child pornography guideline for a policy-based reason have varied across the country. Significantly, the federal courts of appeal have addressed this issue, resolving the question in three different ways. In one group, four circuits have explicitly denied lower courts the legal ability to reject the child pornography guideline for policy reasons. These courts have offered several reasons for their denials. They tend to view Congress’ involvement in the child pornography guideline as a reason to be respect-
ful of the legislature’s view that such crimes are serious and ought to be severely punished.\textsuperscript{43} One appellate court clearly believes that the fact the child pornography guideline represents congressional will is a reason to consider Kimbrough as distinguishable and therefore inapplicable.\textsuperscript{44} That court explained that it is not legally permissible to reject the child pornography guideline based on legislative influence because Congress maintains ultimate authority in setting sentencing policy.\textsuperscript{45} For three circuit courts in this group, the argument that sentencing policies ought to be based on empirical studies is unpersuasive, with the appellate judges noting that determinations of reasonable sentences never necessitated a statistical analysis.\textsuperscript{46} Another appellate court in this group concludes that the child pornography guideline cannot be rejected, but it offers a somewhat conflicting perspective, asserting this guideline actually was the subject of empirical support, though the court is unclear about the foundation for such assertion.\textsuperscript{47}

On the other end of the spectrum is the group of appellate courts, also numbering four, that have explicitly condoned a policy-based rejection of the child pornography guideline.\textsuperscript{48} One appellate circuit construes Congress’ involvement in directly and indirectly amending the child pornography guideline as problematic because it undermines the Commission’s normal empirical study, leading the court to conclude that this guideline lacks credibility in guiding reasonable sentencing practices. Indeed, this court refers to the child pornography guideline as “eccentric,” of “highly unusual provenance, and “fundamentally different” than other guidelines.\textsuperscript{49} Another circuit is in substantial agreement. It points out that when a guideline fails to represent the Commission’s deliberative process and instead is substantively influenced by congressional directive, it deserves even less respect.\textsuperscript{50}

The third group in the dispute on the legal authority to reject the child pornography guideline for policy reasons includes three circuits that have taken an equivocal stance.\textsuperscript{51} These courts theoretically accept the ability of a district judge to reject a guideline for policy reasons but at the same time they have expressed serious reservations about the prospect of rejecting the child pornography guideline. These circuits appear unwilling to adopt a definitive stance on the institutional clash, though they seem inclined to defer to Congress and the Commission. For instance, one court in this group opines that arguments that the child pornography guideline recommends overly harsh sentences ought best to be addressed to the Commission or Congress, rather than the judiciary.\textsuperscript{52} Another circuit has expressed discomfort with the notion of rejecting a guideline that represents Con-
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gress’ clear policy choices.53 The last circuit’s position, while not precluding or condoning a policy rejection of the child pornography guideline, expresses a generic deferential stance to congressional choices on punishments, while also opining that legislative preferences need not be empirically based.54

Statistical analyses of the Commission’s 2012 dataset indicate that this circuit split is correlated with the length of sentences being imposed. The mean sentence in the circuits supporting a policy rejection of the child pornography guideline was about eight years, while in the other circuits it was eleven years. These numbers suggest that the dispute over whether a court may reject the child pornography guideline is related to the lack of national uniformity. Widespread disparities have caused conflict among various institutions in the federal justice system.

Institutional Conflicts

To be clear, some of the conflicts discussed in this chapter are not necessarily limited to child pornography sentencing. There is an ongoing, broader discussion about which federal sentencing institutions may engage in policymaking and, more specifically, whether one of those institutions may trump the others if there is a conflict. Some believe that Congress, as the elected representative body of the people, naturally holds the overriding power.55 Others prefer the Sentencing Commission, pointing to its institutional advantages for empirical analysis and professional judgment, though not necessarily eschewing congressional oversight.56 If the guidelines are more akin to mere “sentencing suggestions,” as some have suggested is the current state of affairs, then perhaps the Commission should be abolished.57 Still other experts insist that sentences are most just when judges are able not only to consider the Commission’s expertise, but also to gather relevant information and engage in individualized sentencing.58

Notwithstanding the larger debate over federal sentencing, child pornography sentencing presents its own singular tensions. Congress continues to press for increases in penalties for child pornography crimes, as well as for decreased judicial discretion. The federal judiciary pushes in the opposite direction by varying downward from guideline recommendations in a significant portion of cases. In a politically charged hearing on the state of federal sentencing after Booker, the then-chair of the House Judiciary Committee remarked that “[a] criminal committing a federal crime should receive similar punishment regardless of whether the crime
was committed in Richmond, Virginia, or Richmond, California. And that's why I am deeply concerned about what's happening in federal sentencing.”  

He focused not just on regional differences in sentences generally, but on high disparity rates for particular crimes, singling out child pornography sentencing as having the most extreme downward variance rate among federal judges. The conflict has caught the attention of the media, with numerous newspapers, magazines, radio shows, and other news outlets reporting on it. For example, legal reporters have recognized that Congress has micromanaged sentencing policy to an exceptional degree with child pornography penalties.

Other constituencies interested in the debate and in its resolution are obvious: prosecutors, victims, the defense bar, and defendants themselves, all with sometimes conflicting interests. The American Bar Association has called for an overhaul of the child pornography guideline, claiming that its sentences are too severe and disproportionate considering they yield sentences longer than drug trafficking, white-collar crime, and some offenses involving luring children into sexual acts. At a recent congressional hearing, an American Bar Association representative further opined that federal judges and the Commission ought to have a more symbiotic relationship; if the judiciary is consistently varying from a guideline, that fact should be considered significant in convincing the Commission that changes are required. The Department of Justice also seeks an overhaul of the relevant guidelines, believing them to be outmoded, though it is not necessarily supporting the downward variance rate or a reduction in sentence severity overall.

For its part, the United States Sentencing Commission appears torn between the constituencies it was designed to serve. On the one hand, the Commission seeks to provide relevant guidance to federal judges in crafting sentences and thereby fostering national uniformity. It clearly recognizes the high variance rate and is displeased with it. A comprehensive review of the validity of the child pornography guideline has been a listed priority of the Commission since 2009, and the agency in 2013 officially expressed its continuing investigation into possible changes. On the other hand, the Commission was created by Congress. Although Congress delegated significant authority to the Commission, the Commission recognizes that Congress retains ultimate authority over sentencing policies and guidelines. In its recent lengthy report specifically addressing the child pornography guideline, the agency reminds Congress that one of the Commission's legal duties is to examine sentencing data and to make modifications in light of feedback from the judiciary, including from their
sentencing decisions, which in the area of child pornography have been dominated by a high variance rate in recent years. Because the Commission evidently believes that prior congressional action in this area constrains it from overhauling the child pornography guideline on its own, it politely asks Congress for official approval to do so. Curiously, the Commission seems to have taken a conciliatory position in this respect. Instead of providing specific recommendations regarding discrete offense levels and SOC point adjustments, it vaguely refers to potential changes. Further, instead of offering modifications that would not infringe upon prior congressional dictates, the report seems to invite legislative approval before any official action is taken. In sum, the situation seems at a standstill, with the agency awaiting some clear congressional response.

Unfortunately, the Commission’s ambivalent position in its recent report means that a significant variance rate and sentencing disparities will continue in the meantime. Indeed, the Commission’s stance may actually create further trouble. Jurists who find fault with the guideline may seize upon the Commission’s suggestions and experiment in implementing them in actual cases, creating even greater discrepancies in sentences nationwide for similarly situated offenders. The fact that there is a circuit level conflict on a major legal issue only muddies the situation.

Overall, this chapter provides reasoning, empirical data, and legal arguments that substantiate wide disparities in sentencing for federal child pornography offenses. Clearly, the various sentencing institutions in the criminal justice system are divided in judgments on culpability, which will lead to continuing differences in opinion on sentencing policy between and within institutions. In addition to the political controversies and empirical questions discussed, two further perspectives may be useful in assessing the current conflict over federal sentencing of child pornography offenders: a comparative analysis of criminal sentencing from other American jurisdictions and competing ideological perspectives.

Comparative Perspectives

Comparing sentences across jurisdictions creates a fuller understanding of the various political and empirical positions of punishment in our federalist system. The U.S. Sentencing Commission is generous in making available much of its data for researchers to analyze, including the statistical analyses in this chapter. Other sentencing agencies are not as transparent, which unfortunately makes it difficult to conduct a comparative analysis of
sentences across multiple American jurisdictions. But there are alternative, albeit weak, methods, to ferret out where the federal system stands in comparison to other jurisdictions. One potential comparator is within the federal government itself: the military. The military justice system operates substantially autonomously from the criminal system for civilians. For the limited purposes needed here, the most relevant distinction is that military sentencers are not bound by the Commission’s policies and guidelines. Though there is no publicly available database of sentences in the armed forces, much anecdotal evidence suggests that sentences in the military for child pornography offenses deviate from the civilian regime. A review of available case law in the past few years indicates that sentences for child pornography crimes in the military system are relatively minimal—generally far less severe than in the civilian system. Across the case opinions, sentences of less than two years appear to be the most common (e.g., ninety days, six months, five months). The case law review suggests that sentences greater than that rarely are present unless additional crimes were involved, such as actual child molestation.

No database exists, either, that permits an easy comparison of actual sentences imposed for child pornography offending in the various states. Two reporters have investigated potential differences in their geographic areas. Comparing federal sentences with Pennsylvania state sentences for federal and state child pornography offenses, one reporter found that half of those sentenced in Pennsylvania state court for child pornography offenses in 2009 did not receive any sentence involving incarceration, while of those that did receive some prison term the longest sentence was approximately eight years. The reporter compared these results to the average seven-and-a-half-year sentence in federal courts during the same time period. A journalist for a Louisville, Kentucky, paper compiled years of statistics to compare sentences for federal child pornography offenders adjudicated in the local federal district court, not with state child pornography defendants, but with child sexual molestation defendants sentenced by the local state court. He concluded that the average sentence for child pornography offenders in the area’s federal district (from 2006 to 2011) was almost four times as long as the sentence received by offenders in the local court for sexually assaulting children.

This author’s own analysis of Texas data for the offenses of possession and promotion of child pornography offenses yielded an average sentence of almost ten years, though with a range of six months to life. Yet this statistic is not exactly comparable considering it was a dataset of all offenders incarcerated in Texas state prisons as of February 2013. It included prison-
ers who were sentenced from 1997 onward and did not include probation-only sentences or those no longer in prison, and the dataset thus may have overrepresented lengthy sentences. A better comparison may be the average sentence imposed: The fiscal 2012 federal average was ten years. The average sentence imposed in Texas for child pornography offenses from January 1, 2012, through February 5, 2013, was about seven years. Again, though, this figure does not include probation-only sentences or those who were already released or for some other reason not then incarcerated in Texas’ prisons despite being sentenced during that time period.

In sum, these small-scale and simplistic comparisons yield different conclusions. Comparing federal and state child pornography offending sentences, the Texas experience appears to be closer to the federal one, while the Pennsylvania sentencing system appears to impose far more lenient sentences. The local Kentucky review showed that federal child pornography defendants received sentences on average about four times as long as state defendants did for contact molestation crimes, suggesting the federal system is much more punitive for noncontact child sexual exploitation offenses.

An alternative, though admittedly also somewhat lax, method for a comparative analysis is to consider statutory sentencing schemes across state systems. Recall that the penalties in the federal system generally range from probation to ten years for possession and five to twenty years for receipt, distribution, and transportation (not including increases for prior sexual offending). A review of the fifty states’ sentencing schemes for nonproduction child pornography crimes shows that there are widespread inconsistencies—some to a dramatic degree—in potential punishments across the country for child pornography crimes. The comparative analysis herein focuses on distribution-type offenses, though many states graduate sentences for possession offenses much lower.

Overall, minimums and maximums vary to large degrees. In many instances, the ranges of punishments between different states do not even overlap. Many states permit sentences for distribution of no term of incarceration, including, among others, Florida, Iowa, Maryland, Michigan, Oregon, Pennsylvania, and Rhode Island. Other states appear to require some period of incarceration. For example, Louisiana, Mississippi, and New Jersey have five-year minimum thresholds, while the minimum in Massachusetts is ten years. In contrast, the maximum statutory penalty for possession and distribution in California is only one year, two years in West Virginia, and three years in Kentucky. Notwithstanding, several states permit more extreme punishments. Montana law allows sentences
up to one hundred years, Alaska up to ninety-nine years, and Wisconsin and Mississippi each sanction forty-year sentences.

The range of possible terms of incarceration in any state varies greatly as well. Montana and Alaska offer the widest sentencing schemes with ranges of zero to one hundred and zero to ninety-nine years, respectively. A few other states provide wide ranges of punishment as well. Idaho’s permitted sentence ranges from zero to thirty years, Mississippi from five to forty years, Illinois from six to thirty years. To the contrary, a handful of states dictate very refined sentencing options, notably New Mexico with a fixed six-year sentence and, at even lower levels, North Carolina provides for twenty-to twenty-five months and Kansas dictates thirty-one to thirty-four months. In general, all of this evidence indicates substantial variations in statutory declarations of culpability for child pornography offenders, as well as significant variations in sentencing, across the country for similar offenses based on both geographical and jurisdictional criteria.

Still, there is some evidence that the discrepancies in a guidelines-based system with sentences actually imposed may be unique to the federal system, at least in the child pornography area. In a recent survey of a representative sample of prosecutors nationwide who pursued child pornography cases, almost 80 percent reported that in their experience judges abided by state sentencing guidelines for child pornography possessors almost all the time.74

The foregoing reflects tensions among officials in defining appropriate punishments for child pornography offenders. Discrepancies in legal opinions between and within federal institutions and in sentencing laws across jurisdictions highlight the troubling results that otherwise similarly situated defendants may face differing sentences depending on the jurisdiction, region, and judge involved. Perhaps ideological contrast may help explain them as well.

**Ideological Perspectives**

Notwithstanding the importance of legal and empirical debates in explaining variations, the disparities in sentencing for child pornography offenders appear also to be founded upon fundamental differences in sociopolitical perspectives. It appears that the diversity of opinions in sentencing, which inherently also imbeds various judgments of culpability, is regularly tied to whether one concentrates upon depictions of sexual abuse of young victims or, instead, on the defendants and their behav-
ior. Those who reiterate that the images depict the horrific sexual exploitation of the very young likely favor more severe punishments to appropriately account for the tremendous suffering of the children. In this view, the consumption of the images operates to victimize the children over and over again. A lens focusing upon the minor victims seems often to embrace the market thesis, that consumption fuels a market for further production and the search for new bodies, necessarily leading to additional incidents of sexual abuse of children. Under this thesis, strong punishment is considered necessary to deter even the casual possessor. Moreover, the market thesis posits that the availability and consumption of material involving child victims creates a greater risk of harm to society in general by normalizing adult-child sexual relations or, even more broadly, normalizing a view of children as appropriate objects, perhaps also holders, of sexual desire. Thus, even outside the area of illegal pornographic materials, the proliferation of these images is thought to beget more sexual activity involving minors. Notably, in this society, the mere idea of children engaging in sex is culturally abhorred. A victim-oriented focus can more easily ignore the offenders themselves. Because their crimes are related to the sexual exploitation of the most protected members of our society, child pornography viewers are universally reviled and therefore undeserving of empathetic concern.

On the other hand, supporters of reduced punishment oftentimes orient more towards the offenders. For example, federal judges often describe individual defendants as good family men with decent jobs, positive community ties, and no prior offenses. Again, statistical runs using the Commission’s 2012 dataset supports the observation that federal child pornography offenders as a group are far different than other federal defendants on certain risk-relevant measures. The vast majority of them are white males, American citizens, highly educated, and with no criminal history. Even the demographic characteristic of age indicates a less risky group; the mean age of child pornography defendants is forty-one years, and over one-quarter were age fifty and above. An additional explanation given why these defendants fail to pose a substantial risk to children is that the conduct is not necessarily indicative of deviant sexual interest in children; other, less nefarious motivations are in play. These alternative motivations include an original interest in adult pornography that led to collecting child pornography, in part because of technological advances in modern times. The Internet offers what has been called the “triple A engine”—anonymity, availability, and affordability—that has fueled addictive behaviors in online activity, including cybersex. Ease of access and efficient
downloading capabilities offered by new technologies mean that individu-
als online do not always control all the materials that are available to them
or that become part of their digital collections. This perspective down-
plays the market thesis because the defendant's individual collection is
seen as contributing little to the global market for child pornography ma-
terials. It also reflects a judgment that there are gradations of culpability
among downloa

ders. Evaluations about culpability variations essentially
involve findings that possession is a lesser crime than distribution and that
distribution is a more serious crime when it is done for profit than when
no financial consideration is involved.80

Ideological divides occur, as well, in how to conceptualize the risks and
the harms of child pornography. It is possible that proponents of harsh
sentences are using child pornography consumption as a proxy to punish
undetected child molestation. To the extent child pornography is plainly
being used as a substitute, critics argue that child pornography crimes
should not be embraced as a sort of inchoate crime, and that it is unjust to
punish what a person has not done (here, child sexual assault) or may in
some merely speculative sense do in the future.81 It may also be that the
distinction between child pornography and child sexual assault has been
negated by the new conceptualization of a broader umbrella of “child sex-
ual exploitation crimes” that consolidate contact crimes together with
child pornography offenses in a single category. This umbrella widens the
lens to defining all those who engage in child sexual exploitation crimes as
directly responsible for the harms caused to child victims, whether or not
the offenders had physical contact with them. Indeed, child pornogra-
phers may even be characterized as having greater culpability considering
that their crimes likely involve not one but many victims.82

Conclusions

As long as the Commission and the guideline structure remain intact, per-
haps the preferred philosophy is to value the advantages that can be ob-
tained. The Commission's data analysis can still foster coherent standards
reflecting national uniformity. At the same time, the decisions of individu-
al judges can act as checks on Congress and the Commission, while, in
turn, Congress' ability to enact mandatory minimums that are generally
enforceable on all institutions constitutes a substantial check.83 Indeed,
experts worry there might be a causative link—that if district judges exer-
cise their Booker discretion and/or Kimbrough-style policy rejection to
vary in a high rate of cases, it may lead Congress to react by implementing mandatory minimum sentences\textsuperscript{84} or even abolishing the Commission and/or the guidelines entirely.\textsuperscript{85} Such fears reflect what has already happened in the area of child pornography sentences.\textsuperscript{86} This struggle over power between the sentencing practices of judges and the potential for Congress’ corresponding backlash, while theoretically applicable to the entirety of federal sentencing, is at its zenith with the child pornography guideline. The sheer magnitude of the downward variance rate, together with Congress’ unique and repeated attempts to counteract judicial discretion, is most striking with this guideline today. This makes the child pornography guideline important for the various reasons discussed herein, but also means it is at the cutting edge of federal sentencing policy for the future. At its core, the debate is about defining just punishment for a crime in which legal and ideological opinions are in direct conflict.

NOTES

2. Chapter 6, Audrey Rogers, The Dignitary Harm of Child Pornography—From Producers to Possessors.
5. U.S. Sent’g Comm’n, 2013 Sourcebook tbl. 17 (2014). References to annual sentencing data utilize fiscal years (October 1–September 30).
7. The term child pornography in this chapter refers only to nonproduction offenses, such as transportation, distribution, receipt, and possession.
8. 18 U.S.C. §§ 2252, 2252A.
9. 18 U.S.C. §§ 2252, 2252A.
10. As relevant to this article, the federal judicial system contains three hierarchical levels of judges/courts. The district judge is essentially the trial (and sentencing) judge, the circuit judge is an appellate judge with the authority to review district court rulings upon appeal, and the highest level is the supreme court.
14. 543 U.S. 220, 245 (2005). The Supreme Court found that the federal sentencing system operated in an unconstitutional manner by permitting judges to find facts that increased the punishment beyond what was authorized by facts admitted in the defen-
dant’s plea or found to be true by a jury. Bestowing advisory status was the Supreme Court’s remedial fix for the constitutional violation that had the added benefit of allowing the federal guidelines system to survive.

26. The author ran statistical analyses using the Commission’s fiscal 2012 data file using standard statistical software.
37. See chapter 5, Carissa Byrne Hessick, Questioning the Modern Criminal Justice Focus on Child Pornography Possession.
40. Any statistic herein concerning the average sentence or recommendations imposed a cap of 470 months as typically representative of a life sentence.
42. This group comprises the Fourth Circuit (United States v. Vanderwerff, 459 Fed. App’x 254 (4th Cir. 2011)), Fifth Circuit (United States v. Miller, 665 F.3d 114 (5th Cir. 2011)), Sixth Circuit (United States v. Bistline, 665 F.3d 758 (6th Cir. 2012)), and Eleventh Circuit (United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008)).


45. Id.

46. United States v. Miller, 665 F.3d 114, 121 (5th Cir. 2011).

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

48. The four circuits in this group include the First Circuit (United States v. Stone, 575 F.3d 83 (1st Cir. 2009)), Second Circuit (United States v. Dorvee, 616 F.3d 174 (2nd Cir. 2010)), Third Circuit (United States v. Grober, 624 F.3d 592 (3rd Cir. 2010)), and Ninth Circuit (United States v. Henderson, 649 F.3d 955 (9th Cir. 2011)).

49. United States v. Dorvee, 616 F.3d 174, 188 (2nd Cir. 2010).

50. United States v. Grober, 624 F.3d 592, 608 (3rd Cir. 2010).

51. The three circuits include the Seventh Circuit (United States v. Garthus, 652 F.3d 715 (7th Cir. 2011)), Eighth Circuit (United States v. Hyer, 498 Fed. App’x 658 (8th Cir. 2013)), and Tenth Circuit (United States v. Herget, 2012 U.S. App. LEXIS 18443 (10th Cir. Aug. 29, 2012)).

52. United States v. Garthus, 652 F.3d 715, 721 (7th Cir. 2011).


64. See generally U.S. SENT’G COMM’N, FEDERAL CHILD PORNOGRA-PHY OFFENSES 126 (2012).


72. Andrew Wolfson, Are Child Porn Laws Unfair? Viewers’ Sentences Can be Worse than Molesters’, COURIER-JOURNAL (LOUISVILLE), March 25, 2012; see also Chapter 8, Wendy Walsh, Melissa Wells & Janis Wolak, CHALLENGES IN INVESTIGATIONS AND PROSECUTIONS OF CHILD PORNOGRAPHY CRIMES (providing information on differences in potential sentences at the state v. federal levels).
74. WENDY WALSH, JANIS WOLAK, & DAVID FINKELHOR, PROSECUTION DILEMMAS AND CHALLENGES FOR CHILD PORNOGRAPHY CRIMES: THE THIRD NATIONAL ONLINE JUVENILE VICTIMIZATION STUDY 9 (2013).
75. Chapter 6, Audrey Rogers, THE DIGNITARY HARM OF CHILD PORNOGRAPHY—FROM PRODUCERS TO POSSESSORS.
82. United States v. Miller, 665 F.3d 114, 121 (5th Cir. 2011).
84. Stephanos Bibas et al., POLICING POLITICS AT SENTENCING, 103 NW. L. REV. 1371, 1372 (2009).