

## Chapter 12

# FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS TO CONGRESS

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### A. INTRODUCTION

This chapter contains (1) the Commission’s findings and conclusions, and (2) the Commission’s recommendations to Congress concerning revisions to the sentencing scheme in child pornography cases. Most of the Commission’s findings, conclusions, and recommendations concern cases in which offenders are sentenced under USSG §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor) for non-production offenses. As discussed in Parts C and D, *infra*, the statutory and guideline penalty scheme in such cases should be revised to reflect current offense conduct, evolving modes of electronic communications and other technologies used by offenders, and knowledge gained from emerging social science research. Such revisions are needed to more fully differentiate among offenders based on their culpability and sexual dangerousness. Separate findings and conclusions concerning cases in which offenders are sentenced under USSG §2G2.1 (Sexually Exploiting a Minor by Production of Sexually Explicit Visual or Printed Material; Custodian Permitting Minor to Engage in Sexually Explicit Conduct; Advertisement for Minors to Engage in Production) for producing child pornography are set forth below in Part E, *infra*.

### B. MAJOR FINDINGS CONCERNING §2G2.2 CASES

1. *All child pornography offenses are extremely serious because they both perpetuate harm to victims and normalize and validate the sexual exploitation of children.*

Child pornography offenses inherently involve the sexual abuse and exploitation of children. Victims are harmed initially during the production of child pornography, but the perpetual nature of the distribution of images on the Internet causes a significant, separate, and continuing harm to victims. Many victims live with persistent concern over who has seen images of their sexual abuse and suffer by knowing that their images are being used for sexual gratification and for the purpose of “grooming” new victims.<sup>1</sup>

Child pornography offenses are international crimes. Countless images depicting the sexual abuse of children are transmitted both domestically and internationally to offenders across the world, each of whom may redistribute the same image. Once an image is distributed via the Internet, it is impossible to eradicate all copies of it or to control access to it.<sup>2</sup> The harm to victims is thus lifelong.

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<sup>1</sup> See Chapter 5 at 107–114.

<sup>2</sup> See Chapter 3 at 41, 64.

Non-production child pornography offenses normalize and validate the sexual exploitation of children, which contributes to the sexual abuse of new victims in at least three different ways. First, some sex offenders use child pornography to “groom” children into believing that sex with adults is appropriate.<sup>3</sup> Second, for some individuals, obtaining sexual gratification through the use of child pornography is a risk factor for other sex offending against minors because child pornography may strengthen existing tendencies in ways that can create a “tipping-point effect” if other risk factors related to antisociality or sexual deviancy are also present. Some research posits that, for some higher-risk offenders, child pornography permits a progression from viewing child pornography to sex offending against minors.<sup>4</sup> Third, offenders’ participation in Internet “communities” in which members promote and share child pornography validates the sexual exploitation of children and may lead to the production of new child pornography images (and the consequent sexual abuse of children) by other community members.<sup>5</sup>

2. *Very young victims are commonly depicted in child pornography today.*

Commission data show that virtually all offenders (96.3%) possess images of minors who were prepubescent or under 12 years of age.<sup>6</sup> The Commission’s data concerning federal non-production child pornography offenses do not allow for a further gradation of victims’ ages. However, a leading study of federal and state offenders in 2006 found that approximately half of child pornography offenders possessed one or more images depicting the sexual abuse of a child under six years old. That same study found that approximately one-quarter of offenders possessed one or more images depicting the sexual abuse of a child two years old or younger.<sup>7</sup>

3. *Significant technological changes related to the commission of child pornography offenses have occurred in recent years.*

During the past three decades — especially since the enactment of the PROTECT Act of 2003 — dramatic technological changes have occurred that have greatly facilitated the commission of child pornography offenses. Innovations in digital cameras and videography as well as in computers and Internet-related technology, such as peer-to-peer (“P2P”) file-sharing programs,<sup>8</sup> have been used by offenders in the production, mass distribution (both commercial and non-commercial distribution), and acquisition of child pornography. These technological changes have resulted in exponential increases in the volume and ready accessibility of child

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<sup>3</sup> See Chapter 4 at 77, 102.

<sup>4</sup> See *id.* at 102–03.

<sup>5</sup> See *id.* at 97–98.

<sup>6</sup> See *id.* Chapter 8 at 209.

<sup>7</sup> See Chapter 4 at 87.

<sup>8</sup> The Commission’s examination of 382 federal non-production cases from the first quarter of fiscal year 2012 revealed that 74.5% of USSG §2G2.2 offenders who received child pornography used P2P file-sharing programs to do so and that 85.3% who distributed child pornography used P2P programs to do so. The Commission’s examination of a large sample of 345 federal non-production cases from fiscal year 2002 revealed that no offenders sentenced that year had used P2P file-sharing programs during the commission of their non-production offenses (according to their presentence reports). See Chapter 6 at 155.

pornography, including many graphic sexual images involving very young victims, a genre that previously was not as widely circulated as it is today. As a result of such changes, entry-level offenders now easily can acquire and distribute large quantities of child pornography at little or no financial cost and often in an anonymous, indiscriminate manner.<sup>9</sup>

Several provisions in the current sentencing guidelines for non-production offenses — in particular, the existing enhancements for the nature and volume of the images possessed, an offender’s use of a computer, and distribution of images<sup>10</sup> — originally were promulgated in an earlier technological era.<sup>11</sup> Indeed, most of the enhancements, in their current or antecedent versions, were promulgated when offenders typically received and distributed child pornography in printed form using the United States mail.<sup>12</sup> As a result, enhancements that were intended to apply to only certain offenders who committed aggravated child pornography offenses are now being applied routinely to most offenders.

4. *The Internet has facilitated the growth of child pornography “communities,” and offenders have varying degrees of engagement in such communities.*

Child pornography offenders who are involved with others in Internet-based child pornography “communities” (e.g., Internet “chat rooms” devoted to child sexual exploitation) normalize and validate sexual exploitation of children, promote the “market” for child pornography, and may directly or indirectly encourage others to produce new images of child pornography.<sup>13</sup> Offenders have varying degrees of engagement in such communities. Commission data do not directly address offenders’ community involvement, but the Commission’s special coding project of fiscal year 2010 §2G2.2 cases revealed different types of distribution behavior suggesting at least some level of community involvement.

Nearly two-thirds of all §2G2.2 offenders in fiscal year 2010 distributed child pornography to others. The distribution conduct of a majority of those offenders (53.4%) was limited to “impersonal” distribution (i.e., “open” P2P file-sharing programs such as LimeWire), which involved anonymous, indiscriminate distribution and no two-way communication between the offender who shared his images and persons who obtained them from the offender’s computer.<sup>14</sup> By contrast, 41.2 percent of those offenders who distributed child pornography — or approximately one-fourth of all non-production offenders in fiscal year 2010<sup>15</sup> — engaged in “personal” distribution to one or more adults<sup>16</sup> (e.g., emailing images to another adult or using a

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<sup>9</sup> See Chapter 3 at 41–43; Chapter 4 at 85 & n.78.

<sup>10</sup> See USSG §2G2.2(b)(2), (3), (4), (6) & (7).

<sup>11</sup> See Chapter 1 at 6.

<sup>12</sup> See *id.*

<sup>13</sup> See Chapter 4 at 92–97.

<sup>14</sup> See Chapter 3 at 53 (discussing such “open” P2P file-sharing).

<sup>15</sup> See Chapter 6 at 150– 51 & n.70 (noting that 445 of the 1,654 non-production offenders in fiscal year 2010, or 26.9%, engaged in “personal” distribution to one or more adults).

<sup>16</sup> According to the presentence reports (“PSRs”) in their cases, an additional 3.7% of offenders distributed child pornography to real or perceived *minors* (typically via email or an instant-messaging service (“IM”)) but did not appear to have distributed to or communicated with other adults concerning child pornography. An additional 1.7%

“closed” P2P file-sharing program such as Gigatribe). Such offenders almost invariably engaged in two-way communication with one or more other offenders concerning child pornography or child sexual exploitation. A reasonable inference from the nature of such “personal” distribution of child pornography to other adults is that such offenders were involved in or were seeking to become involved in (or even create) a child pornography “community” on the Internet.<sup>17</sup>

5. *A significant percentage of §2G2.2 offenders have histories of criminal sexually dangerous behavior that occurred before or concomitantly with their child pornography offenses.*

An important issue confronting judges, policy-makers, and other stakeholders in the criminal justice system concerns sexually abusive, exploitative, or predatory conduct committed previously by offenders convicted of non-production offenses, a significant percentage of whom are pedophiles, according to some experts. Such conduct, committed in addition to offenders’ non-production offenses, increases their culpability and suggests heightened sexual dangerousness.<sup>18</sup> Existing studies, which have employed different methodologies and examined different offender populations (including offenders outside the United States), have yielded inconsistent findings concerning the prevalence of such conduct.<sup>19</sup> The Commission engaged in a special research project that reviewed virtually all federal non-production child pornography cases from fiscal year 1999, 2000, and 2010 — as well as a large sample of such cases from fiscal year 2012 — to provide reliable data concerning the percentage of federal offenders sentenced under the non-production child pornography guidelines who have known histories of criminal sexually dangerous behavior (“CSDB”). For purposes of this report, CSDB comprises three different types of criminal sexual conduct: (1) actual or attempted “contact” sex offenses occurring before or concomitantly with offenders’ commission of non-production child pornography offenses; (2) “non-contact” sex offenses occurring before or concomitantly with offenders’ commission of a non-production child pornography offenses;<sup>20</sup> and (3) prior non-production child pornography offenses (if the prior and instant non-production offenses were separated by an intervening arrest, conviction, or some other official intervention known to the offender). After examining the PSRs in a total of 2,696 non-production child pornography cases,

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of the offenders who distributed child pornography did so in manners that did not permit a determination of whether their intended recipients were other adults (*e.g.*, posting images on photo-sharing websites). *See* Chapter 6 at 151 n.68.

<sup>17</sup> *See id.* at 151.

<sup>18</sup> *See* Chapter 7 at 170–71.

<sup>19</sup> *See id.* at 171-74 (discussing the existing studies); *see also* Michael Seto et al., *Contact Sex Offending by Men With Online Sexual Offenses*, 23 *SEXUAL ABUSE* 124 (2011) (meta-analysis of 24 international studies, which found that approximately one in eight “online offenders” — the vast majority of whom were child pornography offenders — had an “officially known contact sex offense history,” but estimating that a much higher percentage, approximately one in two, in fact had committed prior contact sexual offenses based on offenders’ “self-report” data in six studies).

<sup>20</sup> Contact offenses include sexual molestation offenses (rape and sexual assault). Non-contact offenses include enticing a minor to engage in sexual conduct via the Internet (*e.g.*, “cybersex” via a webcam), knowingly distributing child pornography to a real or perceived minor, and sexual voyeurism and exhibitionism offenses. *See* Chapter 7 at 174-78.

the Commission found that, during the past decade, approximately one in three offenders had engaged in one or more types of CSDB predating their prosecutions for their non-production offenses. The rate of CSDB reflected in prior convictions or findings in PSRs was 33.9 percent for offenders sentenced in fiscal years 1999–2000, 31.4 percent for offenders sentenced in fiscal year 2010, and 33.0 percent for offenders sentenced in the first quarter of fiscal year 2012.<sup>21</sup>

Significantly, the Commission’s study had certain limitations that resulted in its being underinclusive in certain important respects. The study did not include CSDB that was not reported to or detected by the authorities or otherwise not recounted in PSRs. The Commission coded offenders’ CSDB only as reflected in: (1) convictions for sex offenses; (2) findings in PSRs that offenders had engaged in CSDB (which did not result in convictions); and (3) unresolved allegations of CSDB in PSRs.<sup>22</sup> It is well established that the *actual* rate of offenders’ CSDB is higher than the *known* rate because official records of known sex offenses by child pornography offenders fail to account for all such sex offenses.<sup>23</sup> In addition, the Commission’s study is underinclusive of all conduct reflecting offenders’ sexual dangerousness insofar as the study was limited to prior sexually dangerous behavior that amounted to a *criminal offense* and did not include *non-criminal* acts of sexually deviant behavior.<sup>24</sup> The Commission’s review of PSRs revealed a variety of non-criminal but sexually deviant conduct indicating sexual dangerousness (*e.g.*, an offender’s collection of children’s underwear associated with his collection of child pornography or an offender’s “diary” containing graphic descriptions of his sexual fantasies concerning children).<sup>25</sup>

6. *Guideline penalty ranges and average sentences, both imprisonment and supervised release terms, have substantially increased in significant part because of the statutory and guideline amendments resulting from the PROTECT Act of 2003.*

The average guideline minimum for non-production child pornography offenses in fiscal year 2004 — the last full fiscal year when the guidelines were mandatory and the first full fiscal year after the enactment of the PROTECT Act — was 50.1 months of imprisonment, and the average sentence imposed was 53.7 months. By fiscal year 2010, as a larger percentage of cases was affected by the provisions of the PROTECT Act that increased penalty levels, the average

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<sup>21</sup> See Chapter 7 at 181, 201–02.

<sup>22</sup> See *id.* at 179. The Commission was limited to coding such information from PSRs because the Commission does not receive other documents that may contain relevant information concerning criminal sexually dangerous behavior (*e.g.*, transcripts of court proceedings). The Commission’s study reports unresolved allegations separately from CSDB reflected in prior convictions and findings in PSRs. See Chapter 7 at 181–82.

<sup>23</sup> See *id.* at 179–80.

<sup>24</sup> The Commission could not code non-criminal sexually dangerous behavior in reviewing PSRs as a result of difficulties in classifying such varied behavior without a bright-line standard such as criminality. Existing social science research has only undertaken to determine the prevalence of *criminal* sexually dangerous behavior among child pornography offenders. See generally Seto et al., *supra* note 19.

<sup>25</sup> See Chapter 7 at 176. Such sexual deviance, even if not criminal, is a risk factor for sexual recidivism. See Chapter 10 at 286.

guideline minimum was 117.5 months of imprisonment, and the average sentence imposed was 95.0 months.<sup>26</sup>

Typical guideline penalty ranges and average sentences of imprisonment have increased since fiscal year 2004 in significant part because of: (1) a growth in the number and severity of enhancements following the PROTECT Act amendments; and (2) an increase in the incidence of the underlying conduct and circumstances triggering such enhancements resulting from changes in typical offense conduct, particularly in the technology used, during the past decade.<sup>27</sup> In particular, four of the six enhancements in §2G2.2(b) — together accounting for 13 offense levels — now apply to the typical non-production offender.<sup>28</sup> In fiscal year 2010, §2G2.2(b)(2) (images depicting pre-pubescent minors) applied in 96.1 percent of cases; §2G2.2(b)(4) (sado-masochistic images) applied in 74.2 percent of cases; §2G2.2(b)(6) (use of a computer) applied in 96.2 percent of cases; and §2G2.2(b)(7) (images table) applied in 96.9 percent of cases.<sup>29</sup> Thus, sentencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now routinely apply to the vast majority of offenders. Higher penalty ranges and average sentences also have resulted from the statutory mandatory minimum penalties created by the PROTECT Act, which apply in approximately half of all §2G2.2 cases today and which result in higher base offense levels under the guidelines for offenders convicted of offenses carrying such mandatory minimum penalties.<sup>30</sup>

Supervised release terms in child pornography cases also have increased significantly since the PROTECT Act. The PROTECT Act raised the maximum statutory term of supervised release from three years for most child pornography offenders to a lifetime term for all child pornography offenders and also created a statutory mandatory minimum term of five years for all such offenders. In fiscal year 2010, the average term of supervised release for non-production offenders was approximately 20 years (220.3 months for offenders convicted of possession and 273.7 months for offenders convicted of R/T/D offenses); the average term of supervised release for offenders sentenced under the production guideline was nearly 27 years.<sup>31</sup> The sentencing guidelines currently recommend the statutory maximum term of lifetime supervision for all child pornography offenders.<sup>32</sup>

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<sup>26</sup> See Chapter 1 at 8; see also *id.* at 4 (discussing the PROTECT Act).

<sup>27</sup> See Chapter 6 at 123–25, 137–41; see also Chapter 8 at 208–12.

<sup>28</sup> See Chapter 8 at 209 (Table 8-1).

<sup>29</sup> The images table contains incremental enhancements depending on the number of images. The majority of offenders receiving an enhancement based on the images table (69.6%) received the maximum enhancement of 5 levels based on their possession of 600 or more images. See Chapter 6 at 141.

<sup>30</sup> See Chapter 2 at 32; Chapter 6 at 146.

<sup>31</sup> See Chapter 10 at 271–76.

<sup>32</sup> See *id.* at 272.

7. *A variety of charging, plea bargaining, and sentencing practices have contributed to widespread and growing sentencing disparities in §2G2.2 cases.*

Sentencing disparities in non-production cases have increased significantly since fiscal year 2004, the last full fiscal year in which guidelines were mandatory and the first full fiscal year after the enactment of the PROTECT Act (when most offenders were still subject to lower statutory and guideline sentencing ranges). In fiscal year 2004, within range sentences were imposed in 83.2 percent of cases of offenders sentenced under the non-production guidelines. By fiscal year 2011, within range sentences were imposed in only 32.7 percent of such cases. Below range sentences were imposed in nearly two-thirds of the fiscal year 2011 cases; 48.2 percent of such cases had non-government sponsored variances or departures and 14.6 percent had government sponsored variances or departures (other than for offenders' substantial assistance pursuant to USSG §5K1.1 (Substantial Assistance to Authorities (Policy Statement))).<sup>33</sup>

As part of its analysis of sentencing disparities, the Commission studied sentencing and charging practices in §2G2.2 cases from fiscal year 2010. The Commission's study of a large sample of similarly situated §2G2.2 offenders in Criminal History Category I revealed substantial sentencing disparities resulting from how they were charged and the manner in which the guidelines were applied. On average, offenders charged and convicted of possession but whose PSRs or plea agreements reflected that they knowingly received child pornography were sentenced to a 52-month term of imprisonment, while similarly situated offenders charged and convicted of receipt were sentenced to an 81-month term of imprisonment. On average, offenders charged and convicted of possession but who distributed child pornography in exchange for other child pornography, as found by courts in applying the guideline's specific offense characteristic for distribution, received a sentence of 78 months; similarly situated offenders charged and convicted of distribution received an average sentence of 132 months.<sup>34</sup>

Such sentencing disparities resulted from four practices by many courts and parties in §2G2.2 cases that limited offenders' sentencing exposure under the statutory and guideline sentencing scheme: (1) charging decisions, whereby offenders were charged only with possession offenses despite their commission of receipt and/or distribution offenses;<sup>35</sup> (2) plea agreements containing guideline stipulations regarding sentencing enhancements that limited offenders' sentencing exposure under the guidelines; (3) non-government sponsored variances and departures; and (4) government sponsored variances and departures (other than for offenders' substantial assistance to the government).<sup>36</sup> The Commission's special coding project of 1,654 §2G2.2 cases from fiscal year 2010 revealed that one or more of these practices

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<sup>33</sup> See Chapter 1 at 7.

<sup>34</sup> See Chapter 8 at 215, 219 (Figures 8-3 & 8-7).

<sup>35</sup> The Commission's special coding project of USSG §2G2.2 cases from fiscal year 2010 revealed that 53.1% of offenders were convicted of possession only, while 97.5% of offenders engaged in knowing receipt and/or distribution conduct. See Chapter 6 at 146–47. The Commission's special coding project of §2G2.2 cases from the first quarter of fiscal year 2012 yielded similar findings. See *id.* at 152–53 (finding that 95.8% of fiscal year 2012 offenders knowingly received and/or distributed child pornography, but 50.5% were convicted of possession only).

<sup>36</sup> See Chapter 8 at 219–25.

occurred in nearly 80 percent of cases. The Commission’s analysis also showed that no offender or offense characteristics (e.g., an offender’s military service record, history of CSDB, or distribution of child pornography) appeared to account for these practices in most cases. Rather, geographical differences in charging, plea bargaining, and sentencing practices among the 94 districts appear to be the strongest factor explaining whether one or more of these practices limiting sentencing exposure was used.<sup>37</sup>

Finally, appellate review of sentences in non-production cases has not reduced the growing disparities at the district court level. Indeed, differing approaches among the circuit courts today concerning both district courts’ categorical rejection of §2G2.2 on “policy” grounds and the “substantive reasonableness” of significant downward variances from the applicable guidelines ranges have contributed to the sentencing disparities.<sup>38</sup>

8. *Emerging research indicates that child pornography offenders with clinical sexual disorders may respond favorably to appropriate psycho-sexual treatment, particularly if administered pursuant to the “containment model.”*

Many experts believe that sex offenders, including child pornography offenders, with clinical sexual disorders cannot be “cured.” Nevertheless, some studies indicate that psycho-sexual treatment may be effective in reducing recidivism for many sex offenders.<sup>39</sup> Emerging research on the effectiveness of psycho-sexual treatment administered as part of the “containment model” is especially promising and warrants further study. The containment model involves close cooperation among the treatment provider, a polygraph examiner, and a qualified probation officer or other supervising officer. The containment model is now widely considered to be a “best practice” to be implemented in supervising sex offenders, including federal child pornography offenders. The success of the containment model depends on adequate resources and proper training of the professionals who administer it.<sup>40</sup>

9. *The Commission’s study of 610 offenders sentenced under the non-production guidelines in fiscal years 1999 and 2000 found that their rate of known general recidivism was 30.0 percent and their rate of known sexual recidivism (a subset of general recidivism) was 7.4 percent.*

The Commission conducted a study of the rate of known recidivism by federal offenders sentenced under the non-production guidelines during fiscal years 1999 and 2000. In evaluating any recidivism study, particularly one involving sex offenders, caution should be exercised because the known recidivism rate is lower than the actual recidivism rate.<sup>41</sup> Using Federal Bureau of Investigation Record of Arrest and Prosecution or “RAP” sheets, the Commission tracked the 610 offenders during an average eight-and-one-half year follow-up period after their reentry into the community and found a rate of known general recidivism of 30.0 percent (183 of

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<sup>37</sup> See *id.* at 227–38.

<sup>38</sup> See *id.* at 238–44.

<sup>39</sup> See Chapter 10 at 277–78.

<sup>40</sup> *Id.* at 283–84.

<sup>41</sup> See Chapter 11 at 295.

the 610 offenders). General recidivism was measured by arrests for or convictions of any felony or serious misdemeanor offense (including sex offender registration violations) as well as “technical” violations of the conditions of supervision resulting in an arrest or revocation. The Commission found that the offenders’ rate of sexual recidivism, which is a subset of general recidivism, was 7.4 percent (45 of the 610 offenders). Sexual recidivism was measured by arrests for or convictions of a sexual offense (including a new child pornography offense but excluding a sex offender registration violation). Twenty-two of those 45 offenders (or 3.6% of the 610 offenders) were arrested for or convicted of sexual “contact” offenses.<sup>42</sup>

The Commission’s study also found that the general recidivism rate of the members of the study group with a known history of CSDB was similar to the general recidivism rate of the members of the study group without a known history of CSDB. Because the number of the study group who engaged in sexual recidivism was very small (45 offenders), the Commission’s study could not offer a meaningful comparison of the sexual recidivism rates of offenders with CSDB histories and offenders without CSDB histories. Social science research, however, indicates that an offender with a CSDB history is more likely to engage in sexual recidivism than an offender without such a history.<sup>43</sup>

The Commission’s findings concerning offenders’ general and sexual recidivism rates are similar to the findings of two recent child pornography offender recidivism studies by other researchers (one study of federal offenders and the other of Canadian offenders).<sup>44</sup> In addition, the rate of known general recidivism by the Commission’s study group is similar to the rate of known general recidivism by a comparable segment of the entire federal offender population (*i.e.*, white male United States citizen offenders), and the study group’s general recidivism rate and sexual “contact” offense recidivism rate were lower than the equivalent rates of state “contact” sex offenders.<sup>45</sup>

10. *Federal laws regarding victim notification and restitution present unique challenges for victims of federal non-production child pornography offenses.*

Under the Crime Victims’ Rights Act (CVRA),<sup>46</sup> codified at 18 U.S.C. § 3771, federal law enforcement officials must notify a child pornography victim (or his or her guardian if the victim is still a minor) each time the officials charge an offender with a child pornography offense related to an image depicting the victim. Because images circulate widely on the Internet, it is not unusual for some victims to receive multiple official notifications each week. Such notifications can be emotionally traumatic because they serve to remind the victims that the images of their sexual abuse are indelible and increasingly widespread. Although under the CVRA victims may opt out of receiving such notice, doing so may prevent them from obtaining

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<sup>42</sup> *See id.* at 299–301.

<sup>43</sup> *See id.* at 302–03.

<sup>44</sup> *See id.* at 306–07.

<sup>45</sup> *See id.* at 307–08 (noting that the sexual contact offense recidivism rate of the state sex offenders was 5.3% over a three-year follow-up period, while the sexual contact recidivism rate of the federal child pornography offenders was 2.6% over a comparable three-year follow-up period).

<sup>46</sup> *See* Justice for All Act of 2004, Pub. L. No. 108–405, tit. I, § 102, 118 Stat. 2260, 2261–64 (Oct. 30, 2004).

restitution and otherwise exercising their rights as victims. Thus, even as the victims' rights laws have empowered child pornography victims and enabled them to be involved in the criminal justice process, the notification process itself has had the unintended and incidental effect of exacerbating the harms associated with the ongoing distribution of the images for some victims.<sup>47</sup>

In recent years, some victims of child pornography offenses have started to attempt to enforce their statutory right to restitution in 18 U.S.C. § 2259 against non-production offenders who have had no connection to the victims other than in the possession, receipt, or distribution of their images. Federal courts have struggled with calculating restitution for these victims and have reached different outcomes. Courts uniformly have found that child pornography victims are "victims" of the offenses under § 2259 and have suffered harm. Many district courts have refused to order restitution, however, because they have concluded either that a non-production child pornography offense was not the "proximate cause" of the victim's injury or that it would be impossible to apportion a specific amount of restitution owed by an individual defendant. Other district courts either have not required proximate cause or have found proximate cause and then attempted to calculate an appropriate restitution award. This uncertainty has now extended to the appellate level where a split in the federal circuit courts has developed regarding the process of awarding restitution for child pornography victims.<sup>48</sup>

### **C. COMMISSION'S RECOMMENDATIONS FOR THE NON-PRODUCTION (§2G2.2) GUIDELINE**

#### *1. Amendments to USSG §2G2.2*

The Commission believes that the following three categories of offender behavior encompass the primary factors that should be considered in imposing sentences in §2G2.2 cases:

- 1) the content of an offender's child pornography collection and the nature of an offender's collecting behavior (in terms of volume, the types of sexual conduct depicted in the images, the ages of the victims depicted, and the extent to which an offender has organized, maintained, and protected his collection over time, including through the use of sophisticated technology);
- 2) the degree of an offender's engagement with other offenders — in particular, in an Internet "community" devoted to child pornography and child sexual exploitation; and
- 3) whether an offender has a history of engaging in sexually abusive, exploitative, or predatory conduct in addition to his child pornography offense.

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<sup>47</sup> See Chapter 5 at 115–17.

<sup>48</sup> See *id.* at 117–18.

The first two factors primarily relate to retribution (*i.e.*, the need to impose “just punishment” to reflect “the seriousness of the offense” and harm caused to victims),<sup>49</sup> although they also may relate to the need to incapacitate certain sexually dangerous offenders.<sup>50</sup> The third primarily relates both to retribution as well as to the need for incapacitation (for those offenders who pose a significant risk of sexually recidivating if not incarcerated for a significant period of time).<sup>51</sup> The Commission believes that the other purposes of punishment — deterrence and rehabilitation<sup>52</sup> — likewise will be served by a revised sentencing scheme that gives appropriate weight to all three factors and that also provides for proper treatment for offenders with psycho-sexual disorders.<sup>53</sup>

The presence of aggravating factors from any of these three categories, even without the presence of any aggravating factors from the other two categories, warrants enhanced punishment depending on the degree that aggravating factors from that category are present in a particular case. The presence of aggravating factors from multiple categories generally would warrant a more severe penalty than the presence of aggravating factors from a single category.

The current sentencing scheme in §2G2.2 places a disproportionate emphasis on outmoded measures of culpability regarding offenders’ collections (*e.g.*, a 5-level enhancement under §2G2.2(b)(3)(B) for possession of 600 or more images of child pornography, which the typical offender possesses today). At the same time, the current scheme places insufficient emphases on other relevant aspects of collecting behavior as well as on offenders’ involvement in child pornography communities and their sexual dangerousness. As a result, the current sentencing scheme results in overly severe guideline ranges for some offenders based on outdated and disproportionate enhancements related to their collecting behavior. At the same time, it results in unduly lenient ranges for other offenders who engaged in aggravated collecting behaviors not currently addressed in the guideline, who were involved in child pornography communities, or who engaged in sexually dangerous behavior not qualifying for an enhancement in the current penalty scheme. The guideline thus should be revised to more fully account for

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<sup>49</sup> 18 U.S.C. § 3553(a)(2)(A) (stating that sentences should “reflect the seriousness of the offense” and “provide just punishment for the offense”); *see also* *Tapia v. United States*, 131 S. Ct. 2382, 2387 (2011) (referring to this statutory purpose of punishment as “retribution”).

<sup>50</sup> As discussed elsewhere in this report, existing social science evidence is inconclusive whether involvement in a child pornography “community” is associated with an increased risk of “contact” sex offending and other criminal sexually dangerous behavior. The Commission’s own empirical study of child pornography cases did not clearly establish such an association. *See* Chapter 4 at 94 (discussing the social science research); Chapter 7 at 193 (discussing Commission’s findings). Although the existing research is nascent, it appears that the extent of an offender’s sexual deviance (as reflected in part in the content of his child pornography collection) may be a risk factor for contact offenses in some cases. *See* Chapter 10 at 286.

<sup>51</sup> *See* Chapter 7 at 170 (an offender’s history of CSDB is a risk factor for sexual recidivism).

<sup>52</sup> *See* *Tapia*, 131 S. Ct. at 2387 (“The[] four considerations [in 18 U.S.C. § 3553(a)(2)(A)-(D)] — retribution, deterrence, incapacitation, and rehabilitation — are the four purposes of sentencing generally, and a court must fashion a sentence ‘to achieve the[se] purposes ... to the extent that they are applicable’ in a given case. [18 U.S.C.] § 3551(a.)”); *see also* 28 U.S.C. § 991(b)(1)(A) (directing the Sentencing Commission to “establish sentencing policies and practices for the Federal criminal justice system that . . . assure the meeting of the purposes of sentencing as set forth in” § 3553(a)(2)(A)-(D)).

<sup>53</sup> *See* Chapter 10 at 277–85 (discussing psycho-sexual treatment of sexual disorders).

each of the three factors. Such a revision should reflect recent changes in offense conduct and knowledge gained from emerging social science research and also better account for the variations in offenders' culpability and their sexual dangerousness.<sup>54</sup>

Consistent with the position of the Department of Justice,<sup>55</sup> the Commission believes that Congress should enact legislation providing the Commission with express authority to amend the current guideline provisions that were promulgated pursuant to specific congressional directives or legislation directly amending the guidelines.<sup>56</sup> If such legislation were enacted, the Commission would proceed to draft a comprehensive revision of the child pornography guidelines according to the Commission's regular procedures for amendment pursuant to 28 U.S.C. § 994(o). Public comment would be sought, a public hearing would be held, and the proposed revision would be submitted for congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p). The Commission requests Congress to provide the Commission with authority to revise the entire guideline structure.

Without congressional action, the Commission is able nevertheless to amend the child pornography guidelines in a more limited manner that better reflects the three sentencing factors discussed above. As shown in Appendix E of this report, which contains an analysis of the provenance of each section of the current version of §2G2.2, a number of its provisions were promulgated on the Commission's own initiative — not as a result of a specific congressional directive or by direct statutory amendment — and, thus, could be amended pursuant to 28 U.S.C. § 994(o) (subject to congressional review prior to becoming effective pursuant to 28 U.S.C. § 994(p)).

The Commission outlines below its broader vision of revisions to the guidelines to better reflect the Commission's findings and conclusions above.

a. Offenders' Collecting Behavior

The current penalty scheme in non-production cases focuses primarily on an offender's child pornography collection. Three of the six enhancements in §2G2.2 concern the content of offenders' collections: (1) a 2-level enhancement for possession of images of a pre-pubescent minor, (2) a 4-level enhancement for possession of sado-masochistic images or other depictions of violence, and (3) a 2- to 5-level enhancement for collections of a certain number of images (with increments ranging from ten or more images to 600 or more images).<sup>57</sup> Because these

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<sup>54</sup> See generally 28 U.S.C. § 991(b)(1)(C) (requiring the Commission to promulgate guidelines that “reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process”).

<sup>55</sup> See Letter from Jonathan Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice, to Hon. William K. Sessions III, Chair, U.S. Sentencing Commission, at 6 (June 28, 2010) (“We think the report to Congress ought to recommend legislation that permits the Sentencing Commission to revise the sentencing guidelines for child pornography offenses.”).

<sup>56</sup> See U.S. SENT'G COMM'N, HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 11-49 (2009) (discussing how the current guidelines have been influenced by both a series of congressional directives since 1991 and also the direct amendments to the guidelines in the PROTECT Act of 2003).

<sup>57</sup> See USSG §2G2.2(b)(2), (4) & (7). While the Commission has generally defined the term “image” consistently with the statutory definitions of “visual depiction” and “child pornography” in 18 U.S.C. § 2256(5) & (8) and specifically defined the term to take account of child pornography videos, see §2G2.2, comment. (n. 4) (citing 18

three provisions (including the maximum 5-level enhancement for possession of 600 or more images) now apply to a majority of offenders,<sup>58</sup> they add a significant 11-level cumulative enhancement based on the content of the typical offender’s collection. The current guideline thus does not adequately distinguish among most offenders regarding their culpability for their collecting behaviors. Furthermore, the 11-level cumulative enhancement, in addition to base offense levels of 18 or 22,<sup>59</sup> results in guideline ranges that are overly severe for some offenders in view of the nature of their collecting behavior.

The Commission recommends that §2G2.2(b) be updated to account more meaningfully for the current spectrum of offense behavior regarding the nature of images, the volume of images, and other aspects of an offender’s collecting behavior reflecting his culpability (*e.g.*, the extent to which an offender catalogued his child pornography collection by topics such as age, gender, or type of sexual activity depicted; the duration of an offender’s collecting behavior; the number of unique, as opposed to duplicate, images possessed by an offender).<sup>60</sup> Such a revision should create more precisely calibrated enhancements that provide proportionate penalty levels based on the aggravating circumstances present in the full range of offenders’ collecting behavior today.

b. Offenders’ Engagement in Child Pornography Communities

The Commission’s study of the manners in which offenders distribute child pornography suggests that approximately one-quarter of all non-production offenders sentenced in federal court today have had some level of involvement in child pornography communities.<sup>61</sup> There currently is no enhancement in §2G2.2 aimed at offenders’ involvement in such communities. The existing enhancement for distribution of child pornography, §2G2.2(b)(3), indirectly punishes some offenders for their involvement with child pornography communities, insofar as Internet-based communities such as Internet chat rooms or bulletin boards dedicated to child exploitation serve as forums in which offenders often trade child pornography. However, that enhancement — in particular, its incremental 2- to 7-level enhancements for different types of distribution<sup>62</sup> — was not designed to punish community involvement *per se*.<sup>63</sup> Similarly, the 2-

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U.S.C. § 2256(5) & (8) and also providing that each video “shall be considered to have 75 images”), the Commission has authority to revise the definition of “image.”

<sup>58</sup> See Chapter 8 at 209 (noting that, in fiscal year 2010, USSG §2G2.2(b)(2) applied to 96.3% of cases; §2G2.2(b)(4) applied to 74.2% of cases, and §2G2.2(b)(7)(D), the maximum 5-level enhancement for possessing 600 or more images, applied to 67.6% of cases).

<sup>59</sup> See Chapter 2 at 32.

<sup>60</sup> See Chapter 4 at 80–92 (discussing the manners in which offenders today collect child pornography and the nature and volume of images possessed by typical offenders).

<sup>61</sup> See Chapter 6 at 151 & n.70.

<sup>62</sup> See USSG §2G2.2(b)(3)(A)-(F).

<sup>63</sup> See Chapter 6 at 151–52 (discussing the manner in which USSG §2G2.2(b)(3) applies to offenders’ distribution conduct indicating “community” involvement compared to its application to other offenders’ distribution conduct not suggesting “community” involvement).

level enhancement for use of a computer, §2G2.2(b)(6), applies in virtually every case and, thus, fails to differentiate among offenders with respect to their involvement in communities.<sup>64</sup>

A new guideline provision specifically dealing with offenders' community involvement, as distinct from their distribution conduct, could better differentiate among offenders' culpability based on their degree of such community involvement.<sup>65</sup> In addition, the guideline could be amended to better distinguish between more and less culpable distribution conduct while remaining "technology-neutral" (and, thus, remain relevant in view of inevitable future changes in technologies). The enhancement in §2G2.2(b)(3) was created before the widespread use of P2P file-sharing programs and other types of emerging technologies by non-production offenders.<sup>66</sup> Therefore, a revised guideline should better differentiate among offenders based both on their degree of community involvement and the nature of their distribution conduct.<sup>67</sup>

c. Offenders' Known Histories of Sexually Dangerous Behavior

Non-production offenders' histories of criminal sexually dangerous behavior (CSDB) result in increased penalty ranges for some offenders. Some offenders receive the guideline's "pattern of activity" enhancement under §2G2.2(b)(5) and/or the statutory enhancement for having a predicate conviction for a sex offense under 18 U.S.C. §§ 2252(b) or 2252A(b). In addition, depending on the operation of the guidelines' criminal history rules,<sup>68</sup> offenders with

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<sup>64</sup> See *id.* at 139.

<sup>65</sup> By focusing on "community" involvement, the Commission is not intending to suggest that mere association with others who generally advocate child sexual exploitation is a basis by itself for criminal punishment. Rather, a convicted child pornography offender's involvement with other child pornography offenders in actual or virtual "communities" — whereby child sexual exploitation generally and child pornography specifically are validated through the community members' words and actions — is sufficiently related to the offenses of possession, receipt, or distribution of child pornography such that the First Amendment would not bar consideration of that association as an aggravating factor at sentencing. See *United States v. Simkanin*, 420 F.3d 397, 417 n.22 (5th Cir. 2005) (approving of a prior unpublished decision affirming a district court's upward departure based on a child pornography defendant's membership in the North American Man Boy Love Association; stating that such a departure did not violate the First Amendment); see also *Dawson v. Delaware*, 503 U.S. 159, 165 (2002) (holding that "the Constitution does not erect a per se barrier to the admission of [a defendant's] beliefs or associations at sentencing simply because those beliefs and associations are protected by the First Amendment").

<sup>66</sup> The distribution enhancement was in the original version of the guideline (promulgated in 1987). The last time the Commission amended the distribution enhancement was to clarify that "distribution includes advertising and posting [child pornography] on a website for public viewing . . ." USSG App. C, amend. 664 (Nov. 1, 2004). This clarification in the definition of "distribution" did not specifically concern P2P file-sharing programs.

<sup>67</sup> See Prepared Statement of Prof. Bryan N. Levine, Ph.D., Professor of Computer Science, University of Massachusetts, to the Commission, at 1 (Feb. 15, 2012) (contending that offenders' involvement in child pornography communities and use of sophisticated computer technologies "are important aspects of this crime and its offenders that are not taken into account by the current guidelines"); see also Joint Prepared Statement of James Fottrell, Steve Debrotta, and Francey Hakes, U.S. Department of Justice, to the Commission, at 17 (Feb. 15, 2012) ("The Commission should . . . consider adding new specific offense characteristics [to the guideline] to better differentiate among offenders, such as by accounting for offenders who communicate with one another and in so doing, facilitate and encourage the sexual abuse of children and the production of more child pornography, as well as for offenders who create and administer the forums where such communication is taking place.").

<sup>68</sup> See USSG §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

convictions for sex offenses also may receive criminal history points for those convictions and be subject to higher guideline ranges for that reason. Some offenders with CSDB histories, however, are not subject to higher penalty ranges under the statutory or guideline provisions. The Commission’s study of 1,654 §2G2.2 offenders in fiscal year 2010 found that 520 (31.4%) had histories of CSDB reflected in prior convictions or findings in their PSRs. Of those 520 offenders, 230 (44.2%) received the guideline’s pattern of activity enhancement and/or the statutory enhancement for having a predicate conviction for a sex offense.<sup>69</sup> Typically, offenders with CSDB histories did not receive a guideline or statutory enhancement for their CSDB because the legal requirements of the current enhancement provisions were not met.<sup>70</sup> In addition, the Commission’s study of offenders with CSDB histories showed that a majority were in Criminal History Category I based on the operation of the guidelines’ criminal history rules.<sup>71</sup> Therefore, the current non-production penalty scheme does not fully account for the variations in offenders’ known histories of criminal sexually dangerous behavior.

Not only does the current penalty scheme not account for offenders’ known CSDB histories in some cases, it also is silent concerning non-criminal sexually deviant behavior suggesting sexual dangerousness.<sup>72</sup> An amendment to the guidelines should better address a broader range of offenders’ sexual dangerousness and provide for a more nuanced approach depending on the number and type of acts of sexually dangerous behavior in an offender’s history.<sup>73</sup>

## 2. *Supervised Release Terms for Child Pornography Offenders*

The Commission will continue to study subsection (b) of USSG §5D1.2(Term of Supervised Release), which recommends that courts impose “the statutory maximum term of

<sup>69</sup> See Chapter 7 at 187. Of those 230 offenders, 58 received both the guideline and statutory enhancements, 110 received only the guideline enhancement, and 62 received only the statutory enhancement. USSG§2G2.2(b)(3)(C)-(E) — which provide for 5- to 7-level enhancements for distributing child pornography to a minor — also may punish a certain type of criminal sexually dangerous behavior (typically in connection with “travel” or “enticement” cases) occurring during the course of a non-production offense. Those provisions applied in only 2.7% of §2G2.2 cases in fiscal year 2010.

<sup>70</sup> The guideline’s pattern-of-activity enhancement requires *two* predicate acts and the statutory enhancements require a prior *conviction* (as opposed to a finding in a PSR). See Chapter 7 at 187.

<sup>71</sup> See *id.* at 195 (376 of the 581 offenders with CSDB histories were in Criminal History Category I).

<sup>72</sup> See *id.* at 176 (discussing non-criminal sexually dangerous behavior); see also Chapter 10 at 286 (discussing an offender’s sexual deviancy as a risk factor for sexual recidivism). Such non-criminal sexually dangerous behavior may warrant increased punishment. See, e.g., *United States v. Cunningham*, 669 F.3d 723, 727, 735–36 (6th Cir. 2012) (finding that a sentencing court did not err in considering a USSG §2G2.2 offender’s “legal” self-recorded “rape fantasy,” involving the defendant’s filming “himself masturbating to [non-pornographic, legal] photographs of . . . a young child” and “sen[d]ing [the] video to another offender . . . along with lascivious audio commentary of the act”).

<sup>73</sup> The non-criminal nature of such relevant conduct indicating sexual dangerousness would not prevent its consideration at sentencing. See *United States v. Arce*, 118 F.3d 335, 340-41 (5th Cir. 1997) (approving use of evidence of “non-criminal” relevant conduct supporting an upward departure); *United States v. McKnight*, 17 F.3d 1139, 1147 (4th Cir. 1994) (same); cf. *Pepper v. United States*, 131 S. Ct. 1229, 1235 (2011) (stating that “no limitation shall be placed on information” considered at sentencing) (citing 18 U.S.C. § 3661 and *Williams v. New York*, 337 U.S. 241 (1949)).

supervised release” for all offenders convicted of a sex offense, including any child pornography offense. That guideline effectively recommends a lifetime term of supervision for all child pornography offenders because the current statutory maximum term of supervision for any offender convicted of a child pornography offense is “any term of years not less than 5, or life.”<sup>74</sup> The recommendation in §5D1.2(b) was made before the enactment of the PROTECT Act of 2003, which raised the statutory maximum term of supervision from three years for most child pornography offenders to a lifetime term for all child pornography offenders.<sup>75</sup> The Commission is considering amending the guideline in a manner that provides guidance to judges to impose a term of supervised release within the statutory range of five years to a lifetime term that is more tailored to individual offender’s risk and corresponding need for supervision.

#### **D. POSSIBLE CHANGES TO THE NON-PRODUCTION CHILD PORNOGRAPHY STATUTES**

In addition to legislation providing the Commission with authority to revise the child pornography guidelines in a comprehensive manner, the Commission recommends two statutory amendments that Congress should consider: first, an amendment that aligns the statutory penalties for the offenses of receipt and simple possession and, second, an amendment to the statutory provisions governing notice to, and restitution for, victims of non-production offenses. In addition, Congress may wish to revise the current statutory penalty structure to differentiate among the various types of distribution conduct by non-production offenders today. These potential statutory changes are discussed below.

##### *1. Statutory Penalties*

The current statutory range of imprisonment for possession is zero to ten years of imprisonment if an offender possessed child pornography depicting a minor 12 years of age or older who was not then prepubescent and zero to 20 years of imprisonment if an offender possessed child pornography depicting a prepubescent minor or a minor under 12 years of age. The current statutory range of imprisonment for receipt is five to 20 years of imprisonment for R/T/D offenses (whatever the age or sexual development of the minors depicted). Defendants with predicate convictions for sex offenses face increased statutory imprisonment ranges of ten to 20 years for a possession offense (whatever the age or sexual development of the minors depicted) and 15 to 40 years for R/T/D offenses.<sup>76</sup>

Since Congress’s 1990 legislation adding simple possession to the list of prohibited acts, the Commission has taken the position that, because receipt is “a logical predicate” to possession, “there appears to be little difference in the offense seriousness between typical receipt cases and typical possession cases.”<sup>77</sup> For similar reasons, the Criminal Law Committee

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<sup>74</sup> 18 U.S.C. § 3583(k).

<sup>75</sup> See Chapter 10 at 272.

<sup>76</sup> See Chapter 2 at 26. Until late 2012, the statutory maximum penalty for all possession offenses was 10 years (for offenders without a predicate conviction for a sex offense). See Chapter 1 at 5.

<sup>77</sup> U.S. SENT’G COMM’N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 11, 41 (June 1996); Letter of Judge William W. Wilkins, Jr., Chair, U.S. Sentencing Commission, to Hon. Edward R. Roybal, Chairman, House Subcommittee on Treasury,

of the Judicial Conference recently has recommended that Congress remove the statutory mandatory minimum penalty for receipt because “there is no meaningful difference between receipt [and] possession.”<sup>78</sup> In the Commission’s 2010 survey of judges, a clear majority stated that current statutory penalty levels for receipt cases are excessive.<sup>79</sup> The Commission’s special coding project of fiscal year 2010 non-production child pornography cases found that there were inconsistent charging practices that resulted in significant unwarranted sentencing disparities among offenders charged with receipt and similarly situated offenders charged with possession.<sup>80</sup>

In deciding whether to align the statutory penalties for receipt and possession, Congress would need to review its previous decision that the punishment for receipt should mirror the higher penalty range for distribution rather than the lower penalty range for possession.<sup>81</sup> That decision appears to have been predicated on two beliefs — first, that aligning the penalties for receipt with the penalties for distribution rather than with the penalties for possession was important for law enforcement purposes; and, second, that receipt offenses often contributed to the commercial child pornography market.<sup>82</sup> As explained below, neither reason has the same force today because of changed circumstances.

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Postal Service, and General Government, Committee on Appropriations, U.S. House of Representatives (Aug. 7, 1991), included in the *Congressional Record* at 137 CONG. REC. H6736-02 (daily ed. Sept. 24, 1991).

<sup>78</sup> See Testimony of Chief U.S. District Judge M. Casey Rodgers, U.S. District Court for the Northern District of Florida, to the Commission, at 367, 370 (Feb. 15, 2012) (on behalf of the Criminal Law Committee) (“I would urge the Commission to seek repeal of the [statutory m]andatory [m]inimum sentence for receipt offenders.”).

<sup>79</sup> In the survey, 71% of the 639 judges who responded to questions regarding child pornography offenses stated that the statutory mandatory minimum penalty for receipt was too high. See U.S. SENT’G COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010, Questions 1 & 8 (June 2010). The Commission suggested in its recent report on mandatory minimum penalties that “mandatory minimum penalties for certain non-contact child pornography offenses may be excessively severe and as a result are being applied inconsistently.” U.S. SENT’G, COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE CRIMINAL JUSTICE SYSTEM 369 (Oct. 2011).

<sup>80</sup> See Chapter 8 at 213–15. The fiscal year cases examined by the Commission were ones in which the statutory maximum sentence was ten years for possession and 20 years for receipt (for offenders without a predicate conviction for a sex offense). In late 2012, the statutory maximum sentence for possession was increased to 20 years for defendants who possessed child pornography depicting a prepubescent minor or a minor under 12 years of age (a type of child pornography possessed by the vast majority of offenders today). See Chapter 1 at 5; see also Chapter 8 at 209 (noting that 96.3% of non-production offenders possessed such images in fiscal year 2010). Some of the sentencing disparities in 2010 resulted from the prior ten-year statutory maximum for possession offenders. See Chapter 8 at 217, 219. However, additional disparities resulted from the fact that the possession statute did not (and still does not) carry a mandatory minimum penalty and also from the fact that offenders convicted of receipt have a higher base offense level under USSG §2G2.2(a) than offenders convicted of possession. See *id.* at 215. The latter disparities presumably will continue to occur notwithstanding the current possession statute.

<sup>81</sup> See Chapter 2 at 27–28. As discussed in Chapter 2, Congress did not criminalize possession in 1977, when it first criminalized receipt and distribution, and only added possession to the list of prohibited acts in 1990 (with lower penalties than those for receipt and possession). When possession was criminalized in 1990, although it had lower *statutory* penalties than receipt, the Commission decided to align the *guideline* penalties for receipt and possession because it considered the two offenses to be very similar in nature and different from distribution. In 1991, Congress rejected the Commission’s decision to align the guideline penalties for receipt and possession. See *id.* at 28–30.

<sup>82</sup> See *id.* at 29–30.

Congress's first reason related to the manner in which law enforcement officials in the early 1990s detected and prosecuted offenders who trafficked in child pornography. At the time that Congress first criminalized possession in 1990, many offenders who distributed child pornography used the United States postal system to do so. United States postal inspectors often used "reverse sting" operations to detect such offenders and prosecute them for receipt.<sup>83</sup> Prosecutors often filed receipt charges against such offenders rather than distribution charges because, at that time, it generally was easier to prove the offense of receipt than the offense of distribution based on the success of "reverse sting" operations.<sup>84</sup> Today, however, law enforcement officials primarily detect offenders on the Internet and, in particular, can detect and prosecute *distribution* — which typically occurs through the use of P2P file-sharing programs<sup>85</sup> — as or more easily than receipt.<sup>86</sup> Therefore, in view of these changes in offense conduct and law enforcement techniques, the prior rationale for aligning the penalties for receipt with the higher penalties for distribution — rather than aligning the penalties for receipt with the lower penalties for possession — no longer exists.

The second apparent reason that Congress cited for punishing receipt more harshly than possession in the early 1990s was that a large percentage of offenders who received child pornography did so by paying for it and, thus, financially contributed to the commercial child pornography industry.<sup>87</sup> That reason also has been undercut by technological changes in offense conduct during the past two decades. Although paying consumers of child pornography still exist today, in recent years the *non-commercial* market for child pornography has "exploded," and the commercial market has assumed a much smaller portion of the overall market.<sup>88</sup> As non-

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<sup>83</sup> See, e.g., *United States v. Gifford*, 17 F.3d 462 (1st Cir. 1994) (noting that the defendant, who both distributed and received child pornography, was detected by a U.S. Postal inspector in 1990 in a "reverse-sting" operation and ultimately was charged and convicted of receipt).

<sup>84</sup> See Chapter 2 at 29 (quoting from 1990 floor statements of Senator Helms and Representative Wolf).

<sup>85</sup> See Chapter 6 at 154–55.

<sup>86</sup> See Testimony of Assistant U.S. Attorney Steve DeBrotta (Northern District of Indiana), to the Commission, at 282 (Feb. 15, 2012) ("[I]n my opinion, forensically proving receipt has been oversold. It's actually easier to prove where they're doing it, distribution, than it is receipt. Receipt is tricky. Distribution, the forensics evidence tends to be easier.").

<sup>87</sup> See Chapter 2 at 29 (quoting from Senator Helms).

<sup>88</sup> See Testimony of Ernie Allen, President and CEO, National Center for Missing and Exploited Children, Institute of Medicine, Committee on Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States, The National Academies (Jan. 12, 2012) ("I believe that the problem of commercial child pornography has shrunk dramatically. However, the non-commercial distribution of child pornography has exploded. . . . There are millions of child pornography images being traded online by individuals who view them for sexual gratification. Offenders can access them for free on all platforms of the Internet, including the World Wide Web, peer-to-peer file-sharing programs, and Internet Relay Chat."), [http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_US&PageId=4632](http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4632) (last visited Dec. 11, 2012); World Congress against Commercial Sexual Exploitation of Children, *Theme Paper: Child Pornography [Report to the Second World Congress Against Commercial Sexual Exploitation of Children]* 5 (2001) ("[O]nce an image has been digitised and is in the public domain these days it will inevitably find its way on to the Internet where it could be picked up and used both in a commercial and a non-commercial setting. The distinction between commercial and non-commercial child pornography thus ceases to have any real significance in this context."), [http://www.csecworldcongress.org/PDF/en/Yokohama/Background\\_reading/Theme\\_papers/Theme%20paper%20Child%20Pornography.pdf](http://www.csecworldcongress.org/PDF/en/Yokohama/Background_reading/Theme_papers/Theme%20paper%20Child%20Pornography.pdf) (last visited Dec. 11, 2012); see also Chapter 6 at 154 (noting that a majority of offenders today receive child pornography using non-commercial P2P file-sharing programs, while a minority received child pornography from commercial websites).

commercial distribution has eclipsed commercial distribution, the typical offender today receives images without providing financial support to the commercial child pornography industry. Therefore, the rationale for categorically punishing receipt in the same manner as distribution — and more harshly than possession — appears less compelling today than it did in the early 1990s.

Finally, after reviewing over 2,000 cases of offenders sentenced for receipt and possession offenses in fiscal years 1999, 2000, 2010, and 2012 in preparation for this report, the Commission reaffirms its prior conclusion that “there appears to be little difference in the offense seriousness between typical receipt cases and typical possession cases.”<sup>89</sup>

For these reasons, and to reduce the unwarranted sentencing disparities resulting from inconsistent application of the mandatory minimum penalty for receipt offenses,<sup>90</sup> the Commission unanimously recommends that Congress align the statutory penalties for receipt and possession. There is a spectrum of views on the Commission, however, as to whether these offenses should be subject to a statutory mandatory minimum penalty and, if so, what any mandatory minimum penalty should be.<sup>91</sup> Nevertheless, the Commission unanimously believes that, if Congress chooses to align the penalties for possession with the penalties for receipt and maintain a statutory mandatory minimum penalty, that statutory minimum should be less than five years.

Finally, the Commission’s analysis of current offenders’ distribution behaviors revealed several different types of common distribution conduct, ranging from “personal” modes of distribution associated with “community” involvement (*e.g.*, emailing images to other offenders or trading images in “closed” P2P file-sharing programs) to “open” P2P file-sharing programs involving impersonal and indiscriminate distribution to strangers.<sup>92</sup> The most common mode of distribution today is “open” P2P file-sharing.<sup>93</sup> The different types of distribution reflect a significant evolution in the technologies used to distribute child pornography, particularly in the past decade.<sup>94</sup> Because the existing statutory provisions prohibiting distribution and the related act of transportation of child pornography<sup>95</sup> were enacted in earlier technological eras,<sup>96</sup> Congress may wish to revise the penalty structure governing those offenses to differentiate

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<sup>89</sup> U.S. SENT’G COMM’N, *SEX OFFENSES AGAINST CHILDREN*, *supra* note 77, at 41.

<sup>90</sup> *See* Chapter 8 at 215 (discussing sentencing disparities resulting from inconsistent application of statutory mandatory minimum penalty for receipt offenses).

<sup>91</sup> *Cf.* U.S. SENT’G COMM’N, *MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM*, *supra* note 79, at xxxi (noting that “there is a spectrum of views among members of the Commission regarding mandatory minimum penalties” generally).

<sup>92</sup> *See* Chapter 6 at 149–51.

<sup>93</sup> *See id.* at 150, 54.

<sup>94</sup> *See id.* at 155 (noting that no non-production offenders sentenced in fiscal year 2002 appeared to have used a P2P file-sharing program).

<sup>95</sup> 18 U.S.C. §§ 2252(a)(1),(2) & 2252A(a)(1), (2). As noted in Chapter 7, the vast majority of offenders convicted of transportation of child pornography in fact knowingly distributed it to other offenders. *See* Chapter 7 at 189 n.72.

<sup>96</sup> Section 2252(a) originally was enacted in 1977, and § 2252A originally was enacted in 1996. *See* *United States v. Polizzi*, 549 F. Supp. 2d 308, 341 (E.D.N.Y. 2008), *vacated on other grounds*, 564 F.3d 142 (2d Cir. 2009). *See also* Chapter 1 at (discussing the evolution of technology in offense conduct during the past four decades).

among the wide array of newer and older technologies used by offenders to distribute child pornography.

## 2. Notice to and Restitution for Victims of Non-Production Offenses

Implementation of the current federal statutes governing notice to and restitution for victims of non-production child pornography offenses has been problematic. The notice provision has in some cases exacerbated victims' emotional harm, yet has been deemed necessary to protect the victims' rights (including their right to seek restitution). The restitution statute has generated confusion and disparate results in courts around the country.<sup>97</sup> Therefore, Congress should consider amending the notice and restitution statutes in order to minimize emotional trauma to victims and also provide specific guidance to sentencing courts to ensure appropriate restitution for victims.

### **E. FINDINGS AND RECOMMENDATIONS CONCERNING §2G2.1 (PRODUCTION) CASES**

The Commission's special coding project of §2G2.1 cases revealed that production offenders engage in a wide variety of offense behavior. The typical offender, during the course of his production offense, had sexual contact with a prepubescent minor. A minority of offenders, however, did not engage in any physical contact with their victims, and a subset of those offenders were never physically present with their victims because they caused the production of child pornography remotely (*e.g.*, via a webcam or through email).<sup>98</sup>

The rate of sentences imposed within the applicable guideline ranges in §2G2.1 cases is substantially higher than the rate in §2G2.2 cases, but the within range rate in §2G2.1 cases has noticeably decreased during recent years. In fiscal year 2011, the within range rate in such cases was 50.4 percent, down from a rate of 84.0 percent in fiscal year 2004, while the below range rate (excluding departures for substantial assistance to the authorities) rose to 38.1 percent. As with average sentences in §2G2.2 cases, average sentences in §2G2.1 cases steadily increased in the years following the enactment of the PROTECT Act of 2003 but have declined slightly in recent years as the percentage of below range sentences have increased. The average sentence for production offenders in fiscal year 2011 was 274 months.<sup>99</sup>

The Commission will continue to monitor sentencing practices in production cases carefully. In addition, certain conforming amendments to §2G2.1 may be appropriate in conjunction with future amendments to §2G2.2.

### **F. CONCLUSION**

This report by the Commission is intended to provide Congress and the various stakeholders in the federal criminal justice system with relevant and thorough information about child pornography offenses and offenders. As illustrated by this report, child pornography

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<sup>97</sup> See Chapter 5 at 114–18.

<sup>98</sup> See Chapter 9 at 262–66.

<sup>99</sup> See *id.* at 252–57.

offenses result in substantial and indelible harm to the children who are victimized by both production and non-production offenses. However, there is a growing belief among many interested parties that the existing sentencing scheme in non-production cases fails to distinguish adequately among offenders based on their degrees of culpability and dangerousness. Numerous stakeholders — including the Department of Justice, the federal defender community, and the Criminal Law Committee of the Judicial Conference of the United States Courts — have urged the Commission and Congress to revise the non-production sentencing scheme to better reflect the growing body of knowledge about offense and offender characteristics and to better account for offenders’ varying degrees of culpability and dangerousness.

The Commission believes that the current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to offenders’ collecting behavior as well as its failure to account fully for some offenders’ involvement in child pornography communities and sexually dangerous behavior. The current guideline produces overly severe sentencing ranges for some offenders, unduly lenient ranges for other offenders, and widespread inconsistent application. A revised guideline that more fully accounts for all three of the factors discussed in Part C — the full range of an offender’s collecting behavior, the degree of his involvement in a child pornography community, and any history of sexually dangerous behavior — would better promote proportionate sentences and reflect the statutory purposes of sentencing. Such a revised guideline, together with a statutory structure that aligns the penalties for receipt and possession, would reduce much of the unwarranted sentencing disparity that currently exists. The Commission also suggests that Congress may wish to revise the penalty structure governing distribution offenses in order to differentiate among the wide array of newer and older technologies used by offenders to distribute child pornography. Finally, the Commission also recommends to Congress that it consider amending the notice and restitution statutes for victims of child pornography offenses. The Commission stands ready to work with Congress, the federal judiciary, the executive branch, and others in the federal criminal justice community to improve the sentencing scheme for these extremely serious offenses.