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Punishment Without Purpose: The Retributive and Utilitarian Failures of the Child Pornography Non-Production Sentencing Guidelines

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**PUNISHMENT WITHOUT PURPOSE:
THE RETRIBUTIVE AND UTILITARIAN FAILURES
OF THE CHILD PORNOGRAPHY NON-
PRODUCTION SENTENCING GUIDELINES**

BRITTANY N. LOWE*

ABSTRACT

Pursuant to the Sentencing Reform Act of 1984, Congress established the U.S. Sentencing Commission to formulate an empirical set of federal sentencing Guidelines. With the U.S. Sentencing Guidelines, Congress intended to further the basic purposes of criminal punishment—deterrence, incapacitation, just punishment, and rehabilitation. Nevertheless, the Guidelines were instantaneously met with disapproval. Asserting that the mandatory Guidelines violated the Constitution, scholars and judges argued that the Commission usurped Congress’s role by prescribing punishments that were essentially binding law. In 2005, the Supreme Court held that the Guidelines were discretionary in *United States v. Booker*. While this decision resolved many of the issues associated with the Guidelines, it arguably made matters worse with respect to the child pornography non-production Guidelines. The child pornography non-production Guidelines have been widely criticized for lacking a connection to community values, leaving little room for rehabilitation, and being excessively harsh. Thus, district courts often elect to deviate from the problematic Guidelines in an attempt to impose a fair sentence. However, because district courts are free to deviate from the Guidelines at the discretion of the judge, the sentencing system has become inconsistent and unpredictable. In addition, courts often impose punishment for morally repugnant crimes that is *too* lenient. As a result, the child pornography non-production Guidelines do not further the basic theories of criminal punishment in the United States—retributivism and utilitarianism. In order to prevent the sexual exploitation of children and restore consistency in federal sentencing law, the Guidelines system must be systematically reformed.

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I. INTRODUCTION: THE ISSUE PRESENTED BY THE POST-*BOOKER* GUIDELINES

In 2011, Ryan Collins stood before U.S. District Judge James Gwin in Cleveland, Ohio, and awaited his sentence.¹ Collins was thirty-two years old at the time of his sentencing and had no criminal history. Nevertheless, the crime he faced was significant. Months earlier, a jury convicted Collins of one count possessing, distributing, and receiving child pornography and one count possession of child pornography.² Throughout the course of their investigation into Collins' addiction, law enforcement officers found over 1,500 illegal files on his computer.³

¹ Eric Heisig, *Cleveland Federal Judge's Five-Year Sentence in Child Porn Case Frustrates Prosecutor*, CLEVELAND.COM (Feb. 10, 2015), http://www.cleveland.com/court-justice/index.ssf/2015/02/cleveland_federal_judge_hands.html (discussing the controversy surrounding Judge Gwin's decision to deviate from the U.S. Sentencing Guidelines); see also Debra Cassens Weiss, *Judge Polls Jurors and Issues 5-Year Sentence in Child Porn Case; 6th Circuit Dissent Cited*, A.B.A. J. (Feb. 11, 2015), http://www.abajournal.com/news/article/judge_polls_jurors_and_issues_five_year_sentence_in_child_porn_case_6th_cir/ (explaining the basis for Judge Gwin's significant downward departure).

² Heisig, *supra* note 1.

³ *Id.*

After evaluating the U.S. Sentencing Guidelines⁴ for Collins, the U.S. Attorney's Office and U.S. Department of Probation and Pretrial Services recommended between twenty-one and twenty-seven years in federal prison.⁵ If this sentence were imposed, Collins would be a middle-aged man when he was released. Contrary to the Government's recommendation, however, Judge Gwin handed down a five-year sentence—the minimum allowable imprisonment for a child pornography distribution charge.⁶ Judge Gwin's decision, which has become the center of a nationwide controversy, was based on a jury poll about potential sentences.⁷ In stark contrast to the twenty-one to twenty-seven years outlined in the Guidelines, the jury recommended—on average—a mere fourteen months of imprisonment.⁸

Without question, any crime relating to possessing or distributing child pornography is morally repugnant. The sexual exploitation of children is unjustifiable, and offenders should be punished for their crimes. In an attempt to formulate just punishments, Congress has set out penalties for child pornography offenders through the promulgation of the U.S. Sentencing Guidelines. The Guidelines, implemented through the Sentencing Reform Act of 1984,⁹ reflect Congress's attempt to create a uniform and empirical system of punishment.¹⁰ In recent years, however, the Guidelines have proven ineffective.

In 2005, the Supreme Court determined that the Guidelines are merely advisory in *United States v. Booker*.¹¹ As a result, district courts are free to deviate from the

⁴ U.S. SENTENCING COMMISSION, *Guidelines Manual* (Nov. 2016), <http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf> [hereinafter USSG].

⁵ Heisig, *supra* note 1.

⁶ *Id.*

⁷ See Judge James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 186–87 (2010) (detailing the jury questionnaire process and the disparity between the Guidelines and community values); Jacob Sullum, *Judges Find Federal Child Porn Sentences Are Much Longer Than Jurors Consider Just*, REASON MAG. (Feb. 23, 2015), <https://reason.com/blog/2015/02/23/judges-find-federal-child-porn-sentences> (discussing Judge Gwin's approach to sentencing Collins).

⁸ Gwin, *supra* note 7, at 186–87. Following Judge Gwin's downward variance, the Government reiterated its objection to the variance based on the jury poll. See *United States v. Collins*, 828 F.3d 386, 387 (6th Cir. June 29, 2016). Thereafter, the Government appealed, challenging Judge Gwin's "use of the jury poll and his alleged failure to adequately consider deterrence as a sentencing factor." *Id.* at 388. In June 2016, the Sixth Circuit affirmed Judge Gwin's downward variance, finding that Judge Gwin's use of a jury poll *after* the verdict "as one factor in formulating defendant's sentence did not conflate the respective duties of judge and jury." *Id.* at 389. Moreover, the Sixth Circuit recognized that juries "can provide insight into the community's view of the gravity of an offense." *Id.* at 390. Therefore, the court held that Collins' sentence was not unreasonable. *Id.*

⁹ Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

¹⁰ USSG Ch.5, Pt.A, intro.

¹¹ *United States v. Booker*, 543 U.S. 220, 222 (2005). It should be noted that *Booker* found the entirety of the Guidelines—not just the child pornography provisions—to be merely advisory.

Guidelines at the discretion of the judge. In some instances, this may be justifiable, as the child pornography sentences prescribed by the Guidelines are not appropriate in all cases.¹² In fact, the Guidelines have been widely criticized for several reasons. For instance, the Guidelines are excessively harsh, leave little room for rehabilitation, and—as indicated by Judge Gwin’s jury polling study—lack a connection to community values. On the other hand, deviations from the Guidelines are not desirable when district courts impose sentences that are *too* lenient. In any case, because the Guidelines are no longer mandatory, the sentencing system is unpredictable and not always fair to similarly situated defendants.

Moreover, inconsistent sentencing in child pornography cases does not promote the basic theories of punishment that the United States recognizes. For centuries, philosophers and legal scholars have discussed the purposes of punishment. A fundamental principle of the criminal justice system holds that punishment should serve a greater good and balance the moral order of society. Recognizing this philosophy, the Guidelines acknowledge the two competing theories of punishment—retributivism and utilitarianism—and consider them in creating sentencing policies.¹³ Nevertheless, the inconsistent application of the child pornography Guidelines defeats the purpose of such goals and produces no results to better the criminal justice system. In the world of child pornography, the justice system does not seem “just” at all.

This Note examines the ineffectiveness of the child pornography non-production Guidelines. Because of the various issues associated with the Guidelines, federal district courts often decline to follow them and instead impose vastly inconsistent punishments for defendants convicted of similar crimes.¹⁴ These unpredictable sentences do not promote retributive and utilitarian values. Thus, this Note argues that reform is necessary. The Note proceeds in five parts. Part II provides background information about the Sentencing Reform Act of 1984 and the U.S. Sentencing Guidelines, highlighting the penalties for child pornography non-production offenses. In addition, Part II examines retributivism and utilitarianism, detailing the goals that these theories aim to achieve. Part III analyzes the issues associated with the Guidelines and argues that these flaws invite federal judges to impose case-by-case punishments. Part III then asserts that such inconsistent punishment does not serve retributive and utilitarian goals. Part IV proposes a comprehensive reform of the non-production Guidelines. Finally, Part V offers a brief conclusion.

¹² For a detailed discussion of the child pornography Guidelines, see *infra* Part II(A)(2). Child pornography non-production offenses are governed by U.S. Sentencing Guidelines § 2G2.2.

¹³ USSG Ch.5, Pt.A, intro.

¹⁴ See generally Loren Rigsby, Comment, *A Call for Judicial Scrutiny: How Increased Judicial Discretion Has Led to Disparity and Unpredictability in Federal Sentencings for Child Pornography*, 33 SEATTLE U. L. REV. 1319 (2010) (discussing the unpredictable sentences for child pornography offenders due to frequent deviations from the Guidelines).

II. BACKGROUND: SENTENCING REFORM AND THE THEORIES OF JUST PUNISHMENT

A. Sentencing Reform in the United States

1. A Brief History of the Sentencing Reform Act of 1984 and the Development of the U.S. Sentencing Guidelines

Prior to the enactment of the Sentencing Reform Act of 1984, the justice system faced a number of serious problems. Unlimited judicial discretion in sentencing caused unpredictability for criminal defendants.¹⁵ Furthermore, legal scholars and federal judges criticized the justice system's focus on rehabilitation as the primary form of criminal punishment.¹⁶ Although such a system allowed for the individualized treatment of criminal defendants, the judicial discretion also led to a disparity in sentencing that did little to deter future crime and protect the general public.¹⁷ After years of research and debate, Congress implemented a comprehensive, national solution.

With the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984, Congress created a permanent Commission charged with the ongoing responsibilities of recommending appropriate sentences and establishing a research and development program.¹⁸ The primary purpose of the Commission was to reduce sentencing disparities and achieve a more honest criminal justice system.¹⁹ In light of its unique goals, Congress established the U.S. Sentencing Commission as a bipartisan, independent agency in the judicial branch of government.²⁰ Its staff of 100 is divided into five offices, including General Counsel, Education and Sentencing Practice, Research and Data, Legislative and Public Affairs, and Administration.²¹ In terms of general management, the Commission is comprised of seven voting members, three of whom must be federal judges.²² The commissioners, who are appointed by the President and confirmed by the Senate, serve six-year terms.²³ In 1987, the newly-created Commission promulgated its first set of Guidelines in order to meet the aims of the Sentencing Reform Act.²⁴ In theory, the

¹⁵ *An Overview of the United States Sentencing Commission*, U.S. SENTENCING COMM'N, http://isb.uscc.gov/files/USSC_Overview.pdf (last visited Oct. 11, 2015) [hereinafter *An Overview*]; see also *The United States Sentencing Commission in Focus*, U.S. SENTENCING COMM'N, http://www.uscc.gov/sites/default/files/pdf/about/overview/In-Focus_About.pdf (last visited Oct. 11, 2015).

¹⁶ Gwin, *supra* note 7, at 178-79.

¹⁷ *Id.*

¹⁸ *An Overview*, *supra* note 15.

¹⁹ Gwin, *supra* note 7, at 179.

²⁰ *An Overview*, *supra* note 15.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*; see also 28 U.S.C. § 994(a)(1) (delegating the task of formulating the Guidelines to the Commission); Ronald F. Wright, *Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission*, 79 CALIF. L. REV. 1, 8-11 (1991) (discussing the delegation of policymaking authority to the Commission).

Guidelines delineate a sentencing range for a defendant based on the seriousness of the criminal conduct and the defendant's prior record.²⁵ In light of this empirical analysis, the Guidelines assign each federal crime a numerical "offense level" and place offenders in the appropriate "criminal history category."²⁶ The point at which the offense level and criminal history category intersect contains a range for sentencing.²⁷

Unfortunately, the Guidelines were met almost instantaneously with disapproval. Critics argued that the Guidelines violated constitutional principles by empowering the Commission to essentially make law in prescribing the punishment for criminal defendants.²⁸ Contrary to the fundamental principle that "[a]ll legislative powers . . . shall be vested in a Congress of the United States," the Commission was a legislative body that created binding federal law.²⁹ In addition to usurping Congress's legislative powers, the Commission also lacked a direct line of accountability to any of the three branches of government.³⁰ Despite attempts to create a bipartisan, independent agency, the Commission was inherently politicized.³¹ Its powers went largely unchecked—a regime that ran directly contrary to the checks and balances form of government that the Framers of the Constitution intended.

In 2005, the Supreme Court handed down a landmark decision to resolve the constitutional problems associated with the Guidelines. In *United States v. Booker*, the Court held that the Sixth Amendment right to a jury trial applies to the U.S. Sentencing Guidelines.³² Pursuant to *Booker*, district courts, "while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."³³ Furthermore, the Supreme Court mandated that circuit courts review any departures from the Guidelines under a "reasonableness" standard.³⁴ Thus, the Commission was no longer acting as a legislative body, but merely promulgating rules from which federal judges could easily deviate. Independent sentencing factors could therefore be taken into consideration under the *Booker* regime. Undoubtedly, this monumental decision allowed federal judges to return to individualized sentencing—something thought to have been eliminated by the Sentencing Reform Act. However, while *Booker* quieted many of the constitutional

²⁵ Wright, *supra* note 24, at 11.

²⁶ *Id.* at 64.

²⁷ *Id.* at 62 n.281.

²⁸ For a discussion of the constitutional arguments against the U.S. Sentencing Guidelines, see *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (arguing that the majority's decision to uphold the Guidelines condoned a "new Branch" of government and violated basic constitutional principles); Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 POL'Y ANALYSIS 1, 6 (2002), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa458.pdf>.

²⁹ U.S. CONST. art. I, § 1.

³⁰ Luna, *supra* note 28, at 6.

³¹ *Id.*

³² *United States v. Booker*, 543 U.S. 220, 243 (2005).

³³ *Id.* at 264 (emphasis added).

³⁴ *Id.*

arguments against the Guidelines, the decision ultimately did little to resolve the inconsistency in federal sentencing.

2. A Summary of the Child Pornography Non-Production Guidelines and Accompanying Sentencing Enhancements

In the context of child pornography non-production offenses, the Supreme Court's landmark decision in *Booker* arguably worsened the existing problems of federal sentencing law. In a criminal justice system in which judges inconsistently apply the Guidelines on a case-by-case basis, disparity in sentencing has again become a serious issue.³⁵ When confronted with child pornography offenders who have committed non-production offenses, federal judges have shown little deference to the Guidelines.³⁶ In addition, under the "reasonableness" standard set forth by *Booker*, appellate courts often overturn arbitrary departures from the Guidelines and impose varying terms of imprisonment.³⁷ Such rulings are detrimental to the predictability and consistency of sentencing that Congress intended when creating the Commission. Furthermore, countless appeals have wasted judicial resources and reflect poorly on the judiciary as a whole. As a result, it is arguable that federal sentencing law has regressed rather than progressed.

U.S. Sentencing Guidelines § 2G2.2 governs child pornography non-production offenses. Because this particular section lacks a connection to community values, leaves little room for rehabilitation, and is harsh, § 2G2.2 has become one of the most frequently litigated Guidelines in the federal sentencing system.³⁸ Scholars and judges contend that § 2G2.2 contains excessive sentencing ranges that are driven by

³⁵ See Judge Brendan J. Sheehan, *Courts Caught in the Web: Fixing a Failed System with Factors Designed for Sentencing Child Pornography Offenders*, 63 CLEV. ST. L. REV. 799, 801–04 (2015) (highlighting the disparity in sentencing for child pornography offenders with two particular Ohio cases); see also Stephanie Francis Ward, *Courts Are Giving Reduced Terms to Many Child-Porn Defendants*, A.B.A. J. (Aug. 1, 2015), http://www.abajournal.com/magazine/article/courts_are_giving_reduced_terms_to_many_child_porn_defendants (discussing judges' decisions to depart from the Guidelines in sentencing child pornography offenders).

³⁶ Sheehan, *supra* note 35, at 801–04; see also Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 MARQ. L. REV. 717, 731 (2009) ("A number of district courts have concluded 'that the child pornography guidelines' lack of empirical support provides sentencing judges the discretion to sentence below those guidelines based on policy disagreements with them.") (quoting *United States v. Huffstatler*, 561 F.3d 694, 697 (7th Cir. 2009)).

³⁷ *Booker*, 543 U.S. at 264. Under *Booker*, appellate courts must review decisions to deviate from the Guidelines under a "reasonableness" standard, which has both a procedural and substantive component. *Id.*

³⁸ See *System Has Gone Overboard With Child Porn Sentences*, TIMESNEWS (July 16, 2015), <http://www.timesnews.net/News/2015/07/16/System-has-gone-overboard-with-child-porn-sentences.html> [hereinafter *System Has Gone Overboard*] (discussing a recent case in which a child pornography offender received a 520-year sentence); Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G REP. 108, 114 (2011).

politics and partisanship rather than justice and empirical evidence.³⁹ In fact, according to a survey conducted by the Commission, most federal judges think child pornography sentences are too long.⁴⁰ This problem is particularly disturbing with respect to non-production offenses.⁴¹ Non-production offenses, which are governed by § 2G2.2, include the simple possession of child pornography.⁴² Child pornography is defined as:

[A]ny visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
- (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
- (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.⁴³

The simple possession of such materials subjects a defendant to a statutory penalty range of zero to ten years of imprisonment.⁴⁴ However, if the offender has a prior conviction for a covered sex offense, the penalty range increases to ten to twenty years of imprisonment.⁴⁵ While the Guidelines provide a numerical base level of “eighteen” for possession of child pornography, there are several specific offense characteristics that may increase this level, including the age of the child involved, use of a computer or the Internet, and the nature of the acts depicted in the images.⁴⁶

³⁹ *An Introduction to Child Pornography Sentencing*, FAMM, <http://famm.org/wp-content/uploads/2013/09/FS-Intro-to-Child-Porn-8.22.13-fixed.pdf> (last visited Nov. 30, 2015).

⁴⁰ *Id.*

⁴¹ *Id.* The relevant survey reveals that approximately 70% of judges think that the sentences for possession of child pornography are too high. *Id.*

⁴² USSG § 2G2.2 (citing 18 U.S.C. §§ 1466A, 2252, 2252A(a)–(b), and 2260(b) (2016)).

⁴³ 18 U.S.C. § 2256(8) (2012).

⁴⁴ See *Analysis of Child Pornography Offenses*, U.S. SENTENCING COMM’N 106 http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_C11_Child_Pornography_Offenses.pdf (last visited Oct. 11, 2015).

⁴⁵ *Id.*

⁴⁶ *Id.* at 107. The comprehensive list of specific offense characteristics that increase sentences in child pornography cases includes the following:

(3) (Apply the greatest) If the offense involved:

- (A) Distribution for pecuniary gain, increase by the number of levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the retail value of the material, but by not less than 5 levels.(B) Distribution for the receipt, or

Under the current regime of § 2G2.2, years of imprisonment are almost inevitable for most non-production offenders.

District courts have responded to this harshness by deviating from the Guidelines. In recent years, both government and non-government sponsored below-range sentences have increased substantially.⁴⁷ In 2010 alone, less than 55% of child pornography sentences fell within the Guidelines range.⁴⁸ Because district courts refuse to adhere to the harsh penalties prescribed by the Guidelines, they continue to impose inconsistent punishments on a case-by-case basis. Ultimately, sentences for similarly situated defendants are markedly different, deterrence goals are futile, and the sexual exploitation of children continues. In light of this data, it is questionable as to whether the Guidelines have truly achieved a just system of punishment. In fact, the goals of the Sentencing Reform Act seem to have been thwarted.

B. The Theories of Just Punishment in the Criminal Justice System

For centuries, societies around the world have justified criminal punishment based on a number of theories, most of which have been retributive or utilitarian in nature.⁴⁹ Scholars and philosophers have argued that criminal punishment should

-
- expectation of receipt, of a thing of value, but not for pecuniary gain, increase by 5 levels.
 - (B) Distribution to a minor, increase by 5 levels.
 - (C) Distribution to a minor that was intended to persuade, induce, entice, or coerce the minor to engage in any illegal activity covered under subdivision (E), increase by 6 levels.
 - (D) Distribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct, increase by 7 levels.
 - (E) Distribution other than distribution described in subdivisions (A) through (E), increase by 2 levels.
 - (4) If the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence, increase by 4 levels.
 - (5) If the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels.
 - (6) If the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material, increase by 2 levels.
 - (7) If the offense involved—
 - (A) at least 10 images, but fewer than 150, increase by 2 levels;
 - (B) at least 150 images, but fewer than 300, increase by 3 levels;
 - (C) at least 300 images, but fewer than 600, increase by 4 levels; and
 - (D) 600 or more images, increase by 5 levels.

See USSG § 2G2.2(b).

⁴⁷ *Analysis of Child Pornography Offenses*, *supra* note 44, at 196–209.

⁴⁸ *An Introduction to Child Pornography Sentencing*, *supra* note 39.

⁴⁹ See Robert B. McCaleb, *Rejustifying Retributive Punishment on Utilitarian Grounds in Light of Neuroscientific Discoveries: More Than Philosophical Calisthenics!*, 63 CLEV. ST. L. REV. 515, 522 (2015) (noting that the two key theories of punishment are retributivism and utilitarianism).

serve a purpose.⁵⁰ The Guidelines purport to further this goal. Under the Sentencing Reform Act,⁵¹ the Commission is charged with developing Guidelines that “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”⁵² Nevertheless, the Guidelines ultimately fail to promote the theories of just punishment in the context of child pornography non-production offenses.⁵³ Because federal judges often deviate from the flawed non-production Guidelines, sentences have become extremely unpredictable. Such inconsistent punishment does not serve retributive or utilitarian purposes. In order to fully understand the effect of the Guidelines’ inconsistent application, it is necessary to examine the underlying principles of the retributive and utilitarian theories of punishment.

1. Retributivism

A backward-looking theory of criminal punishment, retributivism originated with Immanuel Kant’s famous philosophy that morally culpable individuals deserve punishment.⁵⁴ This idea is epitomized by Kant’s argument that an island society on the verge of disbanding should still execute its last remaining murderer.⁵⁵ According to retributivists, proportionate punishment restores the moral order that has been breached by the criminal act.⁵⁶ Society is obligated to ensure such a balance, and failure to punish blameworthy individuals leaves guilt upon the society.⁵⁷ As a result, the retributive theory presupposes that people are responsible moral agents who are capable of freely choosing between right and wrong.⁵⁸ Retributivism thus requires

⁵⁰ For a discussion of the purposes of criminal punishment, see MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997); JEFFRIE G. MURPHY & JULES COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* (1984).

⁵¹ See *supra* Part II(A)(1) for a discussion of the Sentencing Reform Act of 1984 and the U.S. Sentencing Guidelines.

⁵² USSG Ch.1, Pt.A, intro.

⁵³ See *infra* Part III for a detailed analysis of the ways in which the Guidelines fail to promote the theories of just punishment.

⁵⁴ For a historical discussion of retributivism and its justifications for criminal punishment, see IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor & Jens Timmermann eds., 2012) (1785).

⁵⁵ See Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983). For a vivid illustration of Kant’s “island” argument, see DIANE MORGAN, *KANT TROUBLE: OBSCURITIES OF THE ENLIGHTENED* 89 (2000):

Even if a civil society were to be dissolved by the consent of all of its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice.

⁵⁶ Greenawalt, *supra* note 55, at 347.

⁵⁷ *Id.*

⁵⁸ *Id.* at 348.

some notion of free will that attributes the responsibility for wrongdoing to criminal deviants—a principle that is incompatible with notions of determinism.⁵⁹

Despite its strength as a philosophical theory, retributivism has been subject to much criticism. For one, critics argue, it is difficult—if not impossible—to judge with confidence the moral guilt of others.⁶⁰ In the same vein, religious doctrines have suggested that measuring an offender’s moral culpability is beyond human capacity and therefore an inappropriate human purpose.⁶¹ Furthermore, it is arguable that the notion of an offender “deserving” punishment is somewhat incoherent. Although retributivists may assert that punishment is a legitimate public service, retributivism does not provide a comprehensive *purpose* for the infliction of pain and punishment.⁶² The theory instead focuses on just deserts and retribution, essentially proposing that punishment is simply the right thing to do. In light of these criticisms, some philosophers and scholars hesitate to support retributivism in modern society.⁶³

Nevertheless, the Guidelines purport to further retributive goals, focusing on the severity of the offense in lieu of other considerations, including the mental or physical condition, educational skills, experience, or age of the offender.⁶⁴ In an attempt to depart from the inconsistent system of the past, the Guidelines are empirical in nature and punish largely based on the seriousness of the offense. Moreover, they categorize previous offenders as inherently more culpable by prioritizing the defendant’s criminal history among aggravating sentencing factors.⁶⁵ These considerations are largely retributive in nature and remain subject to criticism and debate among legal scholars and federal judges. In fact, for those who acknowledge a justification for punishment beyond mere deserts, retributivism is indefensible.⁶⁶

2. Utilitarianism

Several of the most harmful criticisms of retributivism are solved by the utilitarian theory of punishment. Contrary to the backward-looking theory of retributivism, utilitarianism is a forward-looking philosophy that seeks to justify

⁵⁹ *Id.* Determinists suggest that an individual’s actions are consequences of preceding causes over which he or she ultimately has no control. *Id.* For further information on the connection between determinism and moral responsibility, see McCaleb, *supra* note 49 (discussing determinism in the context of new developments in neuroscience); Arthur Pap, *Determinism and Moral Responsibility*, 43 J. PHIL. 318 (1946).

⁶⁰ Greenawalt, *supra* note 55, at 348.

⁶¹ *Id.* at 349; see also Mark A. Michael, *Utilitarianism and Retributivism: What’s the Difference?*, 29 AM. PHIL. Q. 173, 175 (1992) (explaining the tenets of the retributivist and utilitarian theories of just punishment, their differences, and the criticisms associated with them).

⁶² Greenawalt, *supra* note 55, at 349.

⁶³ *But see* Chad Flanders, *Can Retributivism be Saved?*, 2014 BYU L. REV. 309 (2014).

⁶⁴ Gwin, *supra* note 7, at 181.

⁶⁵ *Id.*

⁶⁶ For a general moral critique of retributivism, see generally James Q. Whitman, *A Plea Against Retributivism*, 7 BUFF. CRIM. L. REV. 85 (2003).

punishment based on its good consequences.⁶⁷ According to utilitarians, a justified system of punishment is one that brings about the greatest net benefit to society.⁶⁸ Perhaps most important to utilitarianism, however, is the principle of deterrence:

Knowledge that punishment will follow crime deters people from committing crimes, thus reducing future violations of right and the unhappiness and insecurity they would cause. The person who has already committed a crime cannot, of course, be deterred from committing that crime, but his punishment may help to deter others . . . With a properly developed penal code, the benefits to be gained from criminal activity would be outweighed by the harms of punishment, even when those harms were discounted by the probability of avoiding detection. Accordingly, the greater the temptation to commit a particular crime and the smaller the chance of detection, the more severe the penalty should be.⁶⁹

This principle—called “general deterrence”—drives utilitarianism and its variations.⁷⁰ In addition to general deterrence, proponents of utilitarianism argue that the imposition of consistent punishment serves the purpose of “individual deterrence” as well.⁷¹ To deter an offender from repeating his or her *own* criminal act, the punishment should be severe enough to outweigh the benefits of the crime.⁷² Rather than punish the offender solely as a result of the wrongdoing itself, utilitarianism seeks to impose a punishment that will result in the greatest net benefit to all parties involved.

Like retributivism, however, this theory has been subject to a great deal of criticism. First, utilitarianism presupposes that general and individual deterrence are effective. Numerous empirical studies suggest that they are not.⁷³ While utilitarianism requires that imprisonment and punishment will deter future offenders, research indicates that imprisonment—along with increasing the severity of punishment—deters crime only moderately.⁷⁴ In addition, individual deterrence presupposes that offenders weigh the costs and benefits of their crimes before acting—which seems to be a somewhat dubious concept. Beyond the practical arguments against utilitarianism, however, are the philosophical objections to the

⁶⁷ Greenawalt, *supra* note 55, at 350. For a thorough, historical discussion of utilitarianism, see generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Oxford 1907).

⁶⁸ Michael, *supra* note 61, at 174.

⁶⁹ Greenawalt, *supra* note 55, at 351.

⁷⁰ Michael, *supra* note 61, at 175.

⁷¹ Greenawalt, *supra* note 55, at 352.

⁷² *Id.*

⁷³ The effectiveness of criminal deterrence has been questioned by several legal scholars and behavioral scientists. For example, for a comprehensive investigation of the effectiveness of criminal deterrence, see Dieter Dölling, *Is Deterrence Effective? Results of a Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL'Y & RES. (2009).

⁷⁴ See *Five Things About Deterrence*, NAT'L INST. OF JUSTICE (June 6, 2016), <http://www.nij.gov/five-things/pages/deterrence.aspx> (last visited Oct. 13, 2015).

theory. The most fundamental objection is to treating the offender as a means to satisfy social purposes rather than an end in himself.⁷⁵ Because utilitarians believe that the main purpose of punishment is to provide a net benefit to society, they may punish even the innocent in order to achieve this goal.⁷⁶ Although proponents of utilitarianism likely see retributivism as morally repugnant, it is arguable that they, too, would permit practices that society has difficulty accepting.

3. Mixed Theory of Just Punishment

Given the flaws of retributivism and utilitarianism, legal scholars and philosophers have created a hybrid form of punishment that implements elements of both theories. This “mixed theory” justifies punishment with utilitarian principles but uses notions of retributivism in order to impose more stringent constraints on punishment than pure utilitarianism would allow.⁷⁷ In its focus on deserts, the mixed theory suggests that no offender should be punished more severely than could be justified by utilitarian objectives and the degree of the offender’s wrongdoing.⁷⁸ As mixed theorists explain,

[t]he basic reasons for having compulsory legal rules backed by sanctions are utilitarian; these reasons should dominate decisions about the sorts of behavior to be made criminal. Moral wrongs should not be subject to legal punishment unless that is socially useful, and behavior that is initially morally indifferent may be covered by the criminal law if doing so serves social goals. Notions of deserts, however, should impose more-stringent constraints on the imposition of punishment than pure utilitarianism acknowledges.⁷⁹

Nevertheless, in terms of offenders whose mental conditions make them less blameworthy—but also less amenable to deterrence or rehabilitation—mixed theorists would likely support a disproportionate penalty.⁸⁰ In a perfect world, such offenders might be given a moderate sentence and an extended form of treatment. In fact, a reformist position argues that the length of sentence for criminal punishment should depend more on the rate of rehabilitative progress than the severity of the offense.⁸¹ Despite these positions, the mixed theory has not fully implemented a reform and treatment plan.⁸²

⁷⁵ Greenawalt, *supra* note 55, at 353.

⁷⁶ *Id.*; see also Michael, *supra* note 61, at 176 (discussing the charge that “utilitarianism sanctions the punishment of innocent persons”).

⁷⁷ Greenawalt, *supra* note 55, at 354–55.

⁷⁸ *Id.* at 355.

⁷⁹ *Id.* at 345–55.

⁸⁰ *Id.* at 355.

⁸¹ *Id.* at 358. This position is similar to arguments for civil commitment, which is discussed *infra* Part IV(C).

⁸² A comprehensive proposal to reform the Guidelines in the context of child pornography non-production offenses sentencing law is provided *infra* Part IV.

In terms of the criminal law, the retributive and utilitarian theories largely unite. In fact, it is a type of mixed theory that the Guidelines acknowledge in their attempt to further the basic purposes of criminal punishment: “deterrence, incapacitation, just punishment, and rehabilitation.”⁸³ While the Guidelines’ focus on offense severity is retributive in nature, the Commission is also charged with advising and assisting Congress in the “development of effective and efficient crime policy,” which inevitably involves deterrence.⁸⁴ In light of the justice system’s inadequacies prior to the enactment of the Sentencing Reform Act, the Guidelines are designed to promote both retributive and utilitarian goals. However, it remains to be seen whether they are particularly effective in doing so.

III. DISCUSSION: THE RETRIBUTIVE AND UTILITARIAN FAILURES OF THE CHILD PORNOGRAPHY NON-PRODUCTION GUIDELINES

On their face, the Guidelines appear to be an appropriate result of the Sentencing Reform Act. The Guidelines’ empirical structure reflects Congress’s desire to avoid judicial discretion and promote a more uniform system of punishment.⁸⁵ This may have been effective before the Supreme Court’s decision in *Booker*. After *Booker*, however, district courts are free to deviate from the Guidelines. Because the child pornography non-production Guidelines lack a connection to community values, leave little room for rehabilitation, and are harsh, federal judges frequently exercise this option. Deviation from the Guidelines may be appropriate in some instances. In other cases, however, district courts impose sentences that are entirely *too* lenient. As a result, similarly situated offenders often receive very different sentences, creating inconsistency.⁸⁶ Neither retributive nor utilitarian goals are served when punishment varies on a case-by-case basis. Moreover, the sexual exploitation and victimization of young children continues. Thus, in order to promote a criminal justice system in which punishment serves a purpose, reform is necessary.

A. *The Inadequacies of the Child Pornography Non-Production Guidelines*

1. Factors Contributing to District Courts’ Deviations from the Guidelines

In order to fully understand district courts’ decisions not to apply the Guidelines—and the inconsistency that follows—it is first necessary to analyze the issues associated with the Guidelines, including lack of connection to community values, inadequate focus on rehabilitation, and harshness. These flaws motivate federal judges to impose punishments at their own discretion rather than adhere to the Guidelines range. First, the current Guidelines lack a connection to community values. Although the Sentencing Reform Act intended to create an honest criminal justice system, the Guidelines arguably upset this balance in the context of child pornography non-production offenses. In fact, Judge Gwin’s jury polling study is telling—the punishment suggested for non-production offenders is not what society thinks is just.⁸⁷ As a result of this disparity, judges often deviate from the Guidelines

⁸³ USSG Ch.1, Pt.A.

⁸⁴ *An Overview*, *supra* note 15.

⁸⁵ Gwin, *supra* note 7, at 179-80.

⁸⁶ *See System Has Gone Overboard*, *supra* note 38.

⁸⁷ Gwin, *supra* note 7, at 187.

in an attempt to impose a fair—yet unpredictable—punishment. Unfortunately, Judge Gwin’s 2011 case is not an anomaly. Judge Gwin describes an additional Ohio case in which the average recommended sentence was severely disproportionate to the Guidelines range:

In 2007, a jury found Daniel Sheldon guilty of two child pornography offenses. Little about Sheldon was sympathetic. In his twenties and married, Sheldon spent long hours downloading and viewing pictures and videos showing minor girls, some prepubescent, engaging in sex with adults. Some videos showed bondage, others masochism. Sheldon had also engaged in cybersex with individuals who purported to be young girls.

What punishment should follow such a crime? If society punishes in order to stand with victims and impose justified retribution, what amount of deserts is just? No easy calculus exists. Because I was unsure that the Federal Sentencing Guidelines accurately mirror community punishment beliefs, I asked each of the *Sheldon* jurors—who were a cross-section of the community and who actually heard the case, saw the terrible images and videos, and met the defendant—to recommend anonymously what punishment Sheldon should receive. I put their responses away without examining them. Months later, I sentenced Sheldon within the Guidelines range, but near the high end. Surprise came upon learning that my sentence was almost *five times higher* than the average of the jurors’ sentence recommendations.⁸⁸

Lacking a connection to community values, § 2G2.2 is abhorrent to federal judges who strive to impose just punishments.⁸⁹ Such judges frequently decline to apply the Guidelines, causing inconsistency in sentencing. A basic tenet of criminal punishment is that the only penalty that is justifiable is one proportional to the crime committed in manner and degree.⁹⁰ *Ius talionis*, as Kant explained, is a principle of equality that does the work of “the needle on the scale of justice.”⁹¹ Judge Gwin’s study suggests that the Guidelines overstate society’s demand for punishment.⁹² Such a concept is directly contrary to the honest system of punishment that the Sentencing Reform Act hoped to achieve.

In addition to lacking a connection to community values, the non-production Guidelines leave little room for rehabilitation. While it is questionable as to whether imprisonment is appropriate in the context of child pornography offenses, there is little doubt that therapy is effective in treating sex offenders. In the United States, the criminal justice system manages most convicted sex offenders with imprisonment,

⁸⁸ *Id.* at 173 (emphasis added).

⁸⁹ *Id.* at 175.

⁹⁰ Sarah Holtman, *Kant, Retributivism, and Civic Respect*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 107, 108 (Mark White ed., 2011).

⁹¹ *Id.* at 109; see also Jeffrie G. Murphy, *Some Second Thoughts on Retributivism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 93, 96 (Mark White ed., 2011).

⁹² Gwin, *supra* note 7, at 183.

community supervision, specialized treatment or therapy, or a combination thereof.⁹³ Despite efforts to reform offenders into more productive members of society, there is a high rate of recidivism associated with some sex offenses.⁹⁴ Nevertheless, it is generally accepted that rehabilitation has a positive effect on sex offenders, including child pornography non-production defendants.⁹⁵ A recent study based on semi-structured interviews with child pornography offenders revealed that they only began to accept responsibility for their crimes when they undertook treatment.⁹⁶ Until they were required to confront their demons and consider the consequences of their actions, the offenders minimized the severity of their crimes.⁹⁷ In fact, several participants indicated that they did not pose a “danger to children” and distanced themselves from the status of “sex offender.”⁹⁸ Before treatment, such offenders construed looking at and downloading images as a private endeavor that did not imply any knowledge of or contact with the children depicted.⁹⁹ After intensive rehabilitation, however, the offenders identified the victims of child pornography and discovered that the children in the images they downloaded were real.¹⁰⁰ To these offenders, the possession of child pornography was no longer a victimless crime.

This study is not an anomaly—it is widely accepted that treatment has proven effective in this realm.¹⁰¹ Accordingly, the Commission has attempted to integrate rehabilitation into federal sentencing law by recommending psycho-sexual treatment for all child pornography offenders.¹⁰² However, the existing programs are insufficient in a number of ways. First, treatment is often a condition of supervised release rather than a comprehensive form of rehabilitation that is implemented into a prison sentence.¹⁰³ Treatment that is too remote in time allows offenders to further

⁹³ See Sheehan, *supra* note 35, at 813 (citing FAY HONEY KNOPP ET AL., NATIONWIDE SURVEY OF JUVENILE AND ADULT SEX OFFENDER TREATMENT PROGRAMS AND MODELS (1992)).

⁹⁴ *Id.* Recidivism describes the tendency of sex offenders to reoffend even after they have been convicted and served out any sentence. *Id.*

⁹⁵ See generally Belinda Winder & Brendan Gough, “I Never Touched Anybody—That’s My

Defence”: A Qualitative Analysis of Internet Sex Offender Accounts, 16 J. SEXUAL AGGRESSION 125 (2010).

⁹⁶ *Id.* at 136.

⁹⁷ *Id.* at 137.

⁹⁸ *Id.* at 133.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 136–37.

¹⁰¹ See *Sex Offender Treatment in the Context of Supervision: Effectiveness of Sex Offender Treatment (“Review of the Research”)*, CTR. FOR SEX OFFENDER MGMT., http://www.csom.org/train/supervision/long/04_02_02.html (last visited Nov. 16, 2015).

¹⁰² See USSG § 5D1.3(d)(7)(A) (requiring child pornography offenders to “participate in a program . . . for the treatment and monitoring of sex offenders” while on supervised release).

¹⁰³ U.S. SENTENCING COMM’N, *Post-Conviction Issues in Child Pornography Cases*, in REPORT TO CONGRESS 271, 271–74 (2012).

distance themselves from their crimes.¹⁰⁴ In addition, the existing Bureau of Prisons Sex Offender Programs¹⁰⁵ require several eligibility criteria and are only offered at designated institutions, making the programs difficult to enter for some low-level offenders.¹⁰⁶ In fact, one such criterion requires that offenders volunteer to participate.¹⁰⁷ Because sex offenders often experience denial with respect to their crimes,¹⁰⁸ they are highly unlikely to enter such programs of their own free will. Thus, the Commission's attempt to integrate rehabilitation into federal sentencing law ultimately has failed.

Finally, as previously indicated, the non-production Guidelines are entirely too harsh. According to a survey conducted by the Commission, most federal judges think child pornography sentences are too long.¹⁰⁹ This problem is particularly disturbing with respect to non-production offenses, which include the simple possession of pornographic images of children.¹¹⁰ The Commission's survey indicates that approximately 70% of judges think that the sentences for possession of child pornography are too high.¹¹¹ The fact that *most* federal judges feel this way is unsettling. In addition, the child pornography Guidelines contain a laundry list of sentencing enhancements that significantly increase an offender's punishment.¹¹² Although these enhancements reflect Congress's sentiment that the possession of child pornography is a serious crime, they have the adverse effect of creating an unpredictable sentencing system.¹¹³ Taken together, the problems associated with the Guidelines provide judges with ample opportunity to deviate from the Commission's flawed sentencing ranges. As a result of these deviations, retributive and utilitarian goals are defeated.

B. The Retributive and Utilitarian Failures Caused by Inconsistent Punishment

1. Retributive Failures as Demonstrated by Sixth Circuit Case Law

The inconsistent punishment that results from the Guidelines' inadequacies is detrimental to retributive goals. Undoubtedly, punishment is not "equal" when

¹⁰⁴ See generally Winder & Gough, *supra* note 95 (discussing the tendency of sex offenders to detach themselves from their crimes and distance themselves from the title of "sex offender"). Before receiving treatment, sex offenders refused to acknowledge the seriousness of their crimes. *Id.* In addition, child pornography non-contact offenders saw their crimes as victimless. *Id.* Only after treatment did the offenders orientate themselves to their crimes and take responsibility for their actions. *Id.*

¹⁰⁵ For a general overview of the existing Bureau of Prisons Sex Offender Programs and treatment options, see U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, 5234.10, SEX OFFENDER PROGRAMS (2013).

¹⁰⁶ *Id.* at 16.

¹⁰⁷ *Id.* at 17

¹⁰⁸ Winder & Gough, *supra* note 95, at 136–37.

¹⁰⁹ *An Introduction to Child Pornography Sentencing*, *supra* note 39.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² See USSG § 2G2.2.

¹¹³ See Rigsby, *supra* note 14, at 1345.

similarly situated offenders receive very different sentences—a blatant violation of retributivism’s focus on proportionality.¹¹⁴ The inequality in sentencing among non-production offenders then creates a justice system in which valuable prosecutorial and judicial resources are wasted. In response to inconsistent punishments in child pornography cases, the U.S. Government has approached the Courts of Appeals in order to overturn unreasonable sentences.¹¹⁵ Pursuant to the Supreme Court’s landmark decision in *Booker*, district courts, “while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”¹¹⁶ Sentences imposed outside of the Guidelines range are reviewed for “reasonableness” at the appellate level.¹¹⁷ While a presumption of reasonableness applies to a sentence within the Guidelines, no such presumption applies to a variance.¹¹⁸ Thus, a sentence may be substantively unreasonable when it is arbitrary or based on impermissible factors.¹¹⁹

Perhaps unsurprisingly, circuit courts are often confronted with substantively unreasonable sentences in child pornography cases. As a result, they must expend valuable judicial resources in an attempt to make punishment more consistent and predictable. This upsets society’s moral order and violates retributive principles. A recent Sixth Circuit decision exemplifies this issue. In *United States v. Bistline*,¹²⁰ the defendant pleaded guilty to knowingly possessing 305 images and sixty-five videos of child pornography.¹²¹ Based on the seriousness of the offense and Bistline’s criminal history, his Guidelines range was sixty-three to seventy-eight months of imprisonment.¹²² At sentencing, the district court noted that the Guidelines for possession of child pornography were “seriously flawed.”¹²³ In a significant downward departure from the Guidelines, the court announced its intention not to imprison Bistline at all, but instead to confine him overnight in a courthouse lockup.¹²⁴ In vacating Bistline’s sentence, the Sixth Circuit emphasized the district court’s failure to punish based on the seriousness of the offense:

The district court made a number of observations with respect to the seriousness of this offense. Many of them served to diminish it. The court did say that the images on Bistline’s computer were “horrendous,” and that the “production of child pornography and the distribution of it is an

¹¹⁴ Greenawalt, *supra* note 55, at 347-48.

¹¹⁵ See *United States v. Booker*, 543 U.S. 220, 264 (2005).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 262.

¹¹⁸ *Rita v. United States*, 551 U.S. 338, 355–56 (2007).

¹¹⁹ *United States v. Conatser*, 514 F.3d 508, 520 (6th Cir. 2008).

¹²⁰ *United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012).

¹²¹ *Id.* at 760.

¹²² *Id.*

¹²³ *Id.* The district court’s blatant acknowledgment of the Guidelines’ flaws suggests that the above factors played a role in the decision to deviate from the Guidelines. See *supra* Part III(A)(1).

¹²⁴ *Id.*

extremely serious offense, one which should be punished accordingly.” But notably omitted from that recitation (and virtually unpunished in this case) was the crime of possession of child pornography . . . That the producers of child pornography are more culpable . . . does not mean that its knowing and deliberate possessors are barely culpable at all.¹²⁵

First, *Bistline* is precisely the type of case in which a deviation from the Guidelines was *too* lenient. While excessively harsh penalties do not serve retributive values, nor do those that are excessively lenient. For retributivists, proportionality is key to a successful criminal justice system.¹²⁶ Importantly, *Bistline* also makes clear that several non-production offenders receive unpredictable punishments—a violation of the retributive principles on which the Guidelines are based. The Guidelines cannot promote the tenets of retributivism when the imposition of punishment is so arbitrary.

The Sixth Circuit case of *United States v. Robinson*¹²⁷ further demonstrates the issue posed for retributivism when judges arbitrarily deviate from the Guidelines. In *Robinson*, the Sixth Circuit held that a district court’s major departure from the Guidelines was substantively unreasonable.¹²⁸ Robinson, who pleaded guilty to one count of possession of child pornography, subscribed to an online website and accessed over 7,100 images of pornographic material.¹²⁹ A significant amount of the material—which Robinson obtained with a credit card payment—involved the bondage, torture, and rape of prepubescent children.¹³⁰ Despite the fact that Robinson had no significant criminal record and scored a Criminal History Category I, several factors significantly enhanced his offense level, placing him within a Guidelines range of seventy-eight to ninety-seven months of imprisonment.¹³¹ However, based on a number of psychological evaluations and the conclusion that Robinson was not a “pedophile,” the district court sentenced him to one day of imprisonment, followed by a five-year period of supervised release.¹³² In justifying its downward variance, the district court made a number of considerations:

The district court placed substantial weight on Robinson’s psychological evaluation, interpreting [a doctor’s] report to conclude that Robinson was not dangerous and not a pedophile. Relying heavily on that conclusion, the district court judge made the following statements: “[h]e does not render any recidivism factors for future behavior with children,” “I’m convinced you’re not going to do that again,” “[a]nd therefore, I am comfortable in varying to the degree that I’m varying.”¹³³

¹²⁵ *Id.* at 764–65.

¹²⁶ *Cf.* Greenawalt, *supra* note 55, at 347–48 (detailing the justifications of punishment).

¹²⁷ *United States v. Robinson*, 669 F.3d 767, 775 (6th Cir. 2012).

¹²⁸ *Id.*

¹²⁹ *Id.* at 769.

¹³⁰ *Id.*

¹³¹ *Id.* at 769–70.

¹³² *Id.* at 771–72.

¹³³ *Id.* at 775.

In vacating Robinson's sentence, the Sixth Circuit noted that young children were raped in order to enable the production of the pornography that the defendant accessed.¹³⁴ Despite the district court's conclusions, this was a serious and horrendous crime. In addition, Robinson knowingly acquired the images affirmatively, deliberately, and repeatedly, hundreds of times over the course of five years.¹³⁵ Thus, the characterization of "not dangerous and not a pedophile" was somewhat questionable.¹³⁶ In light of the seriousness of the offense—a retributivist consideration—a mere day of imprisonment was not sufficient.¹³⁷ In this instance, the flaws associated with the Guidelines caused yet another lenient punishment that was inappropriate under the circumstances.

2. The Utilitarian Failures of the Child Pornography Guidelines

In addition to failing to promote "just punishment,"¹³⁸ the Guidelines do little to further utilitarian goals as a result of their inconsistent application. In promulgating the Guidelines, the Commission acknowledges deterrence as one of the "basic purposes of criminal punishment."¹³⁹ From a utilitarian perspective, the only justifiable system of punishment is one that brings about the greatest net benefit to society in terms of deterring criminals from future undesirable conduct and creating happier, more useful citizens.¹⁴⁰ In an effort to reap such a benefit, Congress has demonstrated that deterrence is particularly important in child pornography sentencing. With the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Congress intended the Department of Justice to "dedicate the full force of [the] nation's resources against those who victimize [the] nation's youth."¹⁴¹ The PROTECT Act increased penalties

¹³⁴ *Id.* at 777.

¹³⁵ *Id.* at 776.

¹³⁶ *Id.* at 775.

¹³⁷ *Id.* at 776.

¹³⁸ USSG Ch.5, Pt.A, intro.

¹³⁹ *Id.*

¹⁴⁰ *See* Michael, *supra* note 61, at 174.

¹⁴¹ U.S. DEP'T OF JUSTICE, 03-266, FACT SHEET: PROTECT ACT (2003) (describing the PROTECT Act and its general goals); *see also* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 513(c), 117 Stat. 650 (2003). The Department of Justice sets forth several remedies to address the sexual exploitation of children in the U.S., including:

Increased penalties for non-family member child abduction: the minimum prison sentence is now 20 years.

Increased penalties for sexual exploitation of children and child pornography: a first offense of using a child to produce child pornography is now 15 to 30 years.

"Two Strikes" provision that requires life imprisonment for offenders who commit two serious sexual abuse offenses against a child.

Provisions to address the rates of "downward departures"—when judges sentence criminal defendants to less time in jail than the Sentencing Guidelines state.

for child pornography and created provisions to address downward departures in possession cases.¹⁴²

Nevertheless, the current state of the Guidelines has defeated the purpose of such legislation. Deterrence is impossible when the sentences for non-production offenses have become increasingly inconsistent. For centuries, researchers have studied the effectiveness of criminal deterrence. This research indicates that deterrence is only effective when punishment is certain and predictable.¹⁴³ Thus, it is a basic fundamental principle of the theory that without consistency in punishment, criminals will continue to take their chances by participating in undesirable conduct.¹⁴⁴ In an early text on deterrence theory, philosopher Cesare Beccaria explained:

One of the greatest curbs on crimes is not the cruelty of punishments, but their infallibility . . . The certainty of a punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity; even the least evils, when they are certain, always terrify men's minds.¹⁴⁵

Along with other deterrence theorists, Beccaria's position was that the self-interest to commit crimes must be thwarted by punishment that is certain, proportional, and swift.¹⁴⁶ In fact, studies have shown that the perception of legal sanctions acts as at least a moderate deterrent to crime.¹⁴⁷

The Sixth Circuit cases of *Bistline* and *Robinson* indicate that non-production sentences are neither certain nor proportional.¹⁴⁸ Because the Guidelines are no longer mandatory under the *Booker* regime,¹⁴⁹ offenders cannot accurately predict what type of punishment they will receive. In *Bistline*, for instance, the district court

Id. The Department also advocated for provisions that would allow a term of supervised release of any terms of years or for life. *Id.*

¹⁴² *Id.*; see also United States v. Morace, 594 F.3d 340, 347 (4th Cir. 2010) (noting Congress's view that "child pornography crimes are serious offenses deserving serious sanctions") (internal punctuation omitted).

¹⁴³ See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 58 (Henry Paolucci trans., Macmillan 1986) (1764).

¹⁴⁴ *Id.*; see also JACK P. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE 5 (1975) (discussing three key hypotheses that guide deterrence research in the criminal justice system, including certainty, severity, and celerity of punishment).

¹⁴⁵ BECCARIA, *supra* note 143, at 58.

¹⁴⁶ *Id.* at 46–47; see also Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence*, 100 J. CRIM. L. & CRIMINOLOGY 765, 769 (2010) (discussing various approaches to deterrence theory and the overall effectiveness of criminal deterrence).

¹⁴⁷ See generally Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, in 23 CRIME & JUSTICE: A REVIEW OF RESEARCH 1 (Michael Tonry ed., 1998).

¹⁴⁸ See United States v. Bistline, 665 F.3d 758, 766 (6th Cir. 2012); United States v. Robinson, 669 F.3d 767, 775 (6th Cir. 2012).

¹⁴⁹ United States v. Booker, 543 U.S. 220, 264 (2005).

ordered the defendant to a mere night of confinement in the courthouse lockup.¹⁵⁰ While the sentencing range in *Bistline* was sixty-three to seventy-eight months of imprisonment, the court deviated from the Guidelines in an unpredictable exercise of judicial discretion.¹⁵¹ In the absence of consistent punishment, the Guidelines cannot serve the utilitarian purpose of deterrence. Punishment on a case-by-case basis—an attempt at individual deterrence—leads to disparities in sentencing and creates unpredictability.¹⁵² Because district court judges frequently depart from the Guidelines, two similarly situated defendants often receive markedly different sentences, notwithstanding the similarity of their crimes.¹⁵³ While Congress attempted to resolve the disparity in federal sentencing law with the Sentencing Reform Act, these measures have proven ineffective.

Ultimately, the inconsistent application of the Guidelines fails to promote both the utilitarian and retributive theories of punishment, leaving child pornography sentencing law in a state of limbo. Although the Guidelines have been subject to a great deal of criticism, Congress and the Commission have yet to revise them in a way that will promote consistency. While the Commission often revisits the Guidelines in light of sentencing data,¹⁵⁴ it has failed to utilize that data in a productive manner. In light of the aforementioned failures, a systematic reform of the Guidelines is necessary.

IV. A SYSTEMATIC REFORM OF THE CHILD PORNOGRAPHY NON-PRODUCTION GUIDELINES

For years, federal judges, legal scholars, and criminal defendants have urged the U.S. Sentencing Commission to reevaluate § 2G2.2 of the Guidelines. In fact, § 2G2.2 has become one of the most litigated and least followed Guidelines in the federal sentencing system.¹⁵⁵ Despite their failures, however, the Guidelines are still relevant. They should not be abolished, as they have the potential—if applied consistently—to achieve the goals of legislation like the PROTECT Act. Nevertheless, the current state of federal sentencing law is too inconsistent to serve a purpose. Thus, the time has come for Congress to modify the Guidelines in a way that will motivate district courts to adhere to them.

¹⁵⁰ *Bistline*, 665 F.3d at 760; see also *Robinson*, 669 F.3d at 775.

¹⁵¹ *Bistline*, 665 F.3d at 760.

¹⁵² See Gwin, *supra* note 7, at 183. Judge Gwin explains:

Second, any emphasis on purposes other than retribution increases disparities. If individual deterrence becomes central, two defendants may receive markedly different sentences though their crimes and the resulting harm are nearly identical. Similarly, if incapacitation or rehabilitation becomes important, disparities result whenever similar criminals are seen as having different likelihoods for re-offense.

Id.

¹⁵³ *Id.*

¹⁵⁴ USSG Ch.5, Pt.A, intro.

¹⁵⁵ Stabenow, *supra* note 38, at 114.

A. Revision of the Guidelines Based on Jury Sampling

1. Implementing Jury Sampling Practices in District Courts

There are a number of ways to restore consistency to child pornography sentencing practices. The first entails a simple revision of § 2G2.2 based on society's notion of just punishment. Many deviations from the Guidelines can be attributed to their lack of connection to community values. As Judge Gwin explains, community sentiment must be an important part of any just system of sentencing.¹⁵⁶ Sentencing that lacks a connection to community values results in public misunderstanding of the seriousness of criminal conduct, undermines the law's moral standing, and diminishes the criminal law's normative force.¹⁵⁷ Moreover, Judge Gwin explains, the marked disparity between the Guidelines and community values *invites* evasion by federal judges.¹⁵⁸ In light of these issues, Judge Gwin suggests that the Commission methodically sample juror sentiments regarding appropriate punishment.¹⁵⁹ Judge Gwin's model aims to establish such a practice by incorporating juror sentencing recommendations into district courts' reports to the Commission:

The Sentencing Commission could easily ask trial courts to sample jurors who return guilty verdicts. Each sampling would take less than five minutes. District courts already report sentencing decisions to the Sentencing Commission. These reports could easily incorporate juror sentencing recommendations. The Commission currently assembles information that allows it to state the number, the mean and the median sentence for any crime, any offense level for that crime, and any criminal history category for that crime. The collection of juror sampling would pose only a minor additional task.¹⁶⁰

Without question, implementing jury sampling practices would provide insight into community values regarding appropriate punishment for child pornography offenders.¹⁶¹ In fact, the Sixth Circuit recognized the validity of Judge Gwin's jury polling practice on appeal in *United States v. Collins*.¹⁶² The Commission should use the values obtained from jury sampling practices to thereafter revise the Guidelines.

¹⁵⁶ Gwin, *supra* note 7, at 175. See generally PETER H. ROSSI AND RICHARD A. BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997) (evaluating the degree of public consensus around the newly-enacted Guidelines).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *Id.* at 194–95.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *United States v. Collins*, Nos. 15-3263/3309, 2016 WL 3583999, at *2 (6th Cir. June 29, 2016) (noting that juries “can provide insight into the community's view of the gravity of an offense”).

2. Utilizing Jury Sampling Data to Revise the Guidelines

As previously discussed, another common criticism of § 2G2.2 is that its sentencing ranges are excessively harsh. It is likely that jury sampling will reflect that sentiment, as it did in the *Collins* case. If so, the Commission can alleviate the harshness of the Guidelines by eliminating several of the existing sentencing enhancements under § 2G2.2. Perhaps the most controversial and litigated enhancement is the “use of a computer” enhancement, which increases a defendant’s offense level by two if the conduct involved the use of a computer.¹⁶³ Not surprisingly, over 95% of child pornography offenders use a computer to view, download, or distribute explicit materials.¹⁶⁴ Although the use of technology allows offenders to duplicate, distribute, and access child pornography quickly and easily, the computer enhancement has several flaws. First, the enhancement does not distinguish between defendants who view one image on a computer and those who distribute child pornography to a mass number of subscribers.¹⁶⁵ Second, with the widespread use of computers in modern society, the enhancement is essentially part-and-parcel with the offense.¹⁶⁶ Moreover, empirical data does not show that the use of a computer as a means to possess pornography is a “more serious or culpable offense” than viewing the images through another medium.¹⁶⁷ In a way, this enhancement is somewhat arbitrary. The elimination of the computer use enhancement would reduce virtually every child pornography non-production offender’s sentencing range by at least two offense level points.

Undoubtedly, § 2G2.2 must reflect the seriousness of the crime of child pornography. Child pornography is not a victimless crime,¹⁶⁸ and offenders must be punished accordingly. The Commission must, however, ensure the consistent application of the Guidelines. After modifying the Guidelines based on jury sampling, the new sentencing ranges will be proportionate to the crime and

¹⁶³ USSG § 2G2.2(b)(6). The relevant provision provides a two-level increase if “the offense involved the use of a computer or an interactive computer service for the possession, transmission, receipt, or distribution of the material, or for accessing with intent to view the material.” *Id.*

¹⁶⁴ U.S. SENTENCING COMM’N, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS: FISCAL YEAR 2010 37 (2010), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Guideline_Application_Frequencies/2010/10_glinexgline.pdf.

¹⁶⁵ Stabenow, *supra* note 38, at 122.

¹⁶⁶ *Id.*; see also *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009 (E.D. Wis. 2008) (discussing the universal applicability of the “use of a computer” enhancement).

¹⁶⁷ Stabenow, *supra* note 38, at 122 (quoting *United States v. Tapp*, No. 1:09-CR-123-TLS, 2010 U.S. Dist. LEXIS 115051, 2010 WL 4386523, at *6 (N.D. Ind. Oct. 28, 2010)).

¹⁶⁸ For a general discussion of the victims of child pornography and restitution issues in federal sentencing law, see 18 U.S.C. § 2259 (1996) (requiring the defendant to pay restitution for the “full amount of the victim’s losses” in child sexual exploitation cases); Audrey Rogers, *Child Pornography’s Forgotten Victims*, 28 PACE L. REV. 847 (2008); Emily Bazelon, *How Much Can Restitution Help Victims of Child Pornography?*, N.Y. TIMES (Jan. 24, 2013), http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?_r=0.

inherently more fair. Therefore, district court judges will inevitably be more likely to adhere to them—restoring consistency to the system.

3. Potential Issues Associated With Judge Gwin’s Jury Sampling Proposal

A set of Sentencing Guidelines based on community values seems inherently more fair. In fact, community values drive many aspects of both retributivism and utilitarianism. However, a jury sampling proposal has one potential flaw. Undoubtedly, “community values” vary across geographic regions of the United States. For instance, values among jurors from highly-populated, urban communities may be significantly different from values among jurors from rural regions. A difference in culture, upbringing, and education of jurors may affect suggested sentences in child pornography cases. In turn, the samples’ reliability would be jeopardized, and the Commission’s statistical analysis would become increasingly complicated. Judge Gwin recognizes that the Commission currently “assembles information that allows it to state the number, the mean and the median sentence for any crime, any offense level for that crime, and any criminal history category for that crime.”¹⁶⁹ However, because of potential outliers, the mean sentence recommended by juries across the United States may not be entirely accurate.

Despite these issues, jury sampling will—at the very least—provide insight into the revision process. While it may not be a panacea to the issues associated with the Guidelines, sampling will likely assist the Commission in developing a more uniform system of punishment and eliminating harshness from the Guidelines. As Judge Gwin suggests, jury sampling could “provide meaningful insight regarding society’s beliefs about just punishments, and could remedy the lack of moral parallelism between community values and democratic system outcomes evidenced by the jury study.”¹⁷⁰ Thus, jury sampling will allow the Commission to “take measure of important community beliefs” in various regions throughout the country.¹⁷¹ Perhaps the Commission should take into consideration the zip codes of jurors in processing jury polling information. Consequently, the information factored into the new set of Guidelines would be slightly more uniform, and the jury sampling system would reflect a wide range of backgrounds, cultures, and ideological viewpoints.

B. Tempered Discretion Approach to the Guidelines

An alternative solution is for district courts to simply utilize their discretion to vary from the Guidelines sparingly.¹⁷² Greater adherence to the Guidelines would

¹⁶⁹ Gwin, *supra* note 7, at 194.

¹⁷⁰ *Id.* at 175–76.

¹⁷¹ *Id.* at 176.

¹⁷² *Cf.* Daniel A. Chatham, *Playing with Post-Booker Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 638 (2007) (discussing the “tempered discretion” approach to the Guidelines in the context of white collar crimes). The tempered discretion approach is a viable alternative to Judge Gwin’s jury sampling proposal. In fact, tempered discretion in applying the Guidelines would provide for a significant increase in consistency in federal sentencing law. Chatham explains that “[b]y applying the guidelines largely in the same fashion as before *Booker*, federal judges dictate the best possible outcome for all actors in the game and avoid painting themselves into a mandatory minimum corner.” *Id.*

increase consistency, offer predictability for criminal defendants, and better serve retributive and utilitarian goals.¹⁷³ The tempered discretion approach—although perhaps controversial—is slightly more predictable than the jury sampling proposal. This model would be similar to the pre-*Booker* regime of the Guidelines in which sentencing ranges were mandatory and punished defendants swiftly, proportionally, and certainly.¹⁷⁴ Through tempered discretion, district courts can ensure that punishments will be consistent. Rather than impose sentences on a case-by-case basis, district courts might defer to the Commission and exercise judicial discretion in limited situations. Such punishment would be more aligned with what Congress intended when it first envisioned the Guidelines. Furthermore, consistent punishment will promote retributive and utilitarian goals and achieve the honest criminal justice system intended by the Sentencing Reform Act.

C. Research, Rehabilitation, and the Dangers of Civil Commitment in Child Pornography Non-Production Offenses

Finally, a comprehensive solution requires further research. As previously indicated, it is widely accepted that treatment has proven effective for child pornography offenders.¹⁷⁵ However, the current Bureau of Prisons treatment programs are largely ineffective, as they focus on post-release supervision rather than in-prison treatment.¹⁷⁶ Furthermore, the Bureau of Prisons programs involve eligibility criteria that are difficult for many offenders to satisfy.¹⁷⁷ Thus, in conjunction with the Commission, the Bureau of Prisons must implement an effective and accessible rehabilitation program. The Guidelines should require mandatory participation in this program for the most severe child pornography offenses—which, in circumstances of extreme volume and material, may include the simple possession of child pornography. The Guidelines must shift their focus from punishment and blameworthiness to rehabilitation and treatment. While this will likely decrease recidivism among offenders, it will also promote utilitarian values by providing a greater net benefit to society.

It would be highly beneficial to implement some type of rehabilitation or treatment program into federal sentencing law. However, the Commission and Bureau must be aware of the potential dangers associated with civil commitment in the context of child pornography offenses.¹⁷⁸ For sex offenders, civil commitment may not be the best option for rehabilitation. As opposed to the terms of incarceration now imposed in child pornography cases, civil commitment is indefinite and depends wholly on an offender's recovery.¹⁷⁹ Such confinement would

¹⁷³ See Rigsby, *supra* note 14, at 1346.

¹⁷⁴ United States v. Booker, 543 U.S. 220, 264 (2005).

¹⁷⁵ See generally *Sex Offender Treatment in the Context of Supervision*, *supra* note 101.

¹⁷⁶ SEX OFFENDER PROGRAMS, *supra* note 105, at 16.

¹⁷⁷ *Id.*

¹⁷⁸ Civil commitment is defined as a “court-ordered commitment of a person who is ill, incompetent, drug-addicted, or the like, as contrasted with a criminal sentence.” *Civil Commitment*, BLACK’S LAW DICTIONARY (10th ed. 2014). Unlike a criminal commitment, the length of a civil commitment is indefinite because it depends on the offender’s recovery. *Id.*

¹⁷⁹ *Id.*

be even more unpredictable than inconsistent district court sentences because “[u]nder civil commitment the state can hold a person for an undetermined length of time until its therapy works to the satisfaction of law enforcement agents.”¹⁸⁰ This concept is particularly troubling with respect to young offenders, who have the potential to spend the rest of their lives in confinement. The civil commitment process in the United States must be reformed before it will be a viable solution for child pornography offenders. In fact, very few states make use of civil commitment due to its potential dangers.¹⁸¹ Until there is a thorough reform of the existing civil commitment programs, implementing a treatment program alongside traditional incarceration is likely the best choice for lawmakers.

It should be noted that there is still some debate among prosecutors, defense attorneys, judges, and researchers as to whether child pornography offenders are more likely to commit contact crimes upon their release.¹⁸² Researchers have studied the characteristics, motivations, and sexual deviancy of offenders—including the effect of treatment on these traits.¹⁸³ Based on these studies, psychologists have speculated for decades as to whether there is a correlative relationship between child pornography and pedophilia.¹⁸⁴ The fact of the matter is, however, that we may not know enough about the psychology of child pornography offenders to implement a truly comprehensive solution. Future research, including in-depth interviews with child pornography offenders, must delve into factors such as the type of offense, type and severity of material, offender’s childhood characteristics, and offender’s pedophilic interest.¹⁸⁵ Insight into pedophilia and its relationship with child pornography offending “may be helpful in treatment to counteract and prevent reoffending.”¹⁸⁶ Only when we have more thorough and accurate data regarding child pornography offenders will we truly have the ability to systematically reform the Guidelines.

V. CONCLUSION: NEED FOR REFORM TO PREVENT THE SEXUAL EXPLOITATION OF CHILDREN

It is clear that the U.S. criminal justice system is in need of sentencing reform. Despite the goals of the Sentencing Reform Act of 1984, the child pornography non-production Guidelines have failed to promote the basic purposes of criminal

¹⁸⁰ James Ridgeway, *How ‘Civil Commitment’ Enables Indefinite Detention of Sex Offenders*, THE GUARDIAN (Sept. 26, 2013), <http://www.theguardian.com/commentisfree/2013/sep/26/civil-commitment-sex-offenders> (discussing the dangers of confining sex offenders indefinitely, particularly in the case of young offenders).

¹⁸¹ *Id.*

¹⁸² See generally Jenny A.B.M. Houtepen et al., *From Child Pornography Offending to Child Sexual Abuse: A Review of Child Pornography Offender Characteristics and Risks for Cross-Over*, 19 AGGRESSION & VIOLENT BEHAVIOR 466 (2014).

¹⁸³ *See id.*

¹⁸⁴ *See id.*

¹⁸⁵ *Id.* at 472.

¹⁸⁶ *Id.*

punishment: deterrence, incapacitation, just punishment, and rehabilitation.¹⁸⁷ Because of the problems associated with U.S. Sentencing Guidelines § 2G2.2—including lack of connection to community values, failure to offer rehabilitation, and harshness—district courts show little deference to the Guidelines. In fact, it seems that district court judges choose to deviate from the Guidelines range quite often. As a result, child pornography offenders receive inconsistent and unpredictable sentences that do not promote the theories of punishment recognized by the United States.

Child pornography is a serious crime, and the U.S. justice system should make every effort to prevent the sexual exploitation of children. Thus, the Commission must restore consistency to the system. There are a number of ways to accomplish this. First, district courts should implement jury sampling practices into child pornography cases. Jury sampling will shed light on the community's notion of just punishment. Based on this insight, the Commission should then revise the Guidelines accordingly. Alternatively, district courts could exercise tempered discretion with respect to the child pornography Guidelines. Although *Booker* allows district courts discretion in departing from the Guidelines, the 2005 landmark decision has arguably worsened the unpredictability and inconsistency in federal sentencing law. By exercising tempered discretion, federal judges can ensure that offenders receive the punishment that the Commission—and Congress—intended.

Finally, further research into the psychology of child pornography offenders is necessary. Qualitative research regarding sexual preferences, childhood characteristics, and coping strategies of offenders will provide insight into the field and help psychologists and lawmakers in treatment planning.¹⁸⁸ The Commission and the Bureau of Prisons can then implement an effective and accessible rehabilitation program. Such a program will serve utilitarian values and provide a greater net benefit to society.

These measures will increase consistency in federal sentencing law, which—in turn—will better promote retributive and utilitarian goals. Congress has made clear the importance of deterring child pornography crimes—they pose a great threat to our children and result in harm to everyone involved. However, attempts to protect children from sexual exploitation are thwarted when retributive and utilitarian goals are futile. Only when the Guidelines truly reflect the retributive and utilitarian values that our country recognizes can they help protect the nation's youth from sexual exploitation. In a criminal justice system in which purpose reaps benefits, the Guidelines cannot continue to punish child pornography offenders without it.

¹⁸⁷ USSG Ch.5, Pt.A, intro.

¹⁸⁸ Houtepen et al., *supra* note 182, at 472.