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## Child Pornography Sentencing in the Sixth Circuit

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## Child Pornography Sentencing in the Sixth Circuit

### Cover Page Footnote

I am grateful to the organizers of the Honorable James J. Gilvary Symposium on Law, Religion, and Social Justice—Professor James Durham, Professor Susan Elliott, and Steven Justice—for inviting me to participate and for their gracious hospitality. Many thanks to Nick Wilde and Charlotte Kiefer for their research assistance.

# CHILD PORNOGRAPHY SENTENCING IN THE SIXTH CIRCUIT

Carissa Byrne Hessick\*

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## I. INTRODUCTION

There is quite a bit of controversy surrounding child pornography possession cases in the Sixth Circuit. In two high profile cases—*United States v. Bistline*<sup>1</sup> and *United States v. Robinson*<sup>2</sup>—the Circuit has twice reversed sentences imposed by district court judges, ultimately choosing to

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<sup>1</sup> *United States v. Bistline (Bistline II)*, 720 F.3d 631 (6th Cir. 2013); *United States v. Bistline (Bistline I)*, 665 F.3d 758 (6th Cir. 2012).

<sup>2</sup> *United States v. Robinson (Robinson II)*, 778 F.3d 515 (6th Cir 2015); *United States v. Robinson (Robinson I)*, 669 F.3d 767 (6th Cir. 2012).

reassign those cases to different judges—in one case without a reassignment request by either party.<sup>3</sup>

*Bistline* and *Robinson* are two examples of a broader struggle for control over the punishment of federal criminal defendants. A series of recent Supreme Court cases has limited the ability of Congress and the U.S. Sentencing Commission to require judges to adhere to mandatory sentencing guidelines when imposing punishment.<sup>4</sup> But a lack of jurisprudential coherence in those cases has led different courts of appeals to adopt different approaches to judicial sentencing discretion.

These different approaches are especially visible in child pornography cases. In some courtrooms, the Federal Sentencing Guidelines associated with possessing child pornography have increasingly come under attack. Child pornography cases are one of the two categories of cases in which a federal judge is least likely to follow the Federal Sentencing Guidelines.<sup>5</sup> The vast majority of federal defendants convicted of possessing child pornography will receive a sentence that is below the applicable Guidelines range.<sup>6</sup> And several federal courts of appeals have adopted standards of review that either allow or encourage these lower sentences. But the Sixth Circuit has not. As *Bistline* and *Robinson* make clear, below-Guideline sentences in Sixth Circuit child pornography cases will face searching appellate scrutiny.

This Symposium Article explores and analyzes the Sixth Circuit's approach to child pornography sentencing. It not only presents a critique of the Sixth Circuit's cases, but it also provides guidance for defense attorneys seeking a below-Guidelines sentence. It notes that there are particular strategies those attorneys should follow in order to secure not only a more lenient sentence from the district court judge, but also a sentence that is more likely to be upheld by the Sixth Circuit on appeal.

The Article proceeds in four additional parts. Part II explains how the Supreme Court's recent cases have complicated the federal sentencing landscape. In particular, those cases have left uncertainty regarding what level of scrutiny appellate courts may employ when reviewing sentences based on policy disagreements with the Guidelines. Part III turns to the Sixth Circuit's recent child pornography cases. It critiques the heightened standard of appellate review the Circuit has adopted in those cases, identifying several

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<sup>3</sup> *Robinson II*, 778 F.3d at 524 (“Although not requested by the government, we conclude that the case must be reassigned for resentencing by another district court judge.”).

<sup>4</sup> See, e.g., *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

<sup>5</sup> See U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING, Part A, at 6, 60, 67–68 (2012) [hereinafter U.S. SENTENCING COMM'N, 2012 *BOOKER* IMPACT].

<sup>6</sup> See *infra* Section IV.C.3.

weaknesses in the arguments that the Circuit has offered in support of its heightened review. It also notes that the Sixth Circuit appears to have adopted a common law of sentencing in child pornography cases, which is inconsistent with the Supreme Court's sentencing jurisprudence.

Whatever the shortcomings of the Sixth Circuit's analysis, this heightened review is now the reality for defense attorneys and district court judges in Kentucky, Ohio, Michigan, and Tennessee. Thus, Part IV offers some suggestions for how defense attorneys ought to argue for below-Guidelines sentences in child pornography possession cases. These suggestions are offered with the understanding that, although the Sixth Circuit will subject below-Guideline sentences to heightened review, not all below-Guideline sentences will be reversed on appeal. A close reading of the Sixth Circuit's cases suggests that there are certain sentencing explanations that a district court could offer that will make a below-Guideline sentence more likely to be affirmed on appeal. In offering these suggestions, Part IV notes that the Sixth Circuit has failed to defer to district court judgments that the facts and circumstances of a particular case warrant a below-Guidelines sentence. This lack of deference appears to conflict with recent Supreme Court cases.

## II. THE COMPLICATED STATE OF FEDERAL SENTENCING

### A. *Discretion and Appellate Review*

Over the past 15 years, the U.S. Supreme Court has decided a series of cases that dramatically changed the constitutional landscape of sentencing in the United States. In the first of these cases, *Apprendi v. New Jersey*, the Supreme Court addressed the constitutionality of a statutory sentencing enhancement.<sup>7</sup> That enhancement provided for an increase in the maximum sentence for the unlawful possession of a firearm if the defendant possessed the firearm to intimidate someone because of his or her race. That factual finding—whether the defendant committed the crime to intimidate the victim based on race—was decided by the sentencing judge using a preponderance of the evidence standard.<sup>8</sup> The *Apprendi* Court held that, other than the fact of a prior conviction, any fact that increases the statutory maximum penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt.<sup>9</sup>

The Court extended this holding to mandatory sentencing Guideline regimes in *Blakely v. Washington*.<sup>10</sup> The *Blakely* Court explained that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge

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<sup>7</sup> 530 U.S. 466, 469 (2000).

<sup>8</sup> *Id.* at 468–69.

<sup>9</sup> *Id.* at 476.

<sup>10</sup> 542 U.S. 296, 299–303 (2004).

may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*"<sup>11</sup> Thus, if a mandatory sentencing regime limits a sentencing judge's discretion to a range narrower than the statutory range, and if a sentencing court may sentence above that range only if the judge makes a particular finding, then the finding must be submitted to a jury and proven beyond a reasonable doubt. To do otherwise, the Court stated, would violate the Sixth Amendment.<sup>12</sup>

One term after its decision in *Blakely*, the Court addressed the constitutionality of the Federal Sentencing Guidelines in *United States v. Booker*.<sup>13</sup> While finding that the Federal Guidelines suffered from the same constitutional infirmity as the state guidelines in *Blakely*, the *Booker* Court held that the Sixth Amendment problem could be cured, not only by sending aggravating factual findings to a jury, but also by restoring the discretion of sentencing judges.<sup>14</sup> Specifically, five judges elected to remedy the constitutional defect of the Federal Sentencing Guidelines by excising the provision of the Sentencing Reform Act that made the Guidelines mandatory.<sup>15</sup> According to the remedial majority, making the Guidelines advisory, rather than mandatory, avoids the constitutional problem identified in *Apprendi* and *Blakely*.<sup>16</sup> In an advisory guideline system a factual finding is no longer *required* to sentence above the Guideline range.<sup>17</sup>

Of course, giving trial judges sentencing discretion also defeats one of the major goals of the Federal Sentencing Guidelines: avoiding sentencing disparity. And so the *Booker* remedial majority imposed two additional limitations that would promote uniformity. First, it required sentencing judges to begin each sentencing by calculating the correct Guidelines range<sup>18</sup>—thus, ensuring that the Guidelines create an anchoring effect for any subsequent sentencing decisions. Second, the Court provided for appellate review of sentencing decisions under an abuse of discretion standard—thus, allowing courts of appeals to reverse outlying sentencing decisions and promoting sentencing uniformity.<sup>19</sup>

Since *Booker*, the Supreme Court has decided a number of cases in an attempt to clarify the scope of district court discretion under the now-advisory Guidelines, as well as the proper level of scrutiny on appeal. Those subsequent cases have held, *inter alia*, that appellate courts may presume that

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<sup>11</sup> *Id.* at 303 (emphasis in original).

<sup>12</sup> *See id.* at 303–05 (establishing that the Sixth Amendment is violated if a jury does not make a particular finding beyond a reasonable doubt in order to sentence above a statutory range).

<sup>13</sup> 543 U.S. 220, 226 (2005).

<sup>14</sup> *Id.* at 267–68.

<sup>15</sup> *Id.* at 259.

<sup>16</sup> *Id.* at 248–49.

<sup>17</sup> *Id.* at 259.

<sup>18</sup> *See id.* at 264–65; *see also* *Gall v. United States*, 552 U.S. 38, 49 (2007).

<sup>19</sup> *Booker*, 543 U.S. at 264–65; *Gall*, 552 U.S. at 46.

a sentence imposed within the Guidelines is reasonable,<sup>20</sup> that district courts need not provide “proportional justifications” when they sentence outside of the Guidelines’ range,<sup>21</sup> and that district courts may impose non-Guideline sentences based on a disagreement with the policy underlying a particular Guideline.<sup>22</sup>

A closer reading of these cases allows us to draw several inferences regarding the scrutiny that appellate courts ought to employ when reviewing a district court’s sentencing decision under the advisory Guideline regime. First, appellate courts should be most deferential when district courts use their discretion to impose a sentence that is within the Guidelines range. As the Supreme Court has explained, when the sentencing judge’s “discretionary decision accords with the Commission’s view of the appropriate” sentence, “it is probable that the sentence is reasonable.”<sup>23</sup> To be clear, the Supreme Court has not stated that courts of appeals *must* be more deferential to within-Guidelines sentences.<sup>24</sup> And the Court’s reasoning suggests that the presumption of reasonableness should not extend to those Guidelines that were not the product of the U.S. Sentencing Commission’s ordinary process of developing sentencing ranges based on “empirical data and national experience.”<sup>25</sup> These caveats notwithstanding, the clear implication of the Court’s opinion is that a sentence within the Guidelines should only rarely be reversed on appeal.

The second inference we can draw is that a sentence outside of the Guidelines’ range is most likely to be affirmed if it is supported by a finding that facts and circumstances distinguished the particular defendant or her crime from the typical offender. The Supreme Court has stated that “a district court’s decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case ‘outside the “heartland” to which the Commission intends individual Guidelines to apply.’”<sup>26</sup> Thus, although judges may sentence outside of the Guidelines

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<sup>20</sup> See *Rita v. United States*, 551 U.S. 338, 341 (2007).

<sup>21</sup> See *Gall*, 552 U.S. at 41.

<sup>22</sup> *Pepper v. United States*, 562 U.S. 476 (2011); *Spears v. United States*, 555 U.S. 261, 265–66 (2009); *Kimbrough v. United States*, 552 U.S. 85, 109–10 (2007).

<sup>23</sup> *Rita*, 551 U.S. at 351.

<sup>24</sup> In holding that the courts of appeals *may* adopt a presumption that within-Guideline sentences are reasonable, the Supreme Court made clear that the presumption is optional. Appellate courts need not adopt the presumption, and the Court characterized the presumption as non-binding. *Id.* at 347. As I have noted elsewhere, that the *Rita* Court elected to adopt an optional presumption is odd. Courts ordinarily do not have discretion whether to apply a presumption, and the Court granted certiorari in *Rita* in order to decide a circuit split regarding whether an appellate presumption of reasonableness was appropriate, and then it declined to resolve the split. Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 21 n.106 (2008).

<sup>25</sup> See Carissa Byrne Hessick, *Appellate Review of Sentencing Policy Decisions After Kimbrough*, 93 MARQ. L. REV. 717, 739–40 (2009) [hereinafter Hessick, *Post-Kimbrough Appeals*] (explaining why the presumption of reasonableness ought not apply to certain Guidelines sentences). Notably, several circuit courts persist in applying the presumption in these cases. See *id.* at 740–41 (discussing cases from the Fifth and the Tenth Circuits).

<sup>26</sup> *Kimbrough*, 552 U.S. at 109 (quoting *Rita*, 551 U.S. at 351).

based on disagreement with a policy underlying the Guidelines,<sup>27</sup> the non-Guidelines sentences most likely to be affirmed on appeals are those that are supported by a factual finding that something about the defendant or her crime makes an ordinary Guidelines sentence inappropriate.

The third inference we can draw is that some—though not all—non-Guidelines sentences based on a policy disagreement with the Guidelines may be subject to more searching appellate review. Note the uncertainty surrounding this last inference. It is unclear what form the more searching scrutiny will take;<sup>28</sup> it is unclear which sentences that are the product of policy disagreements will be subject to heightened scrutiny and which will not; and it is unclear whether heightened scrutiny will, in fact, apply to *any* policy disagreements. This uncertainty is at the core of the current conflict surrounding child pornography sentencing in the Sixth Circuit. To understand this uncertainty, and how that uncertainty affects the current conflict, it is necessary to delve more deeply into the Supreme Court's cases on policy disagreements with the Guidelines.

### *B. Policy Disagreements with the Guidelines*

A so-called policy disagreement with the Guidelines occurs when a judge imposes a non-Guidelines sentence, not because some fact or circumstance made a Guidelines sentence unsuitable *in a particular case*, but rather because the sentencing judge concluded that the sentence recommended by the Guidelines is unsuitable *in many or most cases*.<sup>29</sup> Some examples may be helpful. If a judge decides to impose a lower sentence because the defendant is only 18 and shows promise for rehabilitation, then the judge has deviated from the Guidelines based on facts and circumstances. If a judge decides to impose a lower sentence on an insider-trading defendant because she believes that the Sentencing Commission set the sentences for white-collar offenses too high, then the judge has deviated from the Guidelines based on a policy disagreement.

It can sometimes be difficult to categorize a sentencing decision as a facts and circumstances decision or as a policy disagreement. Consider our first example of the 18-year-old defendant. A defendant's age is clearly a fact that distinguishes one defendant from other defendants. But the Guidelines include a provision stating that a defendant's age is "ordinarily not relevant"

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<sup>27</sup> See *infra* Section II.B.

<sup>28</sup> *United States v. Evans*, 526 F.3d 155, 168 (4th Cir. 2008) (Gregory, J., concurring) ("While I have closely studied the post-*Booker* Supreme Court triumvirate of *Rita*, *Kimbrough v. United States*, and *Gall*, I must conclude that the Court has left the specifics of how appellate courts are to conduct substantive reasonableness review, charitably speaking, unclear.")

<sup>29</sup> *Kimbrough*, 552 U.S. at 110. Indeed, when discussing policy disagreements with the Guidelines, the Supreme Court has phrased the inquiry, as whether the Guidelines yield a sentence that does not "achieve § 3553(a)'s purposes, even in a mine-run case." *Id.*



to the sentencing decision.<sup>30</sup> Thus, although a defendant's age is a fact, a judge who thinks that this fact should result in a below-Guideline sentence disagrees with the Guidelines' policy not to alter sentences based on a defendant's age. Whether a court of appeals elects to characterize this sentencing decision as one based on facts and circumstances or one based on a policy disagreement could affect how closely the appellate court scrutinizes the sentencing decision.<sup>31</sup>

As a matter of logic, the ability of a judge to impose a non-Guidelines sentence based on a policy disagreement with the Guidelines is a necessary feature of the *Booker* remedy. Recall, the constitutional flaw in the mandatory federal sentencing regime prior to *Booker* was that sentencing judges were permitted to impose certain sentences only when they had made a factual finding.<sup>32</sup> If judges do not have the ability to impose a non-Guidelines sentence based on a policy disagreement, then they must impose a Guidelines sentence unless they identify specific facts of a case that render a Guidelines sentence inappropriate. Even if the sentencing court were not limited to those facts and factors specifically identified by the Commission in the Guidelines, the judge would have to identify *some fact* about the defendant's crime or personal background that warranted a non-Guideline sentence.<sup>33</sup> And that would run directly counter to the constitutional holdings in the Supreme Court's cases.<sup>34</sup>

Although allowing non-Guidelines sentences based on nothing more than a policy disagreement appears to be a necessary feature of the post-*Booker* advisory sentencing system,<sup>35</sup> the Supreme Court has never unequivocally stated that “courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.”<sup>36</sup> Instead, the Supreme Court has said only that “a district court

<sup>30</sup> See U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2015).

<sup>31</sup> As I have previously noted, “several courts have recast what appear to be district courts’ policy disagreements with the Guidelines as case-specific reasons for imposing a non-Guidelines sentence.” Hessick, *Post-Kimbrough Appeals*, *supra* note 25, at 732.

<sup>32</sup> 543 U.S. 220, 226–27 (2005). At the time *Booker* was decided, the relevant limit on sentencing authority was whether the judge could not impose a higher sentence without a factual finding. The Court has since decided that factual findings that prohibit a judge from imposing a lower sentence also raise Sixth Amendment problems. See *Alleyne v. United States*, 133 S. Ct. 2151, 2161 (2013).

<sup>33</sup> See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1668–69 (2012).

<sup>34</sup> According to the Supreme Court, it does not matter whether the judge is required to find a specific fact, one of several specific facts, or *any* fact; making a factual finding a prerequisite to changing the permissible range in which a judge may sentence violates the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (“Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence.” (emphasis in original)).

<sup>35</sup> See *United States v. Herrera-Zuniga*, 571 F.3d 568, 585 (6th Cir. 2009) (“[T]he authority of district courts to reject the Guidelines on policy grounds follows inexorably from the Court’s holding in *Booker* that the Guidelines are advisory only.”).

<sup>36</sup> *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (quoting Brief for United States at 16, *Kimbrough*, 552 U.S. 85 (No. 06-330)). The Solicitor General’s Office made this concession in its brief in *Kimbrough v. United States*, but the Court did not adopt it. See *id.* Similarly, in *Peugh v. United States*,

may *in appropriate cases* impose a non-Guidelines sentence based on a disagreement with the Commission's views."<sup>37</sup>

What is an "appropriate" case for a policy disagreement? The Supreme Court has given some guidance. For example, in *Pepper v. United States*, the Court affirmed a district court's power to impose a non-Guideline sentence based on a policy disagreement where "the Commission's views [embodied in the Guidelines] rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."<sup>38</sup> The Court has also confirmed the power to sentence based on policy disagreements with Guidelines if those "Guidelines do not exemplify the Commission's exercise of its characteristic institutional role."<sup>39</sup> Thus, in *Kimbrough v. United States*, the Court stated that the district courts were free to disagree with the Guidelines for crack cocaine offenses because, when the Commission formulated the Guidelines ranges for crack cocaine offenses, "the Commission looked to the mandatory minimum sentences set in the 1986 Act, and did not take account of 'empirical data and national experience.'"<sup>40</sup>

This guidance is only somewhat helpful. How are lower courts supposed to determine whether the policy underlying a particular Guideline is "wholly unconvincing"? Are we to infer that all policy disagreements with the many Guidelines that are not the product of "empirical data and national experience" will not be subject to "closer review"?<sup>41</sup> Or should we infer that closer review is appropriate even if a Guideline sentence represents a significant deviation from past sentencing practice or if the Commission refused to incorporate feedback from sentencing judges suggesting that a Guideline ought to be revised? We simply do not know.

Even assuming we could agree that the policy underlying a particular Guideline is not "wholly unconvincing" and that the Commission promulgated a particular Guideline based on "empirical data and national experience," it is unclear what effect this agreement would have on district court discretion. Are those Guidelines mandatory? Are they mandatory in

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the Solicitor General argued that, after *Booker*, the federal guidelines "are just one among many persuasive sources a sentencing court can consult, no different from a 'policy paper.'" 133 S. Ct. 2072, 2087 (2013) (citing Brief for United States at 28, *Peugh*, 133 S. Ct. 2072 (No. 12-62)). The Court was unwilling to accept this characterization of the Guidelines. In holding that the *Ex Post Facto* Clause prohibited retroactive application of harsher Federal Sentencing Guidelines, the *Peugh* Court stated that "the federal system's procedural rules . . . impose a series of requirements on sentencing courts that cabin the exercise of [their] discretion. Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences." *Id.* at 2084.

<sup>37</sup> *Pepper v. United States*, 562 U.S. 476, 501 (2011) (emphasis added).

<sup>38</sup> *Id.*

<sup>39</sup> *Kimrough*, 552 U.S. at 109.

<sup>40</sup> *Id.* (citing *United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

<sup>41</sup> As I have explained in detail elsewhere, the Commission promulgated or amended the vast majority of Guidelines in a fashion that deviates from the "characteristic institutional role" that the Supreme Court has described. Thus, the number of Guidelines that were formulated based on "empirical data and national experience" is likely very small. Hessick, *Post-Kimbrough Appeals*, *supra* note 25, at 729–30.

the absence of a compelling fact or circumstance in a particular case?<sup>42</sup> The logic of the *Booker* remedy suggests that the answers to these questions should be “no.”<sup>43</sup> But the Supreme Court has not confirmed this. Instead, it has said that, if a sentencing court imposes a non-Guidelines sentence based on a policy disagreement with such Guidelines, then “closer review *may be* in order.”<sup>44</sup> To be clear, the Supreme Court has not said what that closer review will look like. Nor has it said that closer review should, in fact, occur. Thus, at this point in time, all that can be said about appellate review is that some—though not all—non-Guidelines sentences based on a policy disagreement with the Guidelines *might* be subject to more searching appellate review.

The Supreme Court’s lack of specificity in this area has led to divergent approaches in the circuits when reviewing non-Guideline sentences based on policy disagreements.<sup>45</sup> One very visible circuit split over appellate review involves sentences for possession of child pornography. That split is discussed in the next subsection.

### C. *Child Pornography and the Circuit Courts*

The circuits are currently split on how to review below-Guidelines sentences in child pornography cases. The Sixth Circuit applies the “closer review” concept when it examines below-Guideline sentences in child pornography sentences.<sup>46</sup> The Second Circuit has taken essentially the opposite approach. Not only does the Second Circuit refuse to subject policy disagreements with the child pornography Guideline to closer review, but it also has criticized the “irrationality” of the Guideline,<sup>47</sup> calling it “an eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results.”<sup>48</sup> Rather than reversing below-Guidelines sentences, the Second Circuit has explicitly “encouraged [district

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<sup>42</sup> Cf. *United States v. Herrera-Zuniga*, 571 F.3d 568, 586 (6th Cir. 2009) (stating that “where the guidelines in question ‘do not exemplify the Commission’s exercise of its characteristic institutional role’ . . . may not be the only circumstance in which sentencing courts are authorized to reject the Guidelines on policy grounds”).

<sup>43</sup> See *supra* text accompanying notes 32–35.

<sup>44</sup> *Kimbrough*, 552 U.S. at 109 (emphasis added). The Court reiterated the possibility of “closer review” in a subsequent case, *Spears v. United States*, stating that a district court’s “‘inside the heartland’ departure (which is necessarily based on a policy disagreement with the Guidelines and necessarily disagrees on a ‘categorical basis’) may be entitled to less respect.” 555 U.S. 261, 264 (2009) (per curiam).

<sup>45</sup> Hessick, *Post-Kimbrough Appeals*, *supra* note 25, at 730–33 (collecting cases).

<sup>46</sup> See, e.g., *Bistline I*, 665 F.3d 758, 763–64 (6th Cir. 2012). Interestingly, outside of the child pornography context, the Sixth Circuit has indicated that it will “scrutinize closely *any* decision to reject categorically the Sentencing Commission’s recommendations,” stating that “a categorical, policy-based rejection of the Guidelines, even though entitled to ‘less respect,’ nevertheless is permissible where the guidelines in question ‘do not exemplify the Commission’s exercise of its characteristic institutional role.’” *Herrera-Zuniga*, 571 F.3d at 585–86 (emphasis added). That is to say, the Sixth Circuit conducts a “closer review” for all non-Guidelines sentences based on a policy disagreement, not merely those sentences involving Guidelines that were the product of “empirical data and national experience.”

<sup>47</sup> *United States v. Dorvee*, 616 F.3d 174, 184, 187 (2d Cir. 2010).

<sup>48</sup> *Id.* at 188.

judges] to take seriously the broad discretion they possess in fashioning sentences under § 2G2.2 -- ones that can range from non-custodial sentences to the statutory maximum.”<sup>49</sup>

Other circuits have taken an approach that is less extreme than either the Sixth or the Second Circuits. Those circuits do not subject non-Guidelines sentences to closer review, but they have not expressed the same skepticism about the child pornography Guideline as the Second Circuit.<sup>50</sup> Thus, for example, the Third Circuit has affirmed a district court decision to vary from U.S.S.G. § 2G2.2 because the Commission did not develop the Guidelines “based on research and study rather than reacting to changes adopted or directed by Congress.”<sup>51</sup> But the Third Circuit has also emphasized that § 2G2.2 will not “always recommend an unreasonable sentence, and district courts must, of course, continue to consider the applicable Guidelines range.”<sup>52</sup> As a result, it has also affirmed within-Guideline sentences under § 2G2.2, noting that “district courts have the discretion but not the obligation to consider variances based on arguments that the Guidelines are empirically flawed.”<sup>53</sup>

What explains this split in the circuits? As noted above, the Supreme Court has not offered much guidance on how appellate courts ought to review non-Guidelines sentences based on policy disagreements.<sup>54</sup> In *Kimbrough v. United States*, however, it did indicate that “closer review” may be appropriate when the Guidelines in question “exemplify the Commission’s exercise of its characteristic institutional role”<sup>55</sup>—that is to say, when Guidelines are the product of the Commission’s ordinary process, in which the Commissioners “take account of ‘empirical data and national experience.’”<sup>56</sup> Those circuits that have elected not to impose “closer review” when reviewing child pornography sentences did so after concluding that the child pornography Guideline is not the product of the Commission’s ordinary process, in which the Commissioners “take account of ‘empirical data and national experience’” when promulgating Guidelines.<sup>57</sup>

There is little doubt that the Guidelines for child pornography offenses are not the product of the Commission’s ordinary process. There are

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<sup>49</sup> *Id.*

<sup>50</sup> *See, e.g.,* *United States v. Henderson*, 649 F.3d 955, 964 (9th Cir. 2011).

<sup>51</sup> *United States v. Grober*, 624 F.3d 592, 601 (3d Cir. 2010).

<sup>52</sup> *Id.*, at 609.

<sup>53</sup> *United States v. Elston*, 423 F. App’x 190, 193 (3d Cir. 2011).

<sup>54</sup> *See supra* Section II.B.

<sup>55</sup> *Kimbrough v. United States*, 552 U.S. 85, 109 (2007).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*; *see, e.g.,* *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010) (noting that “the Commission did not use [its typical] empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under § 2G2.2 several times since their introduction in 1987, each time recommending harsher penalties”).

a number of sources explaining how the current Guidelines have been shaped by specific directives from Congress to increase the punishment for these crimes. In 2009, Assistant Federal Defender Troy Stabenow authored a report about the origins of the child pornography Guideline. The report recounted how the many amendments to the Guideline were not the product of “empirical data and national experience,” but were instead the result of political interventions by Congress and the Department of Justice.<sup>58</sup> His report also highlighted several striking features of the current Guideline—namely, that the various Guideline enhancements apply to the vast majority of child pornography defendants,<sup>59</sup> and that a typical child pornography defendant will receive a higher sentence under the Guidelines than a defendant who engaged in the repeated sexual abuse of a child.<sup>60</sup> Stabenow’s report proved to be highly influential. It has been cited by many courts in decisions imposing below-Guideline sentences.<sup>61</sup>

After Stabenow’s report was released, the Sentencing Commission itself issued a report on the history of the child pornography Guidelines. That report documented the origin of the many changes to the Guideline, confirming that the changes were not the product of the Commission’s “ordinary process,” but instead the result of congressional directives.<sup>62</sup> More recently, the Commission issued a report identifying various flaws with the child pornography Guideline and suggesting significant changes.<sup>63</sup>

Both the Stabenow report and the Commission’s report on the history of the Guidelines have played a role in those circuits that have elected not to engage in “closer review” of child pornography sentences. The Second, Third, and Ninth Circuits relied on these (and other) sources to conclude that the child pornography Guidelines is not the product of the Commission’s ordinary process, in which the Commissioners “take account of empirical data and national experience” when promulgating Guidelines.<sup>64</sup> As explained more fully in the next Section, the Sixth Circuit did not follow this line of analysis in deciding to apply “closer review” to below-Guidelines child

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<sup>58</sup> See generally Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines* 1, 6–26 (2009), <http://www.fd.org/docs/select-topics---sentencing/child-porn-july-revision.pdf>.

<sup>59</sup> *Id.* at 23–24.

<sup>60</sup> *Id.* at 26–30.

<sup>61</sup> See, e.g., *United States v. D.M.*, 942 F. Supp. 2d 327, 349–50 (E.D.N.Y. 2013); *United States v. Kelly*, 868 F. Supp. 2d 1202, 1205 n.3 (D.N.M. 2012); *United States v. Cruikshank*, 667 F. Supp. 2d 697, 700 (S.D. W. Va. 2009); *United States v. Grober*, 595 F. Supp. 2d 382, 391–94 (D.N.J. 2008), *aff’d*, 624 F.3d 592 (3d Cir. 2010); *United States v. Hanson*, 561 F. Supp. 2d 1004, 1009–11 (E.D. Wis. 2008).

<sup>62</sup> See U.S. SENTENCING COMM’N, *THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES* 18–26, 33 (2009).

<sup>63</sup> See generally U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES (2012) [hereinafter U.S. SENTENCING COMM’N, CHILD PORNOGRAPHY].

<sup>64</sup> *United States v. Henderson*, 649 F.3d 955, 959–62 (9th Cir. 2011) (citing Commission report); *Grober*, 624 F.3d at 603–07 (citing both Commission and Stabenow reports); *United States v. Dorvee*, 616 F.3d 174, 184–86 (2d Cir. 2010) (citing both Commission and Stabenow reports).

pornography sentences.

### III. THE SIXTH CIRCUIT'S APPROACH TO CHILD PORNOGRAPHY CASES

The Sixth Circuit's "closer review" approach to reviewing below-Guideline sentences for child pornography offenders is different than the approach taken by all other circuits.<sup>65</sup> The circuits that have eschewed "closer review" have noted that the current non-production child pornography Guideline—U.S.S.G. §2G2.2—is the result of political decisions by Congress, rather than the product of "empirical data and national experience."<sup>66</sup> The Sixth Circuit diverged from these other circuits, not because it concluded that the child pornography Guideline was the product of "empirical data and national experience," but rather because it engaged in an entirely different analysis. In particular, the Sixth Circuit's decision to apply "closer review" to policy disagreements with the child pornography Guideline is based on separation of powers concerns, administrative law principles, and a distinction between empirical and retributive judgments. This Part examines each of these arguments.

Given that the Sixth Circuit's decisions have created a circuit split, one might ask whether the Sixth Circuit is acting inconsistently with the *Booker* remedy. After all, those circuits that are not applying "closer review" have based their decisions on language from Supreme Court opinions.<sup>67</sup> But as the previous Part explains, the Supreme Court has been extremely unclear in its discussion of how courts of appeals ought to review policy disagreements.<sup>68</sup> Given how little the Supreme Court has told us about district courts' ability to sentence outside the Guidelines based on policy disagreement, and given that the Court never explained what "closer review" might look like, it is difficult to say that the Sixth Circuit is somehow getting post-*Booker* policy disagreement review wrong.

Thus, rather than speculating about whether the Sixth Circuit's analysis is consistent with the post-*Booker* regime of federal sentencing appeals—an endeavor that is likely to produce little more than an answer "we don't know"—this Part will engage with the Sixth Circuit on its own terms to assess the strength of its arguments. As the following subsections indicate, there are significant flaws in the Sixth Circuit's reasoning.

This Part also examines one other feature of the Sixth Circuit's recent child pornography decisions—namely that the court appears to be developing

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<sup>65</sup> The Eleventh Circuit has applied "closer review" when reviewing a below-Guideline sentence for a defendant who repeatedly raped and sexually tortured children, in addition to producing child pornography. *See, e.g., United States v. Irey*, 612 F.3d 1160, 1202–03 (11th Cir. 2010).

<sup>66</sup> *See supra* notes 47–53 and accompanying text.

<sup>67</sup> Specifically, the courts have relied on language from *Kimbrough*. *See Henderson*, 649 F.3d at 963; *Grober*, 624 F.3d at 600–01; *Dorvee*, 616 F.3d at 188.

<sup>68</sup> *See supra* Section II.B.

a common law of child pornography sentencing. Under this common law, certain facts are deemed insufficient to justify certain sentences, and the court refers to its previous decisions as controlling precedent in this regard. As explained in the final subsection of this Part, this common law is inconsistent with the *Booker* remedy, and it may violate the Sixth Amendment.

#### A. *Separation of Powers Concerns*

The Sixth Circuit invokes the separation of powers as a reason to apply “closer review” to policy disagreements with the child pornography Guideline. In particular, the court has suggested that judicial refusal to follow the child pornography Guidelines because of congressional involvement raises separation of powers concerns. But the Sixth Circuit has ignored the implications of its separation of powers analysis. Congress does, of course, have the power to increase the penalties associated with possession of child pornography. But if it wants to use its legislative powers to increase those penalties, then it must do so in a way that provides the procedural protections for defendants guaranteed by the Constitution.

The Sixth Circuit’s separation of argument is, at its core, an argument that the reasons district courts have given for their policy disagreement with the child pornography Guideline fail to respect the legislative power of Congress. Those district court decisions to disregard the child pornography Guideline note that the Guideline was the product of congressional involvement rather than the product of empirical study by the Commission. For example, in *United States v. Bistline*, the court dismissed the district court’s reasoning that the child pornography Guideline was the product of mandates from Congress rather than the product of empirical study: “The court’s concern about ‘congressional mandates’ was misguided. ‘In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative . . . functions.’”<sup>69</sup> Thus, the *Bistline* Court concluded, “the fact of Congress’s role in amending a guideline is not itself a valid reason to disagree with the guideline.”<sup>70</sup>

Another appeal to the separation of powers can be found in the *Bistline* Court’s rejection of the district court’s concern that “‘political considerations may well have influenced’ the content of [the child pornography Guidelines], given Congress’s involvement in amending it.”<sup>71</sup> The court rejected this reasoning, noting that “political considerations” is essentially a pejorative term for “democratic considerations,” and that “the courts cannot bar Congress from acting on political considerations, any more than Congress can bar the courts from acting on legal ones. Each branch is

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<sup>69</sup> *Bistline* I, 665 F.3d 758, 761 (6th Cir. 2012) (quoting *United States v. Evans*, 333 U.S. 483, 486 (1948)).

<sup>70</sup> *Id.* at 762.

<sup>71</sup> *Id.*

entitled to act according to its nature.”<sup>72</sup> This reference to the “nature” of the different branches not only alludes to the separation of powers, but it also invokes the democratic legitimacy of congressional action. Given that courts and commentators have long struggled with the countermajoritarian difficulty—that is, the fact that the courts are the single branch of the federal government that is not democratically accountable<sup>73</sup>—the reference to “democratic considerations” could easily be read as an admonition that the courts ought not second guess the policy choices of the elected branches.

One can also see the separation of powers concern in the Sixth Circuit’s response to the district court’s decision to reject the child pornography Guideline, in part, because the most recent changes to the Guideline “apparently came from two lawyers in the Justice Department who persuaded a novice congressman to add them to the popular Amber Alert bill.”<sup>74</sup> The Sixth Circuit dismissed this concern, noting that the recent changes to the child pornography Guidelines “became law not because they were approved by a novice congressman, but because they were part of legislation approved by both Houses of Congress and then signed by the President. What came before then is no business of the courts.”<sup>75</sup> This idea that the origin of a Guidelines change is “no business of the courts” is a clear admonition that the district court’s decision overstepped the boundaries and infringed on Congress’s legislative power. “The only antecedent circumstances relevant to the validity of Congress’s directives,” the Sixth Circuit reminded the district courts, “are those spelled out in the Constitution itself: bicameralism and presentment.”<sup>76</sup>

Having identified various instances where the Sixth Circuit has relied on separation of powers concerns to subject below-Guideline child pornography sentences to “closer review,” let us now turn to the substance of that argument. There is no doubt that Congress retains ultimate authority over punishment ranges; there is also no doubt that Congress can dictate specific sentences for specific crimes. But if Congress wants to define crimes and fix penalties, then it must deal with the consequences of those choices. Specifically, it must deal with the procedural protections recognized in the *Apprendi* line of cases.

In those cases, the Supreme Court has said that, when Congress ties certain punishment outcomes to particular facts, then those facts must be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey* involved

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<sup>72</sup> *Id.*

<sup>73</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (2d ed. 1986).

<sup>74</sup> *Bistline I*, 665 F.3d at 762–63.

<sup>75</sup> *Id.* at 763.

<sup>76</sup> *Id.*



factual findings associated with maximum punishments.<sup>77</sup> Most recently, in *Alleyne v. United States*, the Court held that any factual finding that results in an increase in minimum punishments must also be proven to a jury beyond a reasonable doubt.<sup>78</sup> These cases do not limit Congress's legislative power to define crimes and fix penalties. But these decisions make clear that congressional decisions about punishment trigger certain procedural protections for defendants.

For example, imagine that Congress wants to set different punishment ranges for child pornography possession based on the number of images a defendant possesses, or based on the content of those images. Congress certainly has the legislative power to do so. But if it wishes to exercise that power, then it must pass a statute. If Congress passed such a statute, then a district court would not only have to *defer* to the policy judgments implicit in those congressional punishment ranges, it would be *bound* by those ranges.<sup>79</sup> *But* the prosecution would then bear the constitutional burden of proving the facts surrounding the number of images possessed or the content of those images—that is to say, the prosecution would have to either prove those facts to a jury beyond a reasonable doubt or secure a plea deal from a defendant admitting the relevant facts.

The Sixth Circuit's constitutional analysis is incomplete. The Sixth Circuit is concerned that policy disagreement with Guidelines heavily influenced by Congress allows the unelected judiciary to supplant the policy preferences of the elected branches. But this structural constitutional concern pales in comparison to the impact on individual constitutional rights if such disagreement is not permitted. If Congress can avoid the ordinary protections associated with a criminal prosecution—including the jury trial right and the burden of proof beyond a reasonable doubt—by instructing the Commission to change its Guidelines, and if those Guidelines are insulated from policy disagreement because of the congressional involvement, then *Apprendi*, *Blakely*, *Booker* and the Court's more recent sentencing cases are a dead letter. Such a system allows the government to avoid the Sixth Amendment at will.

To be clear, allowing district court judges to disagree on policy grounds with Guidelines that were the product of congressional directive (or other actions by Congress) does not impinge upon the power on Congress. Congress can exercise its legislative power at any time by enacting a statute that changes the definition of a crime or the penalties associated with that crime. Allowing district courts to disagree with congressional policy that is

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<sup>77</sup> 530 U.S. 466, 490 (2000) (holding that the Sixth Amendment prohibited a judge from making factual findings that would increase a maximum possible sentence from ten years to twenty years).

<sup>78</sup> See *Alleyne v. United States*, 133 S. Ct. 2151, 2163 (2013).

<sup>79</sup> *Cf. id.* at 2161 (noting that when a legislature imposes a mandatory minimum sentence, then the judge must impose a higher punishment than she otherwise might wish).

embodied in sentencing Guidelines simply acknowledges that, when Congress exercises its legislative power in a fashion that will enshrine its policy preferences over the preferences of the judiciary, it must do so by enacting laws that change the definition of crimes or the penalties associated with those crimes. Allowing judges to disregard congressional policy preferences enshrined only in sentencing Guidelines ensures that congressional power will be exercised consistent with the individual procedural rights guaranteed in the Constitution to all criminal defendants.

### *B. Administrative Law Critique*

The Sixth Circuit's most convincing argument about closer review for district court policy disagreements is an administrative law critique. Because the Sentencing Commission's power to promulgate Guidelines is delegated to it by Congress, so the argument goes, congressional involvement in the child pornography Guideline cannot be a reason to disagree with the Guideline.<sup>80</sup> It is Congress's power that the Commission is wielding, and thus the Sixth Circuit finds it irrelevant that Congress has elected to shape the exercise of the Commission's delegated power.

[T]he Constitution merely tolerates, rather than compels, Congress's limited delegation of power to the Commission. And that context, we think, puts in a different light the various complaints, both within and without the judiciary, that Congress has encroached too much on *the Commission's* authority with respect to sentencing policy. That is like saying a Senator has encroached upon the authority of her chief of staff, or a federal judge upon that of his law clerk.<sup>81</sup>

If anything, the fact that the Commission acted at the specific direction of Congress is a reason to accord more deference to a Guideline. "Indeed it is normally a constitutional virtue, rather than vice, that Congress exercises its power directly, rather than hand it off to an unelected commission."<sup>82</sup> That is why, for example, acting consistently with the will of Congress "is ordinarily a basis for judicial deference to administrative regulations."<sup>83</sup>

It is difficult to fault this analysis from the Sixth Circuit. The

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<sup>80</sup> *Bistline I*, 665 F.3d at 762 ("Congress delegated to the Commission a limited measure of its power to set sentencing policy, and retained for itself the remainder. It is not the judiciary's province to say that Congress should have delegated still more—especially to another body within the judicial branch. We think it follows that a district court cannot reasonably reject § 2G2.2—or any other guidelines provision—merely on the ground that Congress exercised, rather than delegated, its power to set the policies reflected therein.").

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1492 (2008); see also *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) (setting up a regime of judicial review of agency action that is more deferential when the agency is acting consistent with congressional intent).

administrative law critique is quite persuasive. Indeed, I have made a similar administrative law critique myself in the past.<sup>84</sup> The only problem with the Sixth Circuit's administrative law critique is that it is not a criticism of the district court's policy disagreement of the child pornography Guideline. Rather it is a criticism of the appellate framework adopted by the Supreme Court in *United States v. Kimbrough* and repeated in subsequent cases.

The *Kimbrough* opinion noted that the *Booker* remedy "preserved a key role for the Sentencing Commission" because "the Commission fills an important institutional role: It has the capacity courts lack to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'"<sup>85</sup> The suggestion of "closer review" in *Kimbrough* (a suggestion that is repeated in *Spears* and *Pepper*) is limited to the Guidelines that are the product of the Commission's technocratic expertise. The *Kimbrough* Court said "closer review" did not apply in that case because, when Commission formulated the crack cocaine Guideline it "did not take account of 'empirical data and national experience.'"<sup>86</sup> The Commission had also subsequently indicated that it believed the Guideline to be flawed.<sup>87</sup>

The *Kimbrough* Court focused on this technical expertise as the advantage that Commission has over district courts. It did not discuss the fact that the Federal Sentencing Guidelines have more democratic legitimacy than the policy judgments of a district court.<sup>88</sup> After all, every Guideline has at least some level of democratic legitimacy—the initial Guidelines were subject to congressional approval, and all amendments must be submitted to Congress so that lawmakers have the opportunity to reject them.<sup>89</sup>

Thus, while the administrative law critique is a fairly convincing critique of the entire post-*Booker* sentencing regime, it is not a sound reason to subject policy disagreements with the child pornography Guideline to "closer review" on appeal.

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<sup>84</sup> Hessick, *Post-Kimbrough Appeals*, *supra* note 25, at 724–26.

<sup>85</sup> *Kimbrough v. United States*, 552 U.S. 85, 108–09 (2007).

<sup>86</sup> *Id.* at 109.

<sup>87</sup> *See id.* at 97–100 (describing various reports to Congress and other attempts by the Commission to revise the ratio). Importantly, the Sentencing Commission has, in recent years, indicated that the current child pornography Guideline is flawed. In a 2012 report to Congress, the Commission identified a number of shortcomings with the current Guidelines approach and recommended significant changes. *See U.S. SENTENCING COMM'N, CHILD PORNOGRAPHY*, *supra* note 63. This apparent repudiation of the child pornography Guideline is significant. Not only does it resemble the factual situation in *Kimbrough*, but it also signals that the experts at the Commission do not think that the Guidelines produce appropriate sentences in child pornography possession cases.

<sup>88</sup> *But cf.* Bistline I, 665 F.3d 758, 762 (6th Cir. 2012) ("The Constitution is fundamentally a democratic document, not a technocratic one.").

<sup>89</sup> *See* 28 U.S.C. § 994(p) (2012).

### C. *Distinguishing Retributive and Empirical Judgments*

In *Bistline*, the Sixth Circuit criticized the district court for focusing on the social science legitimacy of the child pornography Guidelines.<sup>90</sup> In doing so, the court stated, the district court failed to acknowledge that congressional changes to those Guidelines also reflected “a retributive judgment that certain crimes are reprehensible and warrant serious punishment . . . .”<sup>91</sup> The *Bistline* Court stated that “when a guideline comes bristling with Congress’s own . . . value judgments,” a district court that disagrees with the Guideline “must contend with those grounds too.”<sup>92</sup>

In his petition for certiorari before the Supreme Court (which was denied), *Bistline* argued that criminal defendants are unable to refute value judgments. As a consequence, *Bistline* argued, the child pornography Guidelines—and potentially other Guidelines—are essentially mandatory.<sup>93</sup> If retributive judgments cannot be refuted, so the argument goes, then a policy disagreement will always be reversed on appeal for failure to “contend” with those arguments. I do not agree with *Bistline*’s argument that retributive judgments cannot be refuted. And in the next Section I explain how a defense attorney might go about making arguments that challenge the retributive judgments underlying various changes to the child pornography Guidelines.<sup>94</sup>

Regardless whether a defendant can refute a retributive judgment, there are other problems with the Sixth Circuit’s direction that district court judges ought to engage with the value judgments underlying Congress’s changes to the child pornography Guideline. The Sixth Circuit presumes that district court judges will have access to reliable information about why Congress elected to change a Guideline, and it suggests that courts ought to assess that congressional reasoning. This is inconsistent with modern judicial review. Although legislative purpose once played a large role in judicial review, courts have moved away from enquiring into congressional motive in recent years.<sup>95</sup> Modern doctrine rarely requires courts to uncover legislative purpose or to assess the soundness of that purpose. Inquiries into legislative purpose are disfavored because they “are sometimes costly to conduct, often threaten insult to other branches of government, and may present formidable evidentiary difficulties.”<sup>96</sup>

It will be difficult, if not impossible, for a district court to uncover why Congress enacted a particular sentencing directive. It is often unclear why Congress enacts particular legislation. There are many members of

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<sup>90</sup> *Bistline I*, 665 F.3d at 763–64.

<sup>91</sup> *Id.* at 764.

<sup>92</sup> *Id.*

<sup>93</sup> Brief of Petitioner at 21–22, *Bistline v. United States*, 720 F.3d 631 (2015) (No. 15-18).

<sup>94</sup> See *infra* Section IV.C.1.

<sup>95</sup> See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 119–29 (2011).

<sup>96</sup> Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 54, 98 (1997).

Congress, and they likely have different reasons for supporting particular laws.<sup>97</sup> These different reasons are often not captured by the ordinary legislative process;<sup>98</sup> committee reports may never be read and floor speeches may never be heard by the legislators voting on a piece of legislation.<sup>99</sup> This is why many legal commentators have concluded that it is impossible to find a single, accurate reason or line of reasoning that would explain why Congress enacted a particular law.<sup>100</sup>

What is more, in saying that courts should review Congress's reasoning, rather than the reasoning of the Commission, the Sixth Circuit is arguably saying that Congress needs to offer justifications for its sentencing directives to the Commission. Ironically, *that* raises separation of powers concerns. Telling Congress that it must offer justifications for its sentencing policies would represent judicial encroachment on the legislative power. As the Sixth Circuit has noted, the Constitution names only two "antecedent circumstances relevant to the validity of Congress's directives . . . bicameralism and presentment."<sup>101</sup> The Constitution does not tell Congress that it must formally justify criminal law policy decisions; it leaves the provision of reasons and the assessment of those reasons to the political process.<sup>102</sup>

Congress generally has no obligation to satisfy courts of its reasoning behind various legislation. There are some exceptions to this general rule. Courts will, for example, inquire about congressional purpose in cases involving the Equal Protection Clause and the Establishment Clause.<sup>103</sup> But judicial review into congressional purpose occurs almost exclusively in situations where a legislature is accused to have acted "for constitutionally illegitimate reasons."<sup>104</sup> A hypothetical retributive judgment by Congress about the seriousness of child pornography offenses is far afield from other

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<sup>97</sup> See *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring) ("[I]t is virtually impossible to determine the singular 'motive' of a collective legislative body . . .").

<sup>98</sup> See BICKEL, *supra* note 73, at 214 ("Legislative motives are nearly always mixed and nearly never professed. They are never both unmixed and authoritatively professed on behalf of an entire legislative majority.")

<sup>99</sup> See, e.g., *Hirschey v. FERC*, 777 F.2d 1, 7–8, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (quoting a passage from the Congressional Record suggesting that a committee report did not reflect the purpose or intent of the relevant legislators).

<sup>100</sup> See, e.g., John F. Manning, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 9 (2014) ("Today . . . almost no one really believes that Congress -- as a collective body -- forms an *actual* intent about the hard questions that preoccupy the law of statutory interpretation." (emphasis in original)); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

<sup>101</sup> *Bistline I*, 665 F.3d 758, 763 (6th Cir. 2012).

<sup>102</sup> *Cf. Ewing v. California*, 538 U.S. 11, 25 (2003) ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'") (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring)).

<sup>103</sup> See generally Fallon, Jr., *supra* note 96, at 90–98 (providing examples of various constitutional doctrines that "explicitly inquire whether the government has acted for forbidden reasons").

<sup>104</sup> *Id.* at 99.

situations where modern jurisprudence allows judicial review of legislative motives. It is instead a situation where courts will uphold legislation so long as there is any possible way to justify it. This is the principle behind rational basis review.<sup>105</sup>

Of course, it is possible the Sixth Circuit's statement that district court judges must "contend" with Congress's "value judgments" is not an invitation for district courts to delve into congressional reasons behind the legislatively directed changes to the child pornography Guideline. Instead, it may simply be another way of stating that a district court judge who disagrees with the policy behind the Guideline is substituting her own value judgments for those of Congress. If so, then this is simply a reiteration of the countermajoritarian difficulty,<sup>106</sup> and it adds nothing more to the Sixth Circuit's separation of powers analysis.<sup>107</sup>

#### D. A Common Law in the Sixth Circuit?

Leaving aside the question of closer review after *Kimbrough*, there is one additional aspect of the Sixth Circuit's recent child pornography decisions that is troubling. Specifically, the Sixth Circuit appears to be developing a sentencing common law for child pornography possession cases. This common law tells district court judges that certain factual findings are necessary to impose certain types of sentences. Such a common law conflicts with the Supreme Court's Sixth Amendment sentencing cases.

The development of a common law for child pornography sentences can be seen in the Sixth Circuit's references to previous child pornography cases. For example, when discussing whether "the history and characteristics of the defendant . . . justify the sentence imposed," the *Bistline* Court relied on its previous decision in *United States v. Christman*, noting the facts of the two cases were similar.<sup>108</sup> In *Christman*, the Sixth Circuit reversed a sentence of five days in prison as substantively unreasonable despite the fact that Christman, like Bistline, had health problems and was the primary caregiver for his ailing spouse.<sup>109</sup> In rejecting the argument that Bistline's history and characteristics justified a sentence of one night incarceration, the Sixth Circuit

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<sup>105</sup> See, e.g., *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (stating that a law is constitutional "if there is any reasonably conceivable state of facts that could provide a rational basis" for its enactment); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.")

<sup>106</sup> The countermajoritarian difficulty occurs when unelected judges overturn "a legislative act or the action of an elected executive[.]" in those situations a court "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." BICKEL, *supra* note 73, at 17.

<sup>107</sup> See *supra* Section III.A.

<sup>108</sup> 665 F.3d 758, 767 (6th Cir. 2012) (citing *United States v. Christman*, 607 F.3d 1110 (6th Cir. 2010)).

<sup>109</sup> *Christman*, 607 F.3d at 1112.

stated “[o]n this point *United States v. Christman* is controlling.”<sup>110</sup>

The recent child pornography opinions further suggest that the Sixth Circuit is developing a common law for child pornography sentences in their discussions of *United States v. Stall*. The court in *Stall* affirmed a child pornography sentence that was similar to the sentences imposed in *Robinson* and *Bistline*.<sup>111</sup> The *Robinson* Court and the *Bistline* Court both took care to distinguish the circumstances surrounding *Stall*, explaining why they were not treating that case as controlling precedent.<sup>112</sup>

It is troubling that the Sixth Circuit appears to be developing a sentencing common law for child pornography cases. Such a common law would reintroduce the same flaw into federal sentencing that caused the Supreme Court to declare the Federal Sentencing Guidelines unconstitutional in *United States v. Booker*.<sup>113</sup> Namely, it requires certain factual findings in order to permit certain sentences. The Supreme Court has made clear that making a factual finding a prerequisite to changing the permissible range in which a judge may sentence violates the Sixth Amendment; it does not matter whether the judge is required to find a specific fact, one of several specific facts, or *any* fact.<sup>114</sup>

The Sixth Circuit’s common law tells district court judges that certain facts are insufficient to support particular sentences. Specifically, *Bistline* and *Christman* tell district court judges that they may not impose a sentence of five days imprisonment or less based only on a factual finding that a defendant suffers from significant health problems and serves as a primary caregiver. Phrased in Sixth Amendment terms, these cases tell judges that *they must make some additional factual finding* in order to impose such sentences in child pornography cases. Requiring such factual findings is inconsistent with the Supreme Court’s modern Sixth Amendment sentencing doctrine.

Nor does it matter that the factual finding is required by circuit precedent, rather than by a statute or a Sentencing Guideline. In stating that its decisions about the substantive reasonableness of child pornography

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<sup>110</sup> *Bistline I*, 665 F.3d at 767.

<sup>111</sup> 581 F.3d 276, 290 (6th Cir. 2009).

<sup>112</sup> *Bistline I*, 665 F.3d at 768 (“It remains only to explain why our decision in this case is not controlled by our decision in *Stall*, where we affirmed a sentence very similar to this one.”); *id.* (“*Stall* is more a cautionary tale about prosecutorial neglect, than it is a precedent important to our decision here.”); *Robinson I*, 669 F.3d 767, 779 (6th Cir. 2012) (“We pause to explain why our decision in this case is not controlled by our decisions in *United States v. Stall*, 581 F.3d 276 (6th Cir. 2009) and *United States v. Prisel*, 316 Fed. Appx. 377 (6th Cir. 2008), where we considered whether one-day sentences of imprisonment for possession of child pornography were substantively reasonable.”).

<sup>113</sup> 543 U.S. 220, 267 (2005).

<sup>114</sup> *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (“Whether the judge’s authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury’s verdict alone does not authorize the sentence.” (emphasis in original)).

sentences are “controlled” by the facts of previous cases, the Sixth Circuit has reintroduced a system where facts found by a judge (rather than by a jury) are necessary to the imposition of sentence. As Justice Scalia explained in his *Rita v. United States* concurrence, if appellate sentencing doctrine dictates that “some sentences cannot lawfully be imposed by a judge unless the judge finds certain facts,” then that doctrine “has reintroduced the constitutional defect that *Booker* purported to eliminate.”<sup>115</sup>

When he wrote his *Rita* concurrence, Justice Scalia was concerned with the ability of a judge to impose a sentence up to the statutory maximum sentence. Subsequently, in *Allelyne v. United States*, the Supreme Court extended its Sixth Amendment sentencing doctrine to factual findings that constrain the ability of judges to impose sentences below a mandatory minimum.<sup>116</sup> There is no statutory minimum sentence for possession of child pornography,<sup>117</sup> and therefore the minimum sentence a judge could impose under the statute is no imprisonment. In stating that additional factual findings are necessary in order to impose a sentence of one day or five days in prison, the Sixth Circuit is imposing a common law mandatory minimum sentence, which ignores the teachings of *Allelyne*.

As noted above, one cannot say whether the Sixth Circuit’s decision to subject sentences based on policy disagreement with the child pornography Guidelines to “closer review” is consistent with *Booker*.<sup>118</sup> But there is a strong argument to be made that the Sixth Circuit’s child pornography sentencing common law—that is, the court’s insistence that certain facts will not justify certain sentences in future cases—is inconsistent with *Booker* and thus in violation of the Sixth Amendment.

#### IV. HOW TO ARGUE FOR A BELOW-GUIDELINE SENTENCE IN THE SIXTH CIRCUIT

The weaknesses I have identified in the Sixth Circuit’s child pornography opinions may be of little use to those defense attorneys who are practicing in the circuit. Unless the Sixth Circuit reverses course or unless the Supreme Court decides to revisit the “closer review” question, *Bistline* and *Robinson* are the prevailing law in Kentucky, Ohio, Michigan, and Tennessee. Consequently, defense attorneys should stop attacking the child

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<sup>115</sup> 551 U.S. 338, 370 (2007) (Scalia, J., concurring) (“If a sentencing system is permissible in which some sentences cannot lawfully be imposed by a judge unless the judge finds certain facts by a preponderance of the evidence, then we should have left in place the compulsory Guidelines that Congress enacted, instead of imposing this jerry-rigged scheme of our own. In order to avoid the possibility of a Sixth Amendment violation, which was the object of the *Booker* remedy, district courts must be able, without finding any facts not embraced in the jury verdict or guilty plea, to sentence to the maximum of the *statutory* range.” (emphasis in original)).

<sup>116</sup> 133 S. Ct. 2151, 2155 (2013).

<sup>117</sup> See 18 U.S.C. § 2252(b)(2) (2012).

<sup>118</sup> See *supra* Section II.B.



pornography Guideline based on congressional involvement and the lack of empirical basis.<sup>119</sup> Instead they should craft arguments for below-Guideline sentences that are consistent with *Bistline* and *Robinson*.

Although the Sixth Circuit has said that it will subject district court disagreement with child pornography sentences to “closer review,” that does not mean the court of appeals will necessarily reverse a below-Guideline sentence. Indeed, the cases applying “closer review” offer some significant guidance about how a district court might justify a child pornography sentence that is significantly below the Guideline range. This Part highlights that guidance, and it explores how a defense attorney might convince a district court judge to justify a child pornography sentence in a manner that is more likely to withstand appellate scrutiny by the Sixth Circuit. Specifically, it explains that child pornography sentences that are more likely to be upheld by the Sixth Circuit will include (a) at least a minimal custodial sentence, (b) an explanation and analysis of the individual Guideline enhancements that applied to the defendant, and (c) an independent § 3553(a) analysis that addresses the seriousness of child pornography possession as a crime, the need for general deterrence, and potential sentencing disparities. This Part also discusses the facts-and-circumstances-based arguments that defense attorneys should pursue.

### A. Custodial Sentences

The Sixth Circuit’s recent child pornography sentences make clear that the court strongly disfavors non-custodial sentences.<sup>120</sup> Thus, a defense attorney may want to argue that her client receive a minimal custodial sentence. To be clear, a token custodial sentence may be insufficient. The defendants in *Bistline* and *Robinson* received sentences that included a single night of incarceration, and the Sixth Circuit reversed both sentences.<sup>121</sup> Thus, the defense attorney may wish to seek a minimal (but non-token) custodial sentence, such as six months imprisonment.

A minimal custodial sentence not only may help the sentence to withstand scrutiny on appeal, but it also may mollify the U.S. Attorney’s Office, which may then decide not to appeal the sentencing decision.<sup>122</sup> After

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<sup>119</sup> Of course, they may want to preserve this argument for a certiorari petition.

<sup>120</sup> See *Robinson II*, 778 F.3d 515, 520 (6th Cir. 2015) (stating that “a noncustodial sentence does not ‘adequately reflect’ the fact that Defendant possessed thousands of images”); see also *Robinson I*, 669 F.3d 767, 773 (6th Cir. 2012) (“Here, no presumption of reasonableness applies because the sentence imposed by the district court varied downward to an essentially non-custodial sentence.”).

<sup>121</sup> See *Bistline II*, 720 F.3d 631, 632 (6th Cir. 2013); *Robinson I*, 669 F.3d at 769.

<sup>122</sup> It is clear that there are some significantly below-Guideline sentences that are not being appealed in the Sixth Circuit. See *Robinson II*, 778 F.3d at 522 n.1 (documenting cases in which child pornography offenders were “sentenced to supervised release for child pornography convictions pursuant to plea agreements with the prosecutor’s office” and noting that the sentences in those cases “were not appealed”); see also James L. Graham, *The Sixth Circuit Broke New Ground in Post-Booker Guideline Sentencing with*

all, post-*Booker* sentencing data tell us that prosecutors often do not appeal below-Guideline sentences.<sup>123</sup>

### B. Individual Enhancements

The Sixth Circuit's recent child pornography sentences make clear that the court expects district court judges to address the various Guideline enhancements that apply to a particular defendant.<sup>124</sup> It is not enough for the sentencing judge to note that an enhancement applies to many or most child pornography defendants.<sup>125</sup> Although the Sixth Circuit has indicated that district court judges should address these enhancements, it has not indicated what form that analysis should take.

One tactic that a defense attorney might wish to pursue is to question the appropriateness of individual enhancements. That is to say, the defense attorney should articulate why a particular Guideline enhancement is an inappropriate aggravating factor. In other words, the enhancement ought not apply to *any* defendant. This tactic may be most effective with respect to two enhancements: the use of a computer enhancement<sup>126</sup> and the number of images enhancement.<sup>127</sup> Both the U.S. Sentencing Commission and the Department of Justice have stated that these enhancements are flawed because they “can at times . . . over-represent the seriousness of an offender’s conduct.”<sup>128</sup> This shared conclusion by the Commission, an agency that possesses expertise in the area, and the Executive, which is democratically accountable, gives a district court judge a firm basis for rejecting these two enhancements.<sup>129</sup>

Another tactic that a defense attorney may wish to pursue is to argue that certain enhancements ought not be applied to her particular client. Specifically, defense attorneys may argue that one or more enhancements do not accurately reflect the culpability of her client. For example, one Guideline

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*a Pair of Important Decisions*, 26 FED. SENT’G. REP. 102, 107 (2013) (observing that district court judges can only impose lenient sentences in child pornography cases with “the government’s consent”).

<sup>123</sup> See U.S. SENTENCING COMM’N, 2012 *BOOKER* IMPACT, *supra* note 5, Part B, at 40 (documenting that the government appeals only a small number of sentences each year).

<sup>124</sup> *Robinson I*, 669 F.3d at 776 (“The district court did not address the enhancements which were applied in computing the guidelines range.”).

<sup>125</sup> See *Bistline II*, 720 F.3d at 633.

<sup>126</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(6) (2015).

<sup>127</sup> *Id.* § 2G2.2(b)(7).

<sup>128</sup> Opinion Letter from Anne Gannon, National Coordinator for Child Exploitation Prevention and Interdiction, to Patti B. Saris, Chair 4 (Mar. 5, 2013), <http://sentencing.typepad.com/files/doj-letter-to-ussc-on-cp-report.pdf> [hereinafter Opinion Letter]; see also U.S. SENTENCING COMM’N, CHILD PORNOGRAPHY, *supra* note 63, at 323–24 (noting that these enhancements “result[] in guideline ranges that are overly severe for some offenders”).

<sup>129</sup> Although an individual federal prosecutor may argue for a sentence that includes one of these enhancements, it would be odd to continue to increase sentences based on metrics that Main Justice no longer supports. An individual prosecutor derives her democratic legitimacy based on the presidential appointment of the Attorney General and the political accountability of other high-ranking Department of Justice officials.

enhancement increases a defendant's sentencing range if he possessed images of minors below a certain age. Specifically, the Guidelines increase a defendant's offense level by 2 levels if he possessed material that "involved a prepubescent minor or a minor who had not attained the age of 12 years."<sup>130</sup> At least some child pornography offenders may possess images of these young victims even though they did not seek out material featuring particularly young victims. Advances in technology allow offenders to download large numbers of images very quickly.<sup>131</sup> As a result, an offender may download large caches of images without knowing the content of those images.<sup>132</sup> Defense counsel may be able to use her client's Internet search history to demonstrate that the defendant did not specifically intend to acquire such images.

If a defendant did not specifically seek out such images, then defense counsel should argue that the enhancement overstates her client's culpability. The Guideline enhancement does not distinguish between offenders based on whether they intentionally acquired such images. But given the prominence of *mens rea* in the American justice system as a means of distinguishing between offenders,<sup>133</sup> there is no reason why judges should not either adjust or ignore the enhancement on that basis. Similar arguments could be made regarding the enhancement for possessing images that portray "sadistic or masochistic conduct or other depictions of violence."<sup>134</sup> If a defendant did not specifically seek out violent images, then the enhancement overstates his culpability.

Defense attorneys can bolster these arguments about culpability by noting that, if their clients did not specifically seek out these images, then they did not create a demand for this particularly reprehensible content.<sup>135</sup> That is because if a possessor does not specifically seek out a type of image, then he does not signal to the "market" (i.e., the producers and the distributors) that more such images should be created. That possessors create demand for child pornography is one of the major justifications for the criminalization of child pornography possession and the harsh punishment associated with that crime.<sup>136</sup> Many have cited the demand for younger victims and more violent

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<sup>130</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(2) (2015).

<sup>131</sup> See Opinion Letter, *supra* note 128, at 4.

<sup>132</sup> U.S. SENTENCING COMM'N, CHILD PORNOGRAPHY, *supra* note 63, at 209 (noting that 96.3% of non-production child pornography cases include at least one image depicting prepubescent minors or children under 12). This may help explain why most child pornography offenders possess thousands of images, and in those thousands of images, most include at least one image of a minor that is prepubescent or under the age of 12.

<sup>133</sup> See generally WAYNE R. LAFAVE, CRIMINAL LAW § 3.4 (3d ed. 2000) (discussing the importance of *mens rea* in distinguishing between offenders).

<sup>134</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(4) (2015).

<sup>135</sup> There are important reasons to doubt whether the mine-run child pornography possessor creates demand that fuels the production of these images. See *infra* note 156.

<sup>136</sup> See, e.g., Osborne v. Ohio, 495 U.S. 103, 109–10 (1990); see also Carissa Byrne Hessick, *Questioning the Modern Criminal Justice Focus on Child Pornography Possession*, in REFINING CHILD

images as reasons to punish the possession of such images more harshly.<sup>137</sup> If a defendant did not contribute to this demand, then the enhancement should not apply.

*C. Independent § 3553(a) Analysis*

The Sixth Circuit's recent child pornography sentences make clear that the court expects to see an independent § 3553(a) analysis supporting any below-Guideline sentence.<sup>138</sup> The district court's § 3553(a) explanation must include an independent analysis about appropriate sentencing levels. It is not enough to justify a sentence below the Guideline range on the basis that Congress intervened in the current Guideline, that the Guideline has a non-empirical basis, or that the current sentence is too high.

After calculating the relevant Guidelines range, all sentencing judges are required to consider all of the factors identified in 18 U.S.C. § 3553(a) before imposing sentence. Those factors include:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed--
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for--
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .

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PORNOGRAPHY LAW: CRIME, LANGUAGE, AND SOCIAL CONSEQUENCES 152 (C.B. Hessick ed., 2016) [hereinafter, Hessick, *Questioning*] (documenting the prevalence of the market theory as a reason for aggressive enforcement against possessors of child pornography).

<sup>137</sup> See, e.g., Opinion Letter, *supra* note 128, at 2.

<sup>138</sup> See Robinson I, 669 F.3d 767, 775 (6th Cir. 2012); see also United States v. Christman, 607 F.3d 1110, 1121 (6th Cir. 2010).

- (5) any pertinent policy statement . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.<sup>139</sup>

In its recent child pornography decisions, the Sixth Circuit has indicated that some district court judges have failed to address the seriousness of child pornography possession as a crime, the need for general deterrence, and the need to avoid sentencing disparity with other child pornography defendants. The following subsections offer guidance on how defense attorneys could help insulate a below-Guideline sentence from such criticism.

#### 1. Seriousness of Child Pornography Possession

The Sixth Circuit has expressed concern that district court judges are minimizing the seriousness of child pornography possession.<sup>140</sup> The circuit court is not receptive to sentencing explanations that say child pornography possession is not as serious as other child pornography crimes, such as production or distribution.<sup>141</sup> Instead, district court judges must justify their sentences in a fashion that explains why the recommended Guideline sentence is too harsh, but at the same time demonstrates an appreciation for the seriousness of the offense.

There are at least two arguments that can accomplish this goal. First, defense attorneys should encourage district court judges to compare Guideline sentences with other serious sex offenses. A recent report by the U.S. Sentencing Commission provides a useful comparison:

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<sup>139</sup> 18 U.S.C. § 3553(a) (2012).

<sup>140</sup> See *Robinson II*, 778 F.3d 515, 519 (6th Cir. 2015) (“[T]he district court failed to consider—or even mention—the factors that made Defendant’s criminal conduct particularly egregious. In fact, the district court’s only comment with regard to why the crime was ‘serious’ was to acknowledge that Congress designated a sentencing range of up to ten years.”); see also *Bistline I*, 665 F.3d 758, 764 (6th Cir. 2012) (“The district court made a number of observations with respect to the seriousness of this offense. Many of them served to diminish it.”).

<sup>141</sup> See *Bistline I*, 665 F.3d at 765.

*Table 1: Comparison of Guideline Sentences for Serious Sex Offenses*<sup>142</sup>

<b>Primary Guideline</b>	<b>Mean Guideline Sentence (months)</b>	<b>Mean Prison Sentence (months)</b>
§2G2.1, Production Child Pornography Offenses (N=200)	281	270
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of minor younger than age 12) (N=27)	252	230
§2G1.3, Travel to Engage in Sexual Contact w/ Pre-Pubescent Minor (Minor younger than age 12) (N=21)	222	187
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of minor age 12 or older) (N=10)	176	173
§2G3.1, Child Prostitution Offenses (N=34)	171	155
§2A3.1, Criminal Sexual Abuse (i.e., forcible rape/sexual assault of adult) (N=39)	146	148
§2G2.2 Non-Production Child Pornography Offenses (N=1,643)	118	95
§2G1.3, Travel to Engage in Sexual Contact w/Minor (Minor age 12 or older) (N=147)	101	104
§2A3.4, Abusive Sexual Contact (Minor) (e.g., fondling) (N=21)	44	46
§2A3.2, Criminal Sexual Abuse of a Minor (Statutory Rape) (N= 47)	32	37
§2A3.4, Abusive Sexual Contact (Adult) (e.g., fondling) (N=16)	15	19

<sup>142</sup> Table 1 is reprinted from U.S. SENTENCING COMM'N, CHILD PORNOGRAPHY, *supra* note 63, at 137. That source lists the source of this data as "US Sentencing Commission, 1992-2010 Datafile, USSCFY92-10."

As Table 1 demonstrates, Guideline sentences are more severe for child pornography defendants who are not involved in production than they are for two types of contact offenses against minors—crimes that include fondling and statutory rape. Guideline sentences are also more severe for non-production child pornography defendants than they are for defendants who travel to engage in sexual contact with a minor.

These comparisons should be very useful to support an argument that a Guideline sentence for child pornography possession is too harsh. This information allows the district court to impose a below-Guideline sentence based on a comparative proportionality analysis.<sup>143</sup> A comparative proportionality analysis does not require the judge to say that a Guideline sentence for child pornography possession is too harsh in absolute terms; rather it allows the judge to say that the sentence is too harsh as compared to those defendants who have either engaged in sexual contact with a minor or who have travelled across state lines in an attempt to do so. It should be uncontroversial that the sexual molestation and attempted sexual molestation of a child are more serious crimes than possession of child pornography.<sup>144</sup> And the Sixth Circuit is less likely to assume that a district court judge who makes such a statement fails to appreciate the seriousness of child pornography possession as a crime.

In addition to referencing this Commission data, a defense attorney could also make a comparative proportionality analysis looking to the Guidelines' base offense levels.<sup>145</sup> The base offense level for possessing child pornography is 18.<sup>146</sup> This is the same base offense level as criminal sexual abuse of a minor under the age of sixteen—a crime that is sometimes referred to as statutory rape.<sup>147</sup> And the base offense level for possessing child pornography is *higher* than the base offense level for abusive sexual contact, which includes sexual contact with a minor. Abusive sexual conduct has a base offense level of 16.<sup>148</sup> This comparison demonstrates that the base offense level for child pornography possession is too high; it should not be equal to or higher than the base offense level for contact offenses.

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<sup>143</sup> Comparative proportionality, which is also sometimes referred to as “relative proportionality” or “ordinal proportionality,” asks how one crime ought to be punished compared to other crimes. *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, *PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES* 182 (1992).

<sup>144</sup> Hessick, *Questioning*, *supra* note 136, at 155. Indeed, the average prison sentence imposed in these molestation and attempted molestation cases is higher than the average Guideline sentence. *See supra* Table 1. This suggests that federal judges across the country agree that contact offenses and attempted contact offenses are serious crimes deserving of serious punishment.

<sup>145</sup> Defense attorneys should make both arguments. The Commission cautions against using its data on average sentences as the sole source for this for proportionality comparison because of variables that affect guideline applications. U.S. SENTENCING COMM'N, *CHILD PORNOGRAPHY*, *supra* note 63, at 137. A base offense level comparison eliminates any concerns about guideline application.

<sup>146</sup> U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(a)(1) (2015).

<sup>147</sup> *Id.* § 2A3.2(a).

<sup>148</sup> *See id.* § 2A3.4(a)(1); *see also* 18 U.S.C. § 2242 (2012).

A defense attorney could also attempt to show that Congress has set the punishment levels for child pornography too high by comparing Guideline sentences to state sentencing statutes. The average Guideline sentence for possessing child pornography is 78–97 months (approximately 6.5 to 8 years). As the following table shows, that average is *higher than the statutory maximum sentence in 24 states*. Put differently, the average Guideline sentence is so harsh that it is more than the maximum amount of punishment that nearly half of the states are willing to authorize.



*Table 2: Comparison of Guidelines Sentence and State Statutes*<sup>149</sup>

<i>Average Guidelines Sentence for Possession, Criminal History Category I</i>	<i>78-97 months (approximately 6.5-8years)</i>
<b>State Possession Statute</b>	<b>Statutory Sentencing Range</b>
California (Cal. Penal Code § 311.11)	0–1 year
Colorado (Col. Rev. Stat. Ann. § 18-6-403)	2–6 years (for possessing more than 20 images)
Delaware (Del. Code Ann. 11, § 1111)	0–3 years
Florida (Fla. Stat. Ann. § 827.071)	0–5 years
Hawaii (Haw. Rev. Stat. § 707-752)	Indeterminate term of 5 years
Indiana (Ind. Code Ann. § 35-42-4-4)	6 months–3 years (advisory sentence of 18 months)
Kentucky (Ken. Rev. Stat. Ann. § 531.335)	1–5 years
Maine (Me. Rev. Stat. Ann. 17, § 284)	1–3 years; 3–5 years if minor under 12 years old
Maryland (Md. Code Ann., Crim. Law § 11-208)	0–5 years
Massachusetts (Mass. Gen. Laws Ann. Ch. 272, § 29C)	0–5 years prison; 0–2.5 years jail
Michigan (Mich. Comp. Laws Ann. § 750.145c)	0–4 years

<sup>149</sup> The data in this table are taken from U.S. SENTENCING COMM'N, CHILD PORNOGRAPHY, *supra* note 63, at 212.

Minnesota (Minn. Stat. Ann. § 617.247)	0–5 years
Nevada (Nev. Rev. Stat. Ann. § 200.730)	1–6 years
New Jersey (N.J. Stat. Ann. § 2c:24-4)	0–18 months
New Mexico (N.M. Stat. Ann. § 30-6A-3)	18 months
New York (N.Y. Penal Law §§ 263.11 & 263.16)	0–4 years
North Carolina (N.C. Gen. Stat. Ann. § 14-190.17A)	4–25 months
North Dakota (N.D. Cent. Code § 12.1-27.2-04.1)	0–5 years
Ohio (Ohio Rev. Code Ann. § 2907.321-.322)	6–18 months
Oregon (Or. Rev. Stat. Ann. § 163.686)	0–5 years
Rhode Island (R.I. Gen. Laws § 11-9-1.3)	0–5 years
Vermont (Vt. Stat. Ann. 13, § 2825, 2827)	0–5 years
Virginia (Va. Code Ann. § 18.2-374.1:1)	1–5 years
West Virginia (W. Va. Code Ann. § 61-8C-3, 61-8D-6)	0–2 years

Not only is the *average* Guideline sentence too high when compared to state sentencing statutes, but the comparison also demonstrates that the *minimum* Guideline sentence is quite harsh. The minimum Guideline

sentence for possessing child pornography—that is, the Guideline range derived for a defendant whose Criminal History Category is I and whose offense level has not been increased by any enhancements—is 27–33 months. As Table 2 demonstrates, that is higher than the statutory maximum sentence in six states.

As with comparisons to hands on sexual abuse of children, comparing the federal Guidelines with state statutory sentencing ranges allows a defense attorney to challenge the retributive judgments implicit in Congress's Guideline directives. Federal child pornography sentences are too harsh because an average Guideline sentence *would not be permitted under the laws of nearly half the states*. If a defense attorney argues for a below-Guideline sentence on these grounds, then the sentencing judges could reference this objective information indicating that a lower sentence nonetheless serves “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.”<sup>150</sup> After all, state legislatures presumably set their sentencing ranges based on those same considerations. What is more, this information justifies a below-Guideline sentence without suggesting that the district court judge fails to appreciate the seriousness of child pornography possession as a crime.

## 2. General Deterrence

The Sixth Circuit expects to see a deterrence analysis in a sentencing explanation of a below-Guideline child pornography sentence. It is not enough for that explanation to discuss why the particular defendant is unlikely to commit any future crimes; the Sixth Circuit has made clear that the deterrence analysis must include an explanation of how a sentence will deter others from possessing child pornography in the future.<sup>151</sup> In other words, a § 3553(a) analysis must include not only a discussion of specific deterrence, but also a discussion of general deterrence.

General deterrence is a tricky topic. One ordinarily assumes that members of the general public do not commit crimes because they are worried about getting caught and being sent to prison. But there is not a lot of social science evidence that allows us to understand how, exactly deterrence works. We can assume that fewer people are likely to commit a crime if the punishment for that crime is 50 years in prison than if the punishment is only one year in prison. This idea of marginal deterrence—that more punishment is likely to reduce crime—is intuitively appealing. But there are reasons to

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<sup>150</sup> 18 U.S.C. § 3553(a)(2)(A).

<sup>151</sup> See *Bistline II*, 720 F.3d 631, 634 (6th Cir. 2013) (“The district court likewise put little weight on the need for Bistline’s sentence to deter other potential violators of the child pornography laws.”); *Robinson I*, 669 F.3d 767, 777 (6th Cir. 2012) (“As deterrence has both an individualized and more general component, particularly in the child pornography context, we do not see how Robinson’s sentence would meaningfully deter anyone else.”).

doubt that it is effective in many cases.<sup>152</sup> Much of the social science literature suggests that making punishment more swift and certain—i.e., catching more people committing the crimes and punishing them quickly and consistently—*is* more likely to decrease crime than making the punishment associated with a particular crime higher.<sup>153</sup> But most importantly, the social science literature is unable to demonstrate clear effects of marginal deterrence generally,<sup>154</sup> let alone for child pornography possession.

Because of how little we know about the effects of marginal deterrence, it is difficult for a defense attorney to craft an argument about the general deterrence that a particular sentence will have. We do not know how effective the current Guideline sentences are at deterring people from possessing child pornography. Thus, it is impossible to say how much less effective a six-month sentence will be at deterring others from possessing child pornography as compared to a 78-month sentence.

One assumes that the Sixth Circuit is relying on the abstract idea of marginal deterrence in its opinions on this matter. That is to say, the court is assuming that any decrease in punishment is likely to result in more future crime. It is hard to predict what, if anything, will persuade the Court otherwise. That said, a defense attorney should attempt to accomplish three things in the § 3553(a) analysis associated with general deterrence. First, the attorney should identify the uncertainty surrounding marginal deterrence. Given how little we know about deterrence specifically and why people commit crimes more generally, it is quite possible that a six-month sentence for possession of child pornography will discourage nearly as many people from possessing such images as a five-year sentence. Second, the attorney should highlight the statutory sentencing range for possession of child pornography. There is no mandatory minimum sentence associated with possession of child pornography. This indicates a congressional judgment that prison sentences are not necessary to discourage the general public from possessing child pornography. Third, the attorney should explain that, if we interpret § 3553(a) to embrace an unrefined vision of marginal deterrence—that is, an assumption that any decrease in punishment is likely to result in more future crime—then it will serve as a thumb on the scales not only against all below Guideline sentences, but also in favor of above Guideline sentences.

There is one final aspect of the Sixth Circuit's discussion of deterrence that is worthy of scrutiny. In *United States v. Robinson*, the court stated that in a § 3553(a) analysis for one who possesses child pornography,

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<sup>152</sup> See generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003).

<sup>153</sup> See, e.g., Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003).

<sup>154</sup> See Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279 (2008).

“[t]he emphasis should be upon deterring the production, distribution, receipt, or possession of child pornography . . . .”<sup>155</sup> In other words, the sentence in a child pornography case must not only be harsh enough to deter other possessors, but also harsh enough to deter others from producing or distributing child pornography.

It is possible that this passage is meant only to remind district court judges that higher sentences for possession of child pornography may deter other members of the public from possessing child pornography. And if others are discouraged from possessing child pornography, then there may be an overall reduction in demand for such images.<sup>156</sup> That reduction in demand could, in return, decrease the production of new child pornography.<sup>157</sup>

But that is not what the *Robinson* opinion says. It instead states that sentences in possession cases must be calculated to deter not only possession, but also distribution and production.<sup>158</sup> This analysis is surely wrong.

Deterrence is the idea that criminal penalties discourage people from committing crimes.<sup>159</sup> Setting the penalties associated with *possession* of child pornography higher will not discourage those who may *distribute* or *produce* child pornography. Think of this argument in the context of drugs. Setting the sentence higher for possessing drugs is not going to affect the deterrence calculus for someone looking to sell drugs. It may affect how many potential customers that potential seller will have; but the harsher penalty for possession, standing alone, does not discourage sale. Put simply, even if harsher possession sentences *reduce demand* for child pornography, that is not the same thing as *deterring* production and distribution. Thus, the sentence for child pornography possessors need not be increased in an attempt to deter those who produce and distribute child pornography.

To be fair, the text of § 3553(a) arguably permits this broad reading.

<sup>155</sup> *Robinson I*, 669 F.3d at 777.

<sup>156</sup> *Osborne v. Ohio*, 495 U.S. 103, 109–10 (1990). Although the market demand theory is a major reason why possession of child pornography has been criminalized, there are reasons to doubt that child pornography is distributed in a commercial market. Child pornography producers appear to be motivated by status, rather than profit, and thus eliminating demand may not limit supply. See Hessick, *Questioning*, *supra* note 136, at 152. A recent report by the U.S. Sentencing Commission casts significant doubt on the market theory. The Commission analyzed all § 2G2.2 offenders from 2010 who were identified as having distributed child pornography. The Commission’s review revealed that *none* of the offenders engaged in “traditional commercial distribution (e.g., a commercial child pornography website operator). Rather, all distribution in the fiscal year 2010 cases was either gratuitous or involved bartering among offenders.” U.S. SENTENCING COMM’N, CHILD PORNOGRAPHY, *supra* note 63, at 149 (emphasis in original).

<sup>157</sup> See *Robinson I*, 669 F.3d at 777 (quoting *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007)) (recounting this logic—namely, that higher sentences for possession may reduce demand, which could reduce production).

<sup>158</sup> The Sixth Circuit is not the only court to have made such a statement. See *United States v. Goff*, 501 F.3d 250, 261 (3d Cir.2007) (remarking, in a possession case, that “detering the production of child pornography and protecting the children who are victimized by it are factors that should have been given significant weight at sentencing, but in fact received not a word from the District Court”).

<sup>159</sup> ANDREW ASHWORTH, SENTENCING & CRIMINAL JUSTICE 64–68 (3d ed. 2000); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2:2 (2d ed. 1991).

The statute tells judges only to consider the need for the sentence imposed “to afford adequate deterrence to criminal conduct.”<sup>160</sup> The language is not limited to a particular defendant—which the Sixth Circuit has relied on in requiring a general deterrence analysis, and not only a specific deterrence analysis.<sup>161</sup> Nor is the statutory language limited to a particular crime. So one might argue that the Sixth Circuit is permitted to assess whether the sentence imposed on a possessor of child pornography is high enough to deter those who produce and distribute child pornography. But that argument either misunderstands the meaning of the word “deterrence,” or it fails to consider the logic associated with deterrence.

### 3. Sentencing Disparity

The Sixth Circuit’s recent opinions make clear that it is concerned about sentencing disparities.<sup>162</sup> Section 3553(a) tells sentencing judges that they must consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”<sup>163</sup> One obvious way to ensure sentencing uniformity is to encourage district courts to sentence within the Guidelines and to reverse non-Guidelines sentences on appeal.<sup>164</sup>

At first glance, the sentences imposed in *Bistline* and *Robinson* appear to be outside the norm for federal child pornography sentences. A recent report by the U.S. Sentencing Commission tells us that the average sentence for child pornography possessor is approximately 52 months.<sup>165</sup> Compared to a 52-month sentence, sentences of one day and five days appear to be significant outliers.

But it is important to remember that this average is heavily influenced by the number of judges who elect to sentence within the Guideline range—that range is 78–97 months. Perhaps a better comparison for disparity purposes would be the average sentence imposed by judges who elect to sentence outside of the Guideline range.

A recent study by the Sentencing Commission of selected child pornography offenders shows that more than 70% of defendants convicted of possession were sentenced below the Guideline range.<sup>166</sup> Thirty percent of below-range offenders were sentenced to 24 months or less,<sup>167</sup> and more than

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<sup>160</sup> 18 U.S.C. §3553(a)(2)(B) (2012).

<sup>161</sup> See *Robinson I*, 669 F.3d at 777.

<sup>162</sup> See *Robinson II*, 778 F.3d 515, 521–22 (6th Cir. 2015); *Robinson I*, 669 F.3d at 777; *Bistline I*, 665 F.3d 758, 761–68 (6th Cir. 2012).

<sup>163</sup> 18 U.S.C. §3553(a)(6).

<sup>164</sup> See Hessick, *Post-Kimbrough Appeals*, *supra* note 25, at 741–42.

<sup>165</sup> U.S. SENTENCING COMM’N, CHILD PORNOGRAPHY, *supra* note 63, at 215.

<sup>166</sup> *Id.* (noting that 116 of 157 offenders were sentenced below the Guidelines range).

<sup>167</sup> *Id.* at 215 (noting 35 of 116 below-Guidelines offenders).

10% were sentenced to no incarceration.<sup>168</sup>

Comparing the sentences in *Bistline* and *Robinson* to the average child pornography sentence of 52 months suggests that these sentences create great disparity. But that disparity looks different once we learn that more than 10% of below-Guideline defendants received no incarceration. Sentences of one day then look as though they are at the low end of a range, rather than complete outliers.

#### D. *Facts and Circumstances*

No § 3553(a) analysis would be complete without consideration of “the nature and circumstances of the offense and the history and characteristics of the defendant.”<sup>169</sup> As noted in Part II, the non-Guideline sentences that are most likely to be upheld on appeal are those that are based on the facts and circumstances of a particular defendant and her crime.<sup>170</sup> The Federal Sentencing Guidelines are meant to be applied to “typical offenders.”<sup>171</sup> Thus, any below-Guideline child pornography sentence imposed because a defendant or her crime is not “typical” ought to receive significant deference from the Sixth Circuit. After all, it is only a policy disagreement with Guidelines that may trigger “closer review.”<sup>172</sup>

Because facts-and-circumstances variances ought to receive appellate deference, a defense attorney should encourage a district court to justify a below-Guideline sentence on grounds that a particular defendant is not a typical child pornography offender. Not only should the defense attorney emphasize how her client differs from other federal child pornography defendants, she should also focus on how her client differs from what Congress and the Commission *perceived* as a typical child pornography offender.

For example, a defense attorney could emphasize that her client does not pose a risk of committing contact sex offenses. The child pornography Guidelines were crafted, in part, to deal with the risk of contact offenses. There is ample evidence that, when crafting the current Guidelines, Congress and the Commission assumed that a “typical” child pornography possessor is largely indistinguishable from an offender who has already sexually abused a child or who poses a substantial risk of doing so.<sup>173</sup> Indeed, a more recent

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<sup>168</sup> *Id.* (noting 13 of 116 below-Guideline offenders).

<sup>169</sup> 18 U.S.C. § 3553(a)(1) (2012).

<sup>170</sup> *See supra* text accompanying notes 26–27.

<sup>171</sup> *Cf. Koon v. United States*, 518 U.S. 81, 98 (1996) (noting that a trial court is permitted to sentence outside of the Guideline range when “certain aspects of the case [are] unusual enough for it to fall outside the heartland of cases . . .”).

<sup>172</sup> *See supra* Sections II.A, II.B.

<sup>173</sup> *See, e.g., U.S. SENTENCING COMM’N, SEX OFFENSES AGAINST CHILDREN*, at i (1996) (stating “a significant portion of child pornography offenders . . . show the greatest risk of victimizing children”); *id.* (stating “a significant portion of child pornography offenders have a criminal history that involves the

statement from the Commission indicates that it perceives the risk of contact offenses as one consideration in setting the Guideline ranges.<sup>174</sup> Thus, if a particular defendant does not pose such a risk, then defense counsel should argue that the defendant does not fall within the heartland of offenders to whom Congress and the Commission thought the Guidelines would apply.<sup>175</sup>

Although appellate courts *ought to be* deferential to below-Guideline sentences based on the facts and circumstances of a particular defendant and her offense, the Sixth Circuit has not always demonstrated such deference. For example, in *United States v. Robinson*, the court was relatively dismissive of the district court's reliance on Robinson's "employment history, age, and debilitating back condition."<sup>176</sup> The Sixth Circuit noted that "the guidelines discourage consideration of these factors," and it admonished courts that when "deciding whether a variance is warranted and in determining the extent of any variance, it should take into account 'the "discouraged" status of these factors.'"<sup>177</sup> In failing to defer to the district court's facts-and-circumstances variance, the *Robinson* Court relied on a previous Sixth Circuit case, *United States v. Borho*.<sup>178</sup> But the reasoning of *Borho* has since been repudiated by the Supreme Court.

The *Borho* Court stated that, although a district court has a "freer hand" to account for discouraged factors under the Guidelines post-*Booker*, "it must offer a compelling justification if those factors form the basis of a substantial variance from the recommended Guidelines range."<sup>179</sup> *Gall v. United States* subsequently rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range" because such a rule comes "too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."<sup>180</sup> The *Borho* Court also stated that, although a district court may

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sexual abuse or exploitation of children"); The Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26, *invalidated by* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (reporting Congressional findings that child pornography is often used by pedophiles and child sexual abusers to stimulate and "whet their own sexual appetites"); Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 899, 900 n.206 (2011) [hereinafter, Hessick, *Disentangling*].

<sup>174</sup> U.S. SENTENCING COMM'N, CHILD PORNOGRAPHY, *supra* note 63, at 171-73 (stating that "reliable data about the prevalence of sexual dangerousness among all non-production offenders is one factor that policy-makers should consider in deciding whether *overall* penalty levels are generally proportionate for the entire class").

<sup>175</sup> To be clear, the argument to be made here is not that a child pornography possessor who does not pose a risk of contact offenses is atypical. To the contrary, there is significant social science research indicating that many possession offenders do not pose such a risk. See Hessick, *Disentangling*, *supra* note 173, at 876 n.91 (collecting sources). This argument is instead that a low-risk possession offender is not what Congress and the Commission *thought* was a typical offender when they created and amended the Guideline.

<sup>176</sup> *Robinson* I, 669 F.3d 767, 775 (6th Cir. 2012).

<sup>177</sup> *Id.* (quoting *United States v. Borho*, 485 F.3d 904, 913 (6th Cir. 2007)).

<sup>178</sup> 485 F.3d at 913.

<sup>179</sup> *Id.*

<sup>180</sup> 552 U.S. 38, 47 (2007).



sentence below the Guideline range “if it adequately justifies why the application of the enhancement to the particular defendant renders the Guidelines sentence too high under the circumstances, it may not disregard a sentencing enhancement simply because the court disagrees with that enhancement as a matter of policy.”<sup>181</sup> *Kimbrough v. United States* subsequently clarified that district courts may, in fact, sentence outside of the Guidelines range based only on a policy disagreement.<sup>182</sup>

Although the Sixth Circuit has not been particularly receptive to below-Guideline sentences based on facts and circumstances that were “discouraged” factors under the Guidelines, defense attorneys may be able to make some headway on this topic. First, defense attorneys ought to argue that *Borho* did not survive *Kimbrough* and *Gall*, and thus the Sixth Circuit should overrule it. Second, defense counsel should argue that the Commission’s decision to label these mitigating factors “discouraged” sentencing factors should not receive any deference. The Commission’s decision to discourage the consideration of these mitigating offender characteristics as sentencing factors was not the product of a congressional directive.<sup>183</sup> Nor was it based on “empirical data and national experience.” To the contrary, these factors were regularly considered at sentencing prior to the promulgation of the Guidelines.<sup>184</sup> And a majority of current federal judges believe that these offender characteristics ought to reduce a defendant’s sentence below the Guideline range, even if these characteristics are not present “to an unusual degree.”<sup>185</sup> What is more, states and the general public support the reduction of punishment when these factors are present.<sup>186</sup> In light of all this, the Sixth Circuit should be more deferential to district court decisions to sentence outside the Guidelines on this basis. And if below-Guideline sentences continue to be reversed on this basis, then defense attorneys should petition the Supreme Court for certiorari on this issue.<sup>187</sup>

## V. CONCLUSION

When it comes to appellate review of child pornography sentences,

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<sup>181</sup> 485 F.3d at 911.

<sup>182</sup> 552 U.S. 85, 110 (2007).

<sup>183</sup> See Baron-Evans & Stith, *supra* note 33, at 1657–59.

<sup>184</sup> See NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 425 (2d ed. 2007); see also KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 79–80 (1998).

<sup>185</sup> U.S. SENTENCING COMM’N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010, at 18 (2012) (showing that 67% of judges reported this with respect to age; 79% with respect to mental condition; 60% with respect to emotional condition; 64% with respect to physical condition; 60% with respect to civil, charitable, or public service; and 62% with respect to prior good works).

<sup>186</sup> See Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 185–201 (2016) (identifying a national consensus surrounding several “disfavored” mitigating factors).

<sup>187</sup> Notably, although both Bistline and Robinson petitioned the Supreme Court for certiorari, neither raised this issue in their petitions. Their petitions were denied. See *infra* notes 191, 192.

the Sixth Circuit is an outlier. It has adopted a heightened form of appellate review for below-Guideline sentences,<sup>188</sup> and the reasons that it has given for that heightened review are seriously flawed. The Sixth Circuit also appears to be adopting a common law of sentencing for child pornography possession cases, and it has failed to defer to district court decisions that certain facts warrant lower sentences even though they were “discouraged” sentencing factors under the Guidelines. Both of these developments are inconsistent with the Supreme Court’s cases in this area.

It is not clear how long this state of affairs will continue. The Sixth Circuit is the only circuit to have adopted “closer review” of child pornography sentences. The adoption of a sentencing common law is forbidden by both the language and the logic of the Supreme Court’s Sixth Amendment sentencing cases. And the Sixth Circuit’s failure to defer to the facts-and-circumstances variances of district court judges is based on circuit precedent that has been undermined by subsequent Supreme Court decisions.

Although the Supreme Court refused to grant certiorari in both *United States v. Bistline*<sup>189</sup> and *United States v. Robinson*,<sup>190</sup> the Court may yet to decide to hear a case on one of these three issues. Unless and until the Supreme Court decides to review the Sixth Circuit’s decisions in this area, defense attorneys will have to craft careful arguments in support of below-Guideline sentences that are likely to be upheld on appeal.

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<sup>188</sup> A Westlaw search conducted on October 22, 2015 did not reveal any other courts of appeals cases applying closer review to child pornography possession cases. *See also* *United States v. Pugh*, 515 F.3d 1179, 1201 n.15 (11th Cir. 2008) (distinguishing U.S.S.G. § 2G2.2 from the crack cocaine Guideline because the Guideline is not “directly derived from Congressional mandate” and because the Sentencing Commission had not issued any statements reporting that § 2G2.2 “produces disproportionately harsh sanctions”). The Commission has since clarified that § 2G2.2 is the product of Congressional mandate. *See supra* text accompanying note 62. The Commission has indicated that the Guideline is in need of revision because “penalty ranges are too severe for some offenders and too lenient for other[s].” U.S. SENTENCING COMM’N, CHILD PORNOGRAPHY, *supra* note 63, at xviii. What is more, the *Pugh* Court conducted an analysis under *Gall v. United States*; it did not address the question whether “closer review” of a policy disagreement was warranted. *See Pugh*, 515 F.3d at 1189, 1194, 1200–01; *see also* *United States v. Irey*, 612 F.3d 1160, 1202–03 (11th Cir. 2010) (the Eleventh Circuit applied “closer review” to a below-Guideline sentence involving production of child pornography).

<sup>189</sup> *Bistline II*, 720 F.3d 631 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1514 (2014); *Bistline I*, 665 F.3d 758 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 423 (2012).

<sup>190</sup> *Robinson II*, 778 F.3d 515 (6th Cir. 2015), *cert. denied*, 135 S. Ct. 2904 (2015); *Robinson I*, 669 F.3d 767 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 929 (2013).