



## U.S. Department of Justice

### Criminal Division

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**Response to “A Reluctant Rebellion,”** by Alexandra Gelber, Assistant Deputy Chief, Child Exploitation and Obscenity Section, Criminal Division, United States Department of Justice, July 1, 2009.

I write in response to Mark Hansen’s article “A Reluctant Rebellion,” which appeared in the June 2009 issue of the ABA Journal. Although Mr. Hansen’s article raises questions about the child pornography sentencing guidelines, his piece speaks to a much more fundamental question about the legitimacy of the crime at issue. While Mr. Hansen does not explicitly argue that the collection, trade, viewing, and possession of images depicting the sexual exploitation and abuse of children should be legal, he does strongly question whether the crime should be treated as seriously as it currently is under federal law. Indeed, he writes, “Critics say the mandatory and recommended penalties for child porn offenses under the guidelines far exceed the seriousness of the crime committed by the typical offender who is swapping and downloading child porn online with other like-minded individuals in the presumed privacy of his own home.”

Mr. Hansen’s article perpetuates fundamental misunderstandings about the nature of the crime, the offenders, and the law. When properly understood, the substance and structure of the criminal provisions and sentences for these pernicious crimes show an appropriate response to an exploding crime problem.

#### ***The True Nature of These Images.***

The phrase “child porn,” used repeatedly by Mr. Hansen throughout his article, masks the true nature of what these images and videos portray, which is the sexual exploitation and abuse of children. In the 1970's and 80's, the typical sexually abusive images of children involved photos of nude children in sexual poses, what would be classified under federal law as a “lascivious exhibition of the genitals or pubic area.” 18 U.S.C. § 2256(2)(A)(v); *United States v. Petrov*, 747 F.2d 824, 829 (2d Cir. 1984); *United States v. Weigand*, 812 F.2d 1239, 1241 (9<sup>th</sup> Cir. 1987); *United States v. Dost*, 636 F. Supp. 828, 833 (S.D. Cal. 1986).

Over time, increasingly severe and graphic images have started to become the norm instead of the exception, depicting the violent sexual abuse of younger and younger children, including infants and toddlers. In a recent prosecution in the Northern District of Florida, fourteen defendants were convicted for participating in a newsgroup where they traded over 400,000 sexually abusive images and videos of children, including images of toddlers and the sadistic sexual abuse of children. See, <http://www.usdoj.gov/criminal/ceos/Press%20Releases/>

NDFL\_SEVEN-DEFENDANTS\_1-14-09.pdf. In some of these videos, the children can be heard screaming and crying in response to the physical assault. *See also, United States v. Cole*, 2009 WL 1443937 \*1 (6<sup>th</sup> Cir. May 22, 2009) (unpublished) (defendant admitted to possessing images of adult males engaged in sexual activity with infants); *United States v. Pugh*, 515 F.3d 1179, 1193 (11<sup>th</sup> Cir. 2008) (defendant's collection included a video of an adult male raping an infant girl and a picture of an adult male having sex with a toddler who wore a dog collar around her neck).

The collection amassed by the defendant in *United States v. Parmelee*, 319 F.3d 583 (3d Cir. 2003) provides a good example of what is seen today. Interspersed among nude images of young girls revealing their genitalia, which are illegal in their own right, are images of:

a naked, minor girl who appears to be screaming in pain as she is digitally penetrated on a bed; (b) two Asian girls, one naked and kneeling with a dog collar and leash around her neck; the other standing in a see-through bodysuit holding a whip in one hand and a leash in the other; (c) a series titled "Young Bondage" depicting a naked, minor female with a metal collar around her neck that was approximately two-and-a-half inches thick and had chains coming from it connected to straps around her wrists ... a picture of a naked, minor female ... lying down and inserting a partially peeled banana into her vagina ... a picture of a naked, minor female standing and holding the neck of a bottle which has been inserted into her vagina ... a picture ... depicting a partially clothed baby having a pacifier inserted into her vagina ... photographs of: minor females blindfolded with their hands and feet tied to a table [and] a minor female sitting with her legs straight up in the air in a "V" position while holding a bottle inserted into her vagina and what appears to be either a penis or a banana inserted into her mouth.

*Parmelee*, 319 F.3d at 586 n.3.

Thus, the collection, trade, and possession of such images are not illegal because of "polite society's disgust and revulsion" with pornography, or as one judge put it, "[o]ur 'social revulsion' against these 'misfits.'" *United States v. Paull*, 551 F.3d 516, 533 (6<sup>th</sup> Cir. 2009) (Merritt, J., dissenting). The heart of a child pornography case is not Victorian-era discomfort with sex, but the sexual exploitation of children through the ongoing mass circulation of images of their abuse. As the Supreme Court noted in *New York v. Ferber*, 458 U.S. 747, 756-57, 58 (1982), "It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling ... [and that] the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child" (internal quotation and citation omitted).

### ***The True Nature of the Harm Caused to the Victims.***

The trade of sexually abusive images of children inflicts unique harms upon its victims. As expressed by one victim, who survived a murder attempt by her mother, and five years of sexual

abuse, when she was aged 5-10, by her adopted father who shared images of that abuse (and also kept her chained in the basement and intentionally malnourished), “Usually, when a kid is hurt and the abuser goes to prison, the abuse is over. But because [the defendant] put my pictures on the Internet the abuse is still going on. Anyone can see them. People are still downloading them ... I’m more upset about the pictures on the Internet than I am about what [the defendant] did to me physically.”

Another child pornography victim, who was raped and bound repeatedly by a relative for 2 years starting at age 10, writes “thinking about all those sick perverts viewing my body being ravished and hurt like that makes me feel like I was raped by each and every one of them. I was so young ... It terrifies me that people enjoy viewing things like this ... Each person who has found enjoyment in these sick images needs to be brought to justice ... even though I don’t know them, they are hurting me still. They have exploited me in the most horrible way.”

These victims’ sentiments correspond to the Supreme Court’s view on these images, as it explained more than two decades ago:

The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children ... [T]he materials produced are a permanent record of the children’s participation and *the harm to the child is exacerbated by their circulation* ... [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

*Ferber*, 458 U.S. at 759-60 and n.10 (internal citations omitted) (emphasis added).

The David Grober case, mentioned by Mr. Hansen, brings the argument full circle. Among the 1500 images and 200 videos of child pornography found on the defendant’s computer were images depicting both of the victims quoted above, along with scores of other children, some who have been identified and rescued from their abusive situation and some who have not.

### ***The True Dynamic of the Crime.***

In addition to severely downplaying the content of these illegal images, and what necessarily happens in order for those images to be created, Mr. Hansen’s article also misrepresents the true dynamics of this crime, which he describes as the “swapping” of images in the “presumed privacy” of a defendant’s own home. In a similar vein, Federal Public Defender Troy Stabenow wrongly characterizes these defendants as the passive viewers of the crimes of others.

As a threshold legal matter, the possession of child pornography is properly prohibited by law, even when it is in “private.” *Osborne v. Ohio*, 495 U.S. 103, 110-11 (1990) (affirming the

constitutionality of laws prohibiting possession of child pornography).

More fundamentally, it is simply not possible to disconnect the collection, trade, viewing, and possession of these images from their production. Every defendant who receives sexually abusive images of children is not acting within the four corners of his own home, but rather is a participant in what Mr. Hansen acknowledges is a global market with millions of members—a market which constantly demands that more children be abused in order to create new images.

An ongoing international investigation succinctly makes this point. Operation Joint Hammer, and its European counterpart Operation Koala, are premised in part on the investigation of customers who accessed a website to purchase lengthy videos depicting the sexual exploitation of dozens of children from a web site. *See*, [http://www.usdoj.gov/criminal/ceos/Press%20Releases/JOINT-HAMMER\\_12-12-08.pdf](http://www.usdoj.gov/criminal/ceos/Press%20Releases/JOINT-HAMMER_12-12-08.pdf). The videos were made by the web site operator. This international investigation has generated leads in over 30 countries, and has led to scores of arrests in the United States so far, including child molesters and producers of child pornography. The web site operator was constantly creating new material for his customers, who kept coming back for more. Quite literally, if there had been no market for these illegal videos of child abuse, they would not have been made in the first instance.

As those investigations illustrate, child pornography collectors never innocuously download images in “private.” Rather, they are the engine of demand that fuels the molestation of children to create more supply. The Supreme Court recognized this dynamic over 25 years ago when it wrote, “the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.” *Ferber*, 458 U.S. at 759. The Supreme Court repeated this sentiment several years later when it commented that “It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand.” *Osborne*, 495 U.S. at 109-110.

There are other insidious dynamics of this crime, discounted by Mr. Hansen: the impact of the content on the viewer, and the impact the collectors have on each other. In his article, Mr. Hansen quotes Mr. Stabenow, who essentially suggests that child pornography laws are wrongly concerned that the images goad the consumers to commit future crimes: “People who watch movies like *Saw* and *Friday the 13th* are being titillated by the act of torture and murder ... That doesn’t mean that they’re going to go out and commit torture and murder.” The analogy does not hold water, principally because no one who watches *Saw* believes that the images of violence are actually happening, where in child pornography images, real children are actually being abused. Furthermore, what is the point of any pornography if not to stoke the fires of sexual desire.

More importantly, Congress has found that the individuals who collect these images are affected by the real abuse they portray: “child pornography is often used by pedophiles and child sexual abusers to stimulate and whet their own sexual appetites ...; such use of child pornography can

desensitize the viewer to the pathology of sexual abuse or exploitation of children, so that it can become acceptable to and even preferred by the viewer”. Omnibus Consolidated Appropriations Act of 1997, PL 104-208, § 121 (September 30, 1996) 110 Stat. 3009-26.

Additionally, through the internet, child pornography collectors can operate in world populated exclusively by “like-minded individuals” who tell them that it is normal to have a sexual attraction to children, and that it is acceptable to act on that attraction. This message, conveyed through the images themselves, erodes the societal mores which would otherwise inhibit them from satisfying that impulse. These images diminish the shame that someone might have felt about having an attraction to children, which lowers the barriers to indulging that attraction. Every defendant who provides a sexually abusive image to someone else is saying that it is OK to be exploiting children this way. When committing these crimes, each defendant necessarily enables and emboldens others, which is one more reason why this activity is properly criminalized and punished.

### ***The True Threat of These Defendants.***

With that as a backdrop, it becomes clear that, contrary to Mr. Hansen’s suggestion, individuals who have collected or viewed child pornography have exploited children. Put another way, the distribution, receipt, viewing, and possession of child pornography is a distinct and egregious form of child exploitation worthy of punishment in and of itself. As these individuals collect these illegal images, they exploit the children in the images. As they trade them among other “like-minded individuals,” they reinforce the concept that a sexual attraction to children is normal and acceptable. As they establish contacts and networks to facilitate the trade and discussion of these images, they contribute to the market demands for more product, which means more child abuse.

Nonetheless, woven throughout Mr. Hansen’s article is the theme that individuals who collect and trade child pornography are not really a threat to children or society, certainly not in the way that “actual” child molesters are. It is here where critics of child pornography laws attempt to have it both ways. On the one hand, they argue that child pornography collectors are not a danger to children. On the other, as indicated in Mr. Hansen’s article, they argue that the defendants amass these images for their “personal gratification” or are “titillated” by what they see.

Jon Hanson, one of the defendants profiled in the article, adopted the first argument, claiming not to be a danger to children. Upon receiving images that included pictures of a seven-to-eight-year-old girl being sexually penetrated by an adult male, Mr. Hanson would write to other like-minded individuals that he “wanted to f\*\*k one so bad,” or that he wanted to rape a young girl. Eastern District of Wisconsin, No. 07-cr-330, Sentencing Transcript, June 19, 2008, page 23 (hereinafter “Transcript”). It does not seem a difficult argument to make that there is legitimate cause for concern when someone reacts to a video of a child being sexually assaulted, not in horror, but in envy of the participants and with a desire for more material.

By repeating an argument that is often made by defendants in child pornography trafficking and possession cases—that these offenders pose “little or no threat of physical harm to any children”—Mr. Hansen disregards the harm already caused children through the continued circulation and consumption of these images. Moreover, it is difficult to understand how Mr. Hansen can conclude that a child pornography collector does not, and will not, pose a physical threat to a child, especially when he himself writes that “there is no published research on the odds that viewers of child porn will actually assault a child,” and quotes a psychiatrist who says, “There’s nothing very definitive when it comes to sexual disorders, especially sexually disorders involving children.” This lack of definitive information does not stop Mr. Hansen and countless defendants from repeatedly making the self-serving argument that they are not a threat to children.

Whether or not one can predict what an individual might do, there is some statistical evidence that consumers of child pornography may also be child contact offenders. Contrary to the statements in the article, a study has been published indicating that among individuals who were convicted federally of trafficking or possessing child pornography, there was a high incidence of previously undisclosed contact offenses against children. Bourke, M.L, Hernandez, A.E. (2009). *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*. Journal of Family Violence, 24(3), 183-191.

Moreover, on May 30, 2009, the G8 Ministers of Justice and Home Affairs issued a declaration on “*The Risk to Children Posed by Child Pornography Offenders*.” See, [http://www.governo.it/GovernoInforma/Dossier/G8\\_interno\\_giustizia/pedo\\_pornography.pdf](http://www.governo.it/GovernoInforma/Dossier/G8_interno_giustizia/pedo_pornography.pdf). In this declaration, the Ministers take note of the findings of an international group of experts who participated in a symposium in April 2009 to develop consensus on the risks to children associated with child pornography. Among the points of consensus was the conclusion that “there is sufficient evidence of a relationship between possession of child pornography and the commission of contact offenses against children to make this a cause of acute concern.”

Setting aside whether there is a causal connection or even a correlation between child pornography and child molestation, those who collect child pornography exploit and victimize the children in those images, and create a demand for the production of more child pornography, regardless of whether they have ever personally molested a child.

To further bolster their claim that they are not dangerous, and therefore should not be punished harshly, defendants often cite to their purported lack of criminal history. (Of course, a defendant’s lack of criminal history is already accounted for in the sentencing guidelines, and thus is not a proper basis for reducing the recommended sentencing level. *United States v. McCart*, 377 F.3d 874, 877 (8th Cir. 2004)).

Often, the lack of a criminal history hides years of systemic criminal behavior. The defendants simply had never been caught—the anonymous nature of internet-based crimes and the silent and secret nature of sex crimes in general (particularly with a vulnerable population such as children) protect defendants from detection by law enforcement whether they are collectors or molesters.

The very case highlighted in the article proves this point: according to the article, Jon Hanson had been violating the law by collecting sexually abusive images of children for “*several years.*” He may have been “an otherwise law abiding father of three,” but when it came to the child pornography laws that he was willing to break, he did so persistently, consistently, and with unwavering dedication. Notably, his effort to rehabilitate himself came only after his arrest.

Moreover, you can talk to any prosecutor or investigator in this area and they will tell you in no uncertain terms that with frightening frequency, investigations of offenders for possession, receipt or distribution offenses ultimately uncover evidence that the offender was also abusing children. The first victim quoted above was rescued only when law enforcement conducted a search of her abuser’s home looking for evidence of the collection and trade of child pornography; no one had any idea that she was being molested as well. The “otherwise law abiding” citizens I’m talking about here include professors, teachers, coaches, fathers, lawyers, doctors, foster parents, adoption agency owners, and more.

Make no mistake. Child pornography defendants can sometimes appear outwardly to be upstanding citizens and members of their community; the defendants selected for discussion in Mr. Hansen’s article are certainly presented in that light. Unlike gang members, drug runners, alien smugglers, and illegal gun dealers, these defendants typically do not make their living through the violation of the law. It can be difficult to understand how someone who has so much to lose would be involved in something so debased as the trade of child pornography. These defendants may not present as criminals, but they are criminals nonetheless. That their fall from grace may have been more dramatic than other criminals does not mitigate the seriousness of the crime.

Comparing child pornography defendants to white collar defendants highlights this point. The Bernie Madoffs of the world are married, have children, have no criminal history, and outwardly appear to be pillars of their community, yet the devastating nature and scope of their criminal conduct remains in sharp focus. In child pornography cases, however, there is a distressing tendency to place greater emphasis on a defendant’s outer appearance of normalcy than on his criminal conduct, which can lead to an under-estimation of their danger and an over-estimation of their capacity for rehabilitation.

For example, in the David Grober case, the district court wrote “For this middle-class, white collar professional, educated, suburban husband and father, the thought of one day in prison is horrifying, particularly given the offense of conviction. Any prison sentence, let alone the mandatory minimum of five years, accomplishes specific and general deterrence.” *United States v. Grober*, 595 F.Supp.2d 382, 409 (D.N.J. 2008). In fact, the prospect of five years in prison was not adequate to prevent the defendant from committing his crimes in the first place. The Court’s conclusion that one day in prison would be adequate to keep that citizen from committing a child pornography crime was belied by the very facts before it. The district court also suggests that the shame and humiliation of getting caught is punishment enough. *Id.* at 404, 409. It is worth wondering why such arguments are accepted for defendants like Grober but not for defendants like Madoff.

### *The True Conduct Punished by the Child Pornography Laws and Sentencing Guidelines.*

If the argument that individuals who distribute, receive, view, and possess child pornography do not pose a physical threat to children is one side of the coin, the other side of the coin is the suggestion, made throughout Mr. Hansen's article, that the child pornography trafficking and possession laws and guidelines serve as mere proxies used to punish child molestation. For example, he writes, "The guidelines are predicated on the untested assumption that anyone who would access and view child porn is a potential child molester." He also includes a comment by Mr. Stabenow that "the child porn guidelines, in effect, punish for presumed future behavior." Factually and legally baseless, both arguments are made by defendants seeking to escape punishment for their crime.

Together, the suggestion that these defendants are not dangerous and that the guidelines simply seek to reach past or future molestation sets up a false syllogism: the child pornography guidelines really punish the molestation of children; there is no evidence that this defendant has molested children; there is no evidence that his collection of child pornography will cause him to molest children in the future; therefore, he should not be punished.

This argument fails for no other reason than the fact that the child pornography laws are not premised on the assumption that all collectors are also abusers. The child pornography laws were not designed to serve as a method of catching child rapists by other means, although they may sometimes function that way. Rather, as already explained, they prohibit the exploitation of children through the collection of the images, a distinct and deplorable form of child abuse that inflicts specific harms upon its victims.

Thus, whether or not Jon Hanson had ever "done anything inappropriate around a child during his entire life," he nonetheless spent years exploiting children through the collection of images of their abuse. Further, as is discussed in more detail below, there is only one sentencing enhancement in the child pornography trafficking guideline which increases a defendant's sentence for based on his molestation of a child, and it applies, not in cases where there is a prediction of future dangerousness, but in cases where there is a demonstrated pattern of child exploitation.

Although it serves a defendant's goal of seeking to avoid punishment for his crime, any suggestion that the unspoken goal of child pornography laws is merely to accomplish preventative detention of molesters is simply not based in fact. To the contrary, neither Congress nor the Supreme Court has ever suggested that the child pornography trafficking and possession laws are premised exclusively on the idea that all consumers of these illegal images are or will be contact offenders. The legislative history pertaining to the passage of the original child pornography trafficking laws in the late 1970s indicates that the "legislation [is] designed to eliminate the exploitation of children in pornographic materials ... [and to] increase the deterrent effect of current federal statutes dealing with the sale and distribution of such materials through interstate or foreign commerce." S. Rep. No. 95-438 (1977), *reprinted in* 1978 U.S.C.C.A.N. 40, 41, 55. The Supreme Court later noted the most efficient method of combating



the production of child pornography was to penalize its distribution and possession. *Ferber*, 458 U.S. at 760; *Osborne*, 495 U.S. at 109-110. Thus, the child pornography trafficking laws were conceived, not as a method to punish contact offenders, but one to stop the abuse of children by others by eliminating the market for such images.

***Child Pornography Sentences Are Appropriate.***

Mr. Hansen's primary argument against the severity of federal child pornography laws is essentially premised on parity, as he repeatedly references criticism that the guidelines "treat first-time offenders with no history of abusing or exploiting children as seriously as murders, rapists, or child molesters ... You can get a lower score for killing somebody than for downloading child porn ... Most people would be hard pressed to explain why a child porn offender deserves to be punished more severely than somebody who uses the Internet to try to entice a child into having sex."

When attempting to draw comparisons between murder, rape, child molestation or enticement, and trafficking and possessing child pornography, it is important to have the proper context. Nowhere in his article does Mr. Hansen state what the sentences actually are under federal law for murder, rape, and child molestation. Without that information, no true comparisons can be drawn. Looking at the statutory punishments and sentencing recommendations under the Sentencing Guidelines, Mr. Hansen's argument falls apart. With few exceptions, the statutory penalties and minimum recommended sentences for murder, rape, child molestation, and child enticement are higher than those for child pornography trafficking and possession for first time offenders. The following chart is illustrative:

<b>Crime</b>	<b>Statute</b>	<b>Applicable Sentencing Guideline</b>	<b>Statutory Sentence</b>	<b>Base Offense Level</b>
<b>Murder in the first degree</b>	18 U.S.C. § 1111	U.S.S.G. § 2A1.1	Death penalty or life in prison	43 (life in prison)
<b>Murder in the second degree</b>	18 U.S.C. § 1111	U.S.S.G. § 2A1.2	Up to life in prison	38 (235-293 months)
<b>Voluntary manslaughter</b>	18 U.S.C. § 1112	U.S.S.G. § 2A1.3	Up to 15 years	29 (87-108 months)
<b>Involuntary manslaughter</b>	18 U.S.C. § 1112	U.S.S.G. § 2A1.4	Up to 8 years	12-22 (10-51 months)
<b>Forcible rape</b>	18 U.S.C. §§ 2241(a)-(b), 2242	U.S.S.G. § 2A3.1	Up to life in prison	30 (97-121 months)
<b>Child rape (under 12)</b>	18 U.S.C. § 2241(c)	U.S.S.G. § 2A3.1	Thirty years to life	38 (235-293 months)
<b>Statutory rape (child aged 12-15)</b>	18 U.S.C. § 2243	U.S.S.G. § 2A3.2	Up to 15 years	18 (27-33 months)
<b>Enticement or transportation of a child</b>	18 U.S.C. §§ 2422(b), 2423(a)	U.S.S.G. § 2G1.3	Ten years to life	28 (78-97 months)
<b>Distribution of child pornography</b>	18 U.S.C. §§ 2252(a), 2252A(a)	U.S.S.G. § 2G2.2	5 to 20 years	22 (41-51 months)
<b>Receipt of child pornography (no intent to distribute)</b>	18 U.S.C. §§ 2252(a), 2252A(a)	U.S.S.G. § 2G2.2	5 to 20 years	20 (33-41 months)
<b>Viewing or possessing child pornography</b>	18 U.S.C. §§ 2252(a), 2252A(a)	U.S.S.G. § 2G2.2	Up to 10 years	18 (27-33 months)

Looking at what the law provides, there is no question that the most serious murderer, rapist, or molester is generally treated more seriously under federal law than the most serious child

pornography collector. Of note, someone who actually has sex with a child under the age of 12 faces a sentence of thirty years to life, while someone who views or possesses a sexually explicit image of a child under the age of 12 would have a recommended sentence of 41-51 months and could not receive a sentence in excess of 10 years. Thus, Mr. Stabenow is plainly wrong when he complains that the child pornography guidelines “equate the titillation of witnessing an illegal act with its actual commission.”

It is true that a defendant could theoretically receive a lower sentence for killing someone than for collecting child pornography, but to achieve that result, you would have to compare the least serious offender of one type of crime (involuntary manslaughter caused by negligence) with the most serious offender of the other (a child pornography distributor with a large collection of extremely young children being sadistically abused and with a history of abusing children), at which point any attempt to draw comparisons across these crimes has little meaning. Further, while murder, rape, and molestation are very serious, the number of victims harmed by a such defendants is often low, while child pornography offenders victimize hundreds and even thousands of children through their collection of these illegal images.

### ***The Child Pornography Guidelines Make Sense.***

In his article, Mr. Hansen states, without explanation, that Congress was being “arbitrary and irrational” in the direction it provided to the Sentencing Commission concerning 2G2.2, the guideline that applies to child pornography trafficking, viewing, and possession cases. While individuals may disagree at the margins, the substance of the 2G2.2 guideline is eminently sound, as becomes apparent upon closer look at the structure of this guideline. In the simplest terms, the base offense level rises from an offense level of 18 for simple possession cases (27-33 months), to 20 for receipt without intent to distribute (33-41 months), and to 22 for other receipt and distribution cases (41-51 months). Correctly anticipating that certain specific offense characteristics would apply in most cases, the Sentencing Commission set the base offense levels for receipt and distribution cases well below the five-year mandatory minimum.

The guideline calls for an increased sentence if the defendant had images of children under the age of 12 (+2 levels), if he had images that depict sadistic, masochistic, or violent conduct (+4 levels), if the defendant engaged in a pattern of child sexual abuse or exploitation (+5 levels), and if the offense involved the use of a computer (+2 levels). The guideline also calls for a higher sentence based on the number of images involved, from +2 levels for a collection between 10-150 images, +3 levels for having 150-300 images, +4 levels for having 300-600 images, and +5 levels for having more than 600 images. Finally, there are a number of enhancements for distribution, including a +2 level enhancement for simple distribution, +5 levels for distribution in exchange for a thing of value (such as other images) and distribution to a minor, a minimum of +5 levels enhancement for distribution for pecuniary gain, +6 levels for distribution to a minor with intent to persuade the minor to engage in illegal activity, and +7 levels for distribution to a minor with intent to persuade the minor to engage in prohibited sexual conduct.

When considering the actual provisions of the guideline, it becomes apparent that they are, in fact, premised on a great deal more than “the general revulsion that is associated with child exploitation-related offenses.” *United States v. Shipley*, 560 F. Supp. 2d 739, 744 (S.D. Iowa 2008). This is especially so because the concepts that underpin this guideline are not novel. For example, imposing a higher sentence on defendants with larger collections of contraband is hardly arbitrary and irrational. The drug, explosives, and gun guidelines also provide for higher sentences based on the volume of contraband involved, and the fraud and theft guidelines recommend higher sentences in cases with larger losses. *See*, U.S.S.G. §§ 2D1.1 (drugs), 2D1.11 (chemicals), 2K1.3 (explosive material), 2K2.1 (guns and ammunition) 2B1.1 (fraud), 2B2.1 (burglary).

As another example, consider the enhancement for sadistic and violent images. This echoes enhancements found throughout the guidelines which apply depending upon the severity of the physical injury to the victim. *See*, U.S.S.G. §§ 2A2.1 (assault), 2A2.2 (assault), 2A3.1 (sexual abuse), 2A4.1 (kidnapping), 2B3.1 (robbery), 2B3.2 (extortion). As 2G2.2 does, other guidelines provide for enhancements when pecuniary gain is involved, such as in the assault guidelines found at U.S.S.G. §§ 2A2.1 and 2A2.2. Other guidelines also call for higher penalties when younger victims are involved. *See*, U.S.S.G. §§ 2A2.3 (minor assault), 2A3.1 2A3.4 (sexual abuse).

As it is for those crimes, it is completely logical in child exploitation cases that a defendant who had a larger collection, who had pictures of younger children, or who had violent pictures has committed a more serious crime than someone who does not.

Looking at 2G2.2, it is clear that Mr. Hansen is flatly wrong when he writes that “The guidelines make no clear distinction between the offender who swaps a few images online with another offender and the mass producers and distributors who make and market such material to millions of potential customers worldwide.” If sentenced under 2G2.2, a mass producer and distributor would receive *at least* a 5 level enhancement, which could go higher depending on the amount of proceeds generated, while someone who was only “swapping” images could receive only a 2 level enhancement. Further, a mass producer, advertiser, and distributor would probably be charged under 18 U.S.C. § 2251 and sentenced per U.S.S.G. § 2G2.1 for producing and marketing the images in the first instance, which carry a higher sentencing range and guideline scheme than the trafficking provisions.

Mr. Hansen makes an oblique reference to “an enhancement so ill-defined that they apply in almost every case,” which I take to mean the +2 enhancement for use of a computer. Far from being ill-defined, the enhancement is quite clear: it applies when the defendant used a computer or the internet to receive, distribute, receive, or possess these illegal images. While it is true that this enhancement applies in nearly every case, as noted above the Commission knew that would be the case, and so established a lower base offense level to account for this:

The Commission determined that a base offense level of 22 is appropriate for trafficking because, when combined with several specific offense characteristics

which are expected to apply in almost every case (e.g. use of a computer, material involving children under 12 years of age, number of images), the mandatory minimum of 60 months' imprisonment will be reached.

*See* Amendment 664, U.S.S.G. App. C. Thus, the Commission negated any impact that would be caused by the frequent application of those enhancements when it established the base offense level for the crimes.

Other criticisms of the guidelines mentioned in Mr. Hansen's article are not borne out by the facts. For example, he states that the enhancement for quid pro quo trading is not sufficiently distinct from the underlying crime. That is simply not true. In the quid pro quo trading that Mr. Hansen describes—where images are traded in exchange for other images—there are necessarily several criminal actors who are facilitating each other's further criminal behavior. This kind of "give-to-get" trading is particularly dangerous, because it can turn a collector into a producer: in order to have the requisite "new" images needed to barter for images in return, a defendant may decide to produce images of his own abuse of a child.

In his article, Mr. Hansen also quotes two defense attorneys who offer these mutually exclusive complaints about 2G2.2. One says that "the child porn guidelines, in effect, punish for presumed future behavior." Another says that "They break down the basic offense into all these tiny little increments that almost repeat one another and then come up with this astronomical number." While one says that the guidelines are too focused on future criminal activity, the other says the guidelines are too focused on the various aspects of distribution, receipt, and possession. Neither position is correct.

As shown above, there is absolutely nothing in the guidelines which in any way increases the defendant's sentence based on a prediction of future dangerousness. Each specific offense characteristic is clearly tied to what the defendant actually did—not what he will do—in the commission of the instant offense. As for the second comment, it is hard to see the substantive overlap between enhancements based on the degree of violence in the images, the age of children, the size of the collection, the nature of the distribution, and the defendants' prior illegal activity.

### ***The Guideline Range for the "Typical" Offender.***

After stripping away the baseless criticisms, the disagreement with the 2G2.2 guideline boils down to the perception that the child exploitation sentencing guidelines are designed such that "the typical offender charts at a guideline range that automatically exceeds the statutory maximum, even when there is full acceptance of responsibility, complete cooperation with law enforcement officials, little or no threat of physical harm to any children, and no criminal history."

Without any description by Mr. Hansen as to who the "typical offender" is, it is impossible to respond to his point with precision, but as a general matter we do not accept the accuracy of his

claim. We do note two things, however. First, Mr. Hansen's claim that the typical offender charts out above the statutory maximum is contradicted by his acknowledgment that the average child pornography sentence in 2007 was 97 months, which is near the mandatory minimum sentence, not the maximum.

Second, Mr. Hansen writes that "a person who only views and downloads child porn online faces a recommended sentence of 210-262 months." The only way a defendant who only downloaded images could get a sentence that high would be if a number of aggravating factors applied. The base offense level for receipt without intent to distribute is effectively 20, which corresponds to a sentence of 33-41 months. In a such a receipt case, none of the distribution enhancements apply. Thus, in order to get a sentence range anywhere close to 210-262 months under Mr. Hansen's hypothetical, the court would have to apply every single remaining aggravating factor, including the five level enhancement for engaging in a pattern of child sexual abuse or exploitation. Thus, a sentence in that range is reserved, not for Mr. Hansen's "casual collector," but for extremely serious offenders.

It is worth noting that Jon Hanson and David Grober, two of the defendants profiled in the article, faced recommended sentences of 210-262 and 235-293 months, respectively, for their distribution of child pornography. This was due, in large part, because both of the defendants' offense level was increased by five levels because they engaged in trading for a thing of value—they would share images only with those who shared images in return. Transcript, page 5; *Grober*, 595 F.Supp.2d at 386, 389. This automatically takes them out of the realm of the "typical" offender and places them in a more serious category, as that particular sentencing enhancement has only been applied in a scant 12% of such cases. *See*, [http://www.ussc.gov/gl\\_freq/08\\_glinexgline.pdf](http://www.ussc.gov/gl_freq/08_glinexgline.pdf), pg. 36.

Contrary to Mr. Hansen's claim, a defendant who receives all of the most commonly applied sentencing enhancements and accepts responsibility for his conduct will not receive a guideline recommendation anywhere near the statutory maximum. As of FY 2008, the most commonly applied enhancements are +2 levels for images of prepubescent children, +4 levels for sadistic or masochistic content, +2 levels for use of a computer, and +5 levels for having more than 600 images. *See*, [http://www.ussc.gov/gl\\_freq/08\\_glinexgline.pdf](http://www.ussc.gov/gl_freq/08_glinexgline.pdf), pp. 36-37. In a distribution case involving those characteristics, that would result in a total offense level of 37. After a 3 level reduction for acceptance of responsibility, this yields a recommended sentencing range of 151-188 months, which falls in the mid-point of the statutory sentence range. A receipt case with those enhancements has a total offense level of 33, or 30 after a plea (97-121 months). A viewing or possession case with those enhancements carries a total offense level of 31, or 28 after a plea (78-97 months).

Therefore, Mr. Hansen's arguments concerning the guidelines are not anchored in fact.

If anything, the fact that many of the enhancements tend to apply in most cases—meaning that most offenders amass collections in excess of 600 images which depict the sexual abuse of children under the age of 12 and the sadistic or masochistic abuse of children—simply

underscores the fact that this crime problem has steadily increased in severity, which necessitates meaningful sentences that have the deterrent value to shut down the market for this abuse.

### ***A Growing, and Misunderstood, Crime Problem.***

At the end of the day, Mr. Hansen's article advances no credible argument for why current child pornography sentences "far exceed" the nature of the crime. (His argument that the sentencing "problem" is caused by the Justice Department's use of its prosecutorial discretion to charge "low-level" offenders who receive and distribute child pornography with the receipt and distribution of child pornography is too absurd to warrant discussion.) All that is left is the simple fact that the average child pornography sentence has increased in the last ten years. In his article, Mr. Hansen notes that the sentence for child pornography defendants increased by 350% over the 10 years from 1997-2007, from less than 21 months to more than 91 months.

That the average sentence has risen does not mean that the average sentence is now too high.

The context is critical. At the same time that the average child pornography sentence was rising, so was the extent of the crime, both in terms of frequency and severity. As Mr. Hansen notes, as the average child pornography sentences has risen, so to has the rate of child pornography prosecutions, from a few dozen a year in the late 90's to well over 2000 per year in the last few years.

Mr. Hansen fails to draw the meaningful conclusion from those pieces of statistical information: as the crime is treated more seriously by the law, it still is not taken seriously by the defendants who are "surprised" when they are prosecuted under these laws. Even with the punishments available now, Mr. Hansen's article indicates that defendants "have no idea that it's a crime, let alone a federal crime punishable by five or ten or twenty years in prison." Even Mr. Stabenow admits that child pornography defense is a "growth industry." It is astonishing that as the crime problem is actually worsening there can be talk that it should be treated *less* seriously under criminal law, or that critics could suggest that Congressional efforts to address this problem is little more than a "sex panic."

At its heart, the current criticism of child pornography sentences is not really about the degree of the sentence imposed on these defendants, but rather whether the distribution, receipt, viewing, and possession of child pornography—activity which the Supreme Court recognized in *Ferber* as being "intrinsically related to the sexual abuse of children"—should be viewed as a crime at all. 458 U.S. at 759.

Courts have imposed below guideline sentences in distribution, receipt, or possession cases almost exclusively where there is no evidence that defendants engaged in any form of child exploitation other than through the collection of images, that is, in cases where defendants distributed, received, viewed, or possessed child pornography but had not enticed or molested a child. Salvatore Graci, a former elementary school teacher who subscribed to child pornography websites, was sentenced on June 30, 2009, in the Eastern District of Pennsylvania to one day in

prison because, according to the court, there was no evidence presented that the defendant ever acted in a predatory way towards minors. *See also, Shipley*, 560 F.Supp.2d at 741, 44-45, *Grober*, 595 F.Supp.2d at 384-86, *United States v. Szymanski*, 2009 WL 1212252 \*3 (N.D.OH 2009), *United States v. Beiermann*, 599 F.Supp.2d 1087, 1091-93 (N.D.IA 2009), *United States v. Smith*, 275 Fed.Appx. 184, 184-86 (4<sup>th</sup> Cir. 2008) (unpublished), *United States v. Rowan*, 530 F.3d 379, 380 (5<sup>th</sup> Cir. 2008), *United States v. Duhon*, 541 F.3d 391, 394-95 (5<sup>th</sup> Cir. 2008), *United States v. Weller*, 2009 WL 1349779 \*1-2 (6<sup>th</sup> Cir. 2009), *United States v. Prisel*, 316 Fed.Appx. 377, 378-79 (6<sup>th</sup> Cir. 2008) (unpublished), *United States v. Autery*, 555 F.3d 864, 867-68 (9<sup>th</sup> Cir. 2009), *United States v. Huckins*, 529 F.3d 1312, 1314-15 (10<sup>th</sup> Cir. 2008).

In contrast, in cases where the defendants both collected child pornography images and molested children, little to no criticism is heard that the child pornography guidelines are an excessive reaction caused by simple revulsion.

The conclusion to be drawn from these cases is clear: when a court expresses concern about the purported empirical basis of the child pornography trafficking guideline, the question actually being asked centers on the legitimacy of the crime in the first instance. This hidden truth becomes most obvious in cases where the courts impose the lowest possible sentence (a probation sentence in a possession case or a five year sentence in a receipt or distribution case). A disagreement with the guidelines at the margins is one thing, but a wholesale disregard for every and all recommended aggravating factors is quite another. Courts which resolve their “disagreement” with the substance or basis of the guidelines by ignoring their content completely are not asking when “enough is enough,” but rather, are revealing a fundamental disagreement with the crime or a lack of understanding of these defendants.

The problem, then, is not really with the guidelines, but with the our understanding and appreciation of the true nature of the crime and the harm caused by these defendants. It appears that it is easy to understand traditional child exploitation where the defendant and the victim are face to face, but harder to understand the severity of the crime when a computer stands between the defendant and victim. There is no other way to explain results such as those in the Graci case, where a court concluded that a one-day sentence is appropriate in a child pornography case involving a teacher who held a position of trust over young children. When it comes to the sexual exploitation of children, is the best response really to slap the defendants on the wrist and to tell them not to do it again? If nothing else, what deterrent value could such a sentence possibly have on the individuals out there still participating in this form of child exploitation?

The implication ultimately made by the cases where the courts wholly disregard or sharply discount the severity of child pornography trafficking offenses and sentences, as well as Mr. Hansen’s and Mr. Stabenow’s arguments, is that the federal government should use the child pornography laws only against known child sex offenders. We simply cannot accept any argument that child pornography trafficking prosecutions are only legitimate in cases involving defendants who have also engaged in other forms of child sexual exploitation. If nothing else, that approach would effectively legalize the collection, receipt, and trade of child pornography except in the most egregious circumstances. Such a result would be catastrophic for children and



for our efforts to protect them.

Imagine a scenario where the production of cocaine was illegal, but its transportation, sale, receipt, and possession were legal. The legalization of the trade of these drugs would effectively remove the barriers to the circulation of this contraband. From a law enforcement perspective, the only way to combat the crime would be to target the producers, but there would be no method of stopping the transporters and consumers who facilitate the spread of the contraband and keep demanding more.

The only viable approach is the one recognized by the Supreme Court in *Ferber* and *Osborne*, that is, that “the most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties” on all activity along the entire distribution chain, from producer to possessor, whether or not those possessors are contact offenders as well. *Ferber*, 458 U.S. at 760; *Osborne*, 495 U.S. at 109-110. We cannot combat the sexual exploitation of children if the possessors, the viewers, the receivers, and the distributors are not held accountable for their contribution to the problem.

### ***A Victim’s Mother Speaks.***

The Supreme Court has noted that “child pornography harms and debases the most defenseless of our citizens. Both the State and Federal Governments have sought to suppress it for many years, only to find it proliferating through the new medium of the Internet.” *United States v. Williams*, 128 S.Ct. 1830, 1846 (2008). Mr. Hansen’s article essentially asks whether those the laws meant to suppress this crime are truly legitimate. I will let the mother of a child pornography victim, whose images are now circulating the world on the internet, have the final word on that question:

[M]y daughter was abused repeatedly to produce images for the purpose of being traded [and] shared over the internet. Without a market to receive and trade those images, without the encouragement of those who wanted to acquire the images, I truly believe this abuse would not have occurred.

All those who trade these images and thereby create the demand for lurid and violent depictions of children are participants in the exploitation of my daughter. Each traded picture that placed a value on inventiveness, novelty, or cruelty played a role in egging on the abuser to even more vile acts.

The pictures of my daughter were ‘made for trade’ - her abuser adapted to serve his market - whatever his audience was looking to acquire, that’s what happened to her ...

Producer, distributor, and consumer- everyone who participates in this evil exchange helps create a market, casting a vote for the next abuse. Regardless of whether they directly abused children themselves, reveled in the images of

suffering, or persuaded others to abuse children on their behalf (to provide images of the abuse) each participant has a responsibility for the effects...

[As for my daughter,] a shadow ... comes over her face if a stranger gives her an unexpected compliment. The pictures are still out there ...

Now that she's growing older and realizing the extent of the internet, she's also beginning to grasp the darker side of the story - how many people see those same pictures as something to enjoy rather than abhor.

We have no way of knowing how many pedophiles used the pictures of her being tortured and degraded as an opportunity for personal gratification ...

I struggle with anger at the unbounded nature of this continuing exploitation and the arrogant callousness of those who perpetuate it.

If I had my way, each and every image of my daughter's sufferings would be burned. Then she would no longer have to worry about those images being used to further hurt or humiliate her. But as it is, there are those who have no shred of decency, and continue to copy and pass on these pictures ...

I can find no words to express the fury I feel at those who participate in this evil, or my scorn for any attempt to minimize responsibility by feeble claims that the crime was 'victimless.' My daughter is a real person. She was horribly victimized to provide this source of 'entertainment.'" She is exploited anew each and every time an image of her suffering is copied, trade, or sold. While the crime is clearly conscienceless, it is hardly 'victimless.'

I asked my daughter what she most wanted to ask of the judge. Her request: 'Please, don't let them pretend no-one's getting hurt.'

\* \* \*