THE SEX OFFENDER

CURRENT TRENDS IN POLICY AND TREATMENT PRACTICE

VOLUME VII

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2012

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ISBN 978-1-887554-87-9

Preface

As I sat pondering what to discuss in this Preface, I began reminiscing about the evolution of the field of sex offender treatment. Since I have been in the field for over forty years, I have seen the trials and tribulations of the profession in general and my colleagues in particular. I have met individuals who qualified for sainthood and others who were definitely on the wrong side of prison bars. A few of the original individuals doing this work, such as Gene Abel, Jim Haaven, Steve Bengis, Rob Longo, and Carol Ball, are still around and actively involved in the field. Others, such as Nancy Steele and Murray Cohen, are retired and enjoying life. Still others, such as Fay Honey Knopp, Jan Hindman, Theo Seghorn, Roger Wolfe, and Steve Hudson, have passed on and left us to benefit from their legacy and wonderful memories.

I suppose one could not survive in this field without having a sense of humor. Consequently many of the fondest memories of my career involve gatherings of my peers (granted our humor may not be appreciated by all). I can see Jan Hindman presiding over the opening of an Association for the Treatment of Sexual Abusers (ATSA) meeting with a petrified walrus penis as a gavel; Gene Abel showing a slide show of penile implants at the speaker's dinner in the very staid Harvard Club in Boston; a sign at the Disney World Hilton consisting of an arrow pointing to a breakout room with the words "Serial Murderers" on it, and the poor newlyweds who were sharing a conference center with an ATSA conference and whose wedding guests had to maneuver their way through a heated debate of whether one can rape a corpse. I also remember the looks on the faces of our fellow diners when a group of us would descend on a restaurant and begin our "shop talk." After a number of years in our field one begins to lose to all vestiges of social acceptability. However, we have had fun and, I hope, along the way helped our patients transform their lives.

One also needs that sense of humor, as the context in which we practice our profession can be extremely challenging. Private practice with involuntary patients is fraught with frustrations. It is difficult enough to deal with resistant clients who may be in total denial, but it is outright heartbreaking to deal with individuals who are motivated but are homeless, unemployed, and rejected by society but still struggling toward recovery. I was speaking with a fellow therapist who told me that his homeless patients were celebrating Thanksgiving in his office as that is the closest thing they have to a home. Cutbacks in Medicaid may deprive impoverished sex offenders of therapists, either because they cannot afford the fee or because their therapists can no longer afford to offer treatment to this population. This could mean that many of these individuals would be imprisoned for probation or parole violation or, tragically, for a reoffense. Trying to offer sex offender treatment in prisons can be either highly rewarding or unbelievably frustrating. I have worked in both systems and speak from experience.

Fortunately, I now run a program for the Maine Department of Corrections, which currently could not be more supportive of treatment. Although faced with major financial problems, it has continued to support its treatment programs. Officers are actively involved in treatment. Administrators and therapists work hand-in-hand. Thanks to the active cooperation between my employer, Counseling and

Psychotherapy Center, and the Maine Department of Corrections, after six years we have so far achieved our goal of "No More Victims."

Other than the efforts of the individual authors of the chapters, this volume is largely the work of its publishers and editors at Civic Research Institute including Mark Peel, Deborah Launer, and Lori Jacobs. I am indebted to them for their patience and their meticulous attention to detail. I also wish to thank my colleagues at Counseling and Psychotherapy Center including Barry Anechiarico, Tom App, Dennis McNamara, and Tim Sinn, as well as my fellow therapists at the R.U.L.E. Program—Gordon Winchell, Hannah Monaco, Lindsey Wellman, Bill English, and our unit director, Penny Bailey—as well the administrators and our unit team at the Maine Correctional Center. Finally, I thank my family, including Ed, Ben, Karen, Bea, Betsy, and Peter, as well as Cedey and my co-therapist, Tembo, for their support.

Barbara Schwartz
February 2012

Introduction

I am very excited about Volume 7 of *The Sex Offender.* Not only does it present the cutting edge of developments in the field, but it is also filled with practical tools for the clinician. I am already implementing many of the ideas as they are highly compatible with the prison-based program I run under the auspices of Counseling and Psychotherapy of Needham, Massachusetts, for the Maine Department of Correction. It is a pleasure to be constantly reassured that despite the roadblocks that crop up to interfere with our mission to restore sex offenders to functioning citizens, the field remains vital and innovative.

I am always on the lookout for signs that sanity will prevail in dealing with the problem of sexual abuse. July 26, 2011, was the deadline for compliance with the Adam Walsh Act (AWA), and according to the SMART Office, the division of the Department of Justice, which administers the Sex Offender Registration and Notification Act of which AWA is a part, twenty-five states and nine Native American tribes were in compliance. The rest of the jurisdictions will loose 10% of their Byrne/JAG grant funds. The states repeatedly attempted to bring their concerns to the Department of Justice but, according to W. A. Logan (quoted in Ackerman & Rada, 2011), the DOJ has turned a "deaf ear" to state's objections, refused to respond to objections raised in 2007 hearings, and waived the public notice and comment period required by the Administrative Procedure Act as being "impractical, unnecessary and contrary to public safety" (p. 57). In refusing to endorse the draconian requirements of the AWA, in half of the states and the majority of Indian tribes, decision makers have stood up to the federal government and refused to have their ways of managing sex offenders trumped. Granted, in some areas, more sex offenders will be removed from public notification, but in many more areas many individuals determined to be at low risk will be placed on a national registry. More horrific, juveniles as young as 14 could be subject to lifetime registration.

However, a number of states are reconsidering their registration policies. Texas recently revised its registration law to exempt "Romeo and Juliette" situations, where adolescents and young adults have consensual sex. California's Sex Offender Management Board has recommended against adopting the AWA. Its position paper points out that because an entirely different risk determination system is mandated, every sex offender in California would have to be reassessed, including ex-offenders who are currently not included on the registry. In commenting on the registration of juveniles, the Board's paper points out that there is no evidence that their inclusion would promote public safety.

The AWA would also add to the list of registerable offenses without presenting evidence that this would improve public safety. In addition, this is an unfunded mandate which according to California's Attorney General would cost $21.3 million to conduct presentencing record checks plus $6 million to conduct retroactive record checks on previously convicted sex offenders. Another $10 million would be needed for local law enforcement agencies to conform to changes in frequency of registration, plus $770,000 to retier current offenders, not counting tracking down and tiering ex-offenders who are no longer required to register. This effort would be expended to

save the loss of $2.1 million in Byrne/JAG funds. Legislators are resisting this encroachment on states' rights in managing their criminal justice system, especially without funding.

Two other far-reaching decisions may have a dramatic impact on sex offender management. Periodically, the American Psychiatric Association (APA) undertakes the updating of its *Diagnostic and Statistical Manual of Mental Disorders*, which identifies and describes the conditions that are recognized as mental illnesses. This is relevant to sex offender management because civil commitment is based on proving that a sex offender is suffering from a "mental disorder" or "mental condition" which makes it likely that an individual will commit another sex offense. Pedophilia and sexual sadism are recognized in DSM-IV-TR (American Psychiatric Association, 2000) and qualify as mental disorders for the purpose of civil commitment. However, two common diagnoses account for a significant percentage of commitments—paraphilia NOS–hebephilia and paraphilia NOS-nonconsent. For example, 56% of the individuals committed to the Arizona facility have been diagnosed with paraphilia NOS-nonconsent (Becker, Stinson, Tromp, & Messer, 2003). This year the APA sex disorders work group considered recognizing these conditions as psychiatric conditions.

A proposal regarding paraphilia NOS-nonconsent would have renamed the condition "paraphilic coercive disorder" defined as "recurrent and intense sexual arousal from sexual coercion as manifested by fantasies, urges or behaviors" (Harris, 2011, p. 33). The assumption is that some rapists are aroused by the resistance of their victims but that is distinct from sexual sadism. Certainly I have seen a few cases where this was true, but in civil commitment proceedings this assumption is made for all rapists subjected to this process. The state's expert could argue that rape by definition is coercive, and therefore either the offender must be aroused by resistance or his excitation is not inhibited by the objections of the victim. It would be easy enough to establish a "recurrent and intense sexual arousal" by pointing out that the offender certainly had an urge to rape which was probably accompanied by a fantasy, even a fleeting one, which was followed by a behavior. This condition has been consistently rejected in DSM-III (American Psychiatric Association, 1980), DSM-III-R (American Psychiatric Association, 1987), and DSM-IV (American Psychiatric Association, 1994). The issue addresses the basic question—Is a rapist "mad or bad"? Frances (2011) stated that "The current careless and widespread application of 'Paraphilia NOS, Nonconsent' results in commitments that are psychiatrically incorrect and constitutionally questionable. The DSM-5's rejection of rape as mental disorder will hopefully call attention to, and further undercut this abuse of psychiatric diagnosis" (p. 1). However, it has been included in the appendix as a condition which merits further study, which may confuse the issue.

Paul Stern (2011), a Snohomish County Prosecuting Attorney, argues that opposition to the diagnosis is based on "some amorphous fear of how lawyers may use the more precise diagnosis [which] seems a grossly cynical position" (p. 37). He further states that opposition is based issues surrounding civil commitment. I plead guilty as charged. Forty years in this field may have engendered some cynicism. Unfortunately this is a case where the politics of civil commitment cannot be ignored.

The work group is still considering hebephilia, which would apply to individuals who are sexually attracted to youths between the ages of 11 and 14. This diagnosis is

fraught with problems. In the first place it is generally recognized that normal males are aroused by adolescents. Many European countries and Canada have lowered the age of consent to 14. In addition, youths between these ages vary tremendously in their physical and emotional development. So are people being committed due to pedophilic tendency because their victim was 13 but looked 10 or for sexual arousal to a 14-year-old who looked 18? Frances and First (2011), in an article whose title summarizes their position, state unequivocally that evaluators "have clearly defied the intent of the DSM-IV-TR and that attraction to adolescents is normative male behavior" (p. 79).

The conflict regarding these diagnoses is the natural outcome of trying to force a round peg (the incapacitation of dangerous persons) into a square hole (having to label these people as mentally ill). Indeterminate sentencing could have offered an alternative solution but was circumvented for political reasons when the Washington State reinstituted civil commitment. At the very least, the DSM-5 debates have brought together some fine minds to seriously discuss issues related to sex offenders.

Another ray of hope involves recent research on "psychopathic" offenders. The long-held belief has been that individuals who were given this label, usually by scoring over 30 on the Psychopathy Checklist–Revised (PCL-R; Hare, 2003) were untreatable (Quality Assurance Project, 1991). Despite research by Looman, Abracen, Serin, and Marquis (2005) to the contrary, this axiom has persisted. However, Stephen Wong, a long-time colleague of Hare, and Olver have reported on a specialized treatment program that refutes this conviction (Olver & Wong, 2009). Although psychopaths had a higher attrition rate, they had no higher recidivism rate after treatment than did non-psychopaths. One of the problems with the label of "psychopath" is the fact that currently the only diagnostic tool is the PCL-11.

We do have reason to be optimistic. The chapters in this volume represent an expansion of the paradigm of treating sexual abusers. Looking at the agenda for the upcoming 30th Annual Conference of the Association for the Treatment of Sexual Abusers, one sees that one plenary address will discuss the development of a brain-mapping technique to diagnose pedophilia while another one focuses on positive psychology, which emphasizes positive traits, positive experiences, and developing institutions that reinforce these. It is interesting to speculate the ramifications to the field were Dr. Cantor's fMRI-based test for pedophilia or Dr. Knight's genetic theory of this condition to be validated. A century ago a theory that people could be "born bad" led to the enactment of defective delinquent laws, which were the forerunner of the original sex offender civil commitment laws. These laws were a response to the belief that there were certain people who were a danger to public safety—but not criminally responsible because they were born that way. The popular 1950s film, *The Bad Seed*, reflected this concept. In the states where these laws were enacted, such individuals were institutionalized in mental hospitals. If the biological basis of some forms of pedophilia is confirmed, will individuals be proactively evaluated and confined or could gene therapy modify the condition? Addressing the other issue, positive psychology, could this approach encourage changes in programs, including those that are prison-based? In this volume, discussions of the Good Lives Model reflect a positive psychology approach.

Our profession continues to look at what is being used in varieties of subspecial-

ties and adapting these techniques to our clients. Motivational interviewing (see Clark & Liddle, Chapter 10, this volume) was originally developed as a technique for dealing with alcoholism but is now widely being used to enhance motivation among sex offenders. Dialectical behavioral therapy first brought effective treatment to females with borderline personality disorders. However, it is now being used with both juvenile and adult sex offenders to enhance emotional containment (see Chancey, Jones, & Walsh, Chapter 22, this volume). Trauma-based therapy and brain-based techniques are being used to treat juveniles with sexually inappropriate conduct (see Adler, Chapter 23, this volume). One of the exciting aspects of treating this population is that, due to their diversity, innovations in mental health care in general may be applied to subpopulations of sex offenders as well.

Recently insisted-upon congressional mandates may devastate social programs in the near future. These cuts may impact sex offender treatment in numerous ways. Just as programs are reporting encouraging results, the funding for both institutional and community-based therapy may diminish. We can only hope that the legislators who rushed to endorse the Adam Walsh Act will consider the victims when eliminating programs that actually work.

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Part 1

Legal Policy Issues

In a time when funds are being drastically cut from vital human services such as health and education, it behooves all policymakers to ensure that programs and policies that cannot prove their efficacy are the ones on the chopping block regardless of how popular they may be. Public policies regarding sex offenders are driven by politics. Starting with Jack the Ripper, legislation has been enacted in response to notorious offenders who committed widely publicized crimes. The media in both its news coverage and its dramatic presentations such as NBC's *Law and Order: Special Victims' Unit* has raised the specter of the homicidal pervert lurking behind every bush to the point where, according to a recent Gallup poll, 66 percent of those polled were "very concerned" about sex offenders while 36 percent said the same about terrorists. Elected officials want to appear "tough on crime" and all of them fear that they will be associated with a modern-day Willie Horton. Because of the political nature of the origin of this legislation, these bills are rarely subjected to close scrutiny. Most laws, including the original sexual psychopath laws, the "Jacob Wetterling Act," "Megan's Law," and most recently "the Adam Walsh Act," have been passed overwhelmingly, usually without public hearings. What lawmakers would vote against a bill associated with a picture of an adorable child who had been violently accosted? Of course, everything possible should be done to prevent these types of crimes. However, the tragedy of such offenses deserves a thoughtful, research-based approach rather than a knee-jerk response.

Unlike many of the serious problems facing our world today, there are programs that have proven effectiveness in managing sex offenders. In the late 1990s, Janet Reno convened a blue-ribbon commission, which included law enforcement, the judiciary, treatment, and victims' voices to make recommendations that could be translated into state and national legislation. These recommendations revolved around the containment approach, which stresses a team approach in which a probation/parole officer, therapist, victim rights representative, and polygrapher cooperate to supervise the offender. The recommendations did not include public notification, civil commitment, or residency requirements. After all, the whole object of addressing this problem is to prevent further victimization—not to make it impossible for offenders to find jobs, housing, or relationships.

Left to themselves, states might have developed creative responses to preventing sexual assault. They would have had funds to pursue restorative justice approaches, circles of accountability, and primary prevention approaches. However, the U.S. Congress by passing the Sex Offender Registration and Notification Act (SORNA); a single title of the Adam Walsh Child Protection and Notification Act, initially mandated controversial policies such as public notification including adolescents; a nationwide, computerized registry based not on risk but on the nature of the crime, as well as numerous other demands on states and Indian tribes. As of this date a number of states may have begun to rebel against federal domination in this arena. As it

stands, the deadline for complying with SORNA was July 2011, but as of this writing only Ohio, Delaware, South Dakota, and Florida, plus the Confederated Tribes of the Umatilla Indian Reservation and the Bands of the Yakima Nation, have complied. The Criminal Justice Committee of the Texas State Legislature recommended that its state repeal the legislation that bound Texas to comply with federal registration requirements including sex offender registries and additionally to not comply with SORNA. They recommended that the state consider more evidence-based practices such as the use of risk assessments and a system of "deregistration." The California Sex Offender Management Board had previously made a similar recommendation. Given the degree of noncompliance, SORNA has been modified by granting discretion to jurisdictions as to requiring juveniles to register. In an attempt to encourage states to comply with SORNA, free training in sex offender management practices was provided to stakeholders throughout the country by the Department of Justice's SMART Office. Three of the experts providing this training were instrumental in discouraging their own states from complying with the Adam Walsh Act. This is not surprising as one could not in good faith include this legislation in a training of best practices in sex offender management. In Chapter 1 of this volume, Christopher Lobanov-Rostovsky, Andrew Harris, and Jill Levenson discuss the ways states are responding to SORNA.

Have the current policies including sex offender registries had an impact on the problem of sexual assault? Dr. Levenson, who is considered to be the leading authority on the effect of sex offender registries, has stated, "Though the research differs somewhat from state to state and study to study, overall it does not appear that registries have resulted in a significant decline in crime in general or in recidivistic sex crime more specifically." While sex offender registries certainly would not pass the evidence-based practices test, they have resulted in negative consequences to sex offenders. Richard Tewksbury (2005) surveyed 121 sex offenders and found that 47 percent had been harassed and 16 percent assaulted. Since 2005, six offenders have been murdered by killers who got their names off the registries (Yoder, 2011). In addition, the law has also had consequences for families and friends with 44 percent reporting that they had been harassed or threatened, 27 percent had property damaged, and 7 percent were physically assaulted. Furthermore, many more offenders are pleading guilty to non-sex offenses in order to avoid the registry, which also complicates their access to treatment.

While some states have opted to create a level system where only the highest-risk sex offenders are on the public registry, others place all sex offenders, regardless of risk, on their websites. Some states even place non-sex offenders on their public registries, including those convicted of false imprisonment where the crime was not sex related. Registries create the impression that all of those on them are at high risk to reoffend. However, of the more than 700,000 sex offenders on registries, the vast majority are low-risk offenders, 70 percent according to Washington Sex Offender Policy Board. Twenty-nine states required the registration of teens who have had consensual sex with another teenager. According to a 2008 report by the Vera Institute, the vast majority of offenders (93 percent) are known to their victims.

Sex offender registries have led directly to residency restrictions, which have caused a tremendous rise in the number of homeless sex offenders, a 750 percent increase in California. The policy of forcing sex offenders, both male and female, to live under a bridge in Miami has been widely reported. Homelessness affecting any

type of offender contributes to recidivism. Many of those who advocated for increased awareness of the whereabouts of sex offenders in the community have had second thoughts. For example, Patty Wetterling, whose son's disappearance led to the federal mandating of sex offender registration, has stated:

> We need to keep in mind the goal—to have no more victim's. Go down that path, then you have to find the things that every human being needs in life. You need housing, You need a job. You need family support, community support—Everyone on the registry is somebody's brother, somebody's son, somebody's father. (Yoder, 2011, n.p.)

If someone who has endured a parent's worse nightmare can demonstrate such a reasonable perspective, perhaps policymakers will as well.

Another important legal issue is "cybersex," particularly Internet sexual crimes. Two chapters in this volume are devoted to this issue. In Chapter 2, Richard Wollert, Jacqueline Waggoner, and Jacob Smith discuss the sentencing guidelines and whether they are justified based on recidivism data. The Internet has provided those interested in exploring or pursuing deviant sexual practices with a wide range of venues. In most cases these interests can be pursued anonymously. Prior to the web, individuals interested in unusual sexual activities had to either pursue these interests through their fantasies, frequent adult bookstores, or do elaborate research to find groups such as the North American Man/Boy Love Association (NAMBLA). Now connecting with others with similar interests is only a click of a mouse away. There are newsgroups, webforums, and listserves for every imaginable interest. I treated one man who belonged to 250 different Internet groups for people with a fetish for little boys' white cotton underwear. These groups provide support and validation for deviant subcultures, which then provide materials and techniques for engaging in these activities. Through computer-mediated sites individuals can trade pornography, the distribution of which is highly profitable. For example, the International Center for Missing and Exploited Children reports that cost of subscriptions for child pornography has gone from $29.99 in 2006 to anywhere from $100 to $1,200 a month.

Social networking has provided child molesters with access to children with whom they can correspond, interact via webcam or Skype, and possibly arrange for meetings with the intent of sexually abusing the child. Concern that the latter will occur has probably contributed to harsh penalties imposed on individuals found in possession of even one example of child pornography. These individuals can be sentenced under the United States Sentencing Guidelines as this is a federal crime. Our authors point out that a typical person convicted of possessing one or two pornographic depictions involving children, including adolescents, could be sentenced to 200 months in federal prison.

Certainly there are pedophiles who use the Internet not only to access victims but also to encourage others to do the same. But are all individuals who download this material likely to engage in hands-on crimes against children? Both chapters on the issue in this book address this question. A common way these crimes are detected is through computer repair services. The individuals who naively bring a hard drive containing child porn into a repair person are not the sophisticated NAMBLA members who communicate methods of avoiding apprehension. Thus it may well be that, as

with other crimes, the most severe offenders are the least likely to be detected and the amateur is the one who ends up in prison. Being sexually aroused by children is not the only reason one may be in possession of child pornography. Collectors of pornography of all types trade files with others. These files can contain thousands of pictures. Thus, the person receiving the file may not even know what is in it. There are also those who are sexually curious or are attracted to any taboo behaviors with no intention of ever engaging in any of these activities. The response to the child pornography offender is another instance of treating all individuals in a category with a broad brush.

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Chapter 2

Federal Internet Child Pornography Offenders—Limited Offense Histories and Low Recidivism Rates

by Richard Wollert, Ph.D., Jacqueline Waggoner, Ed.D. and Jason Smith, Psy.D.

OVERVIEW

A growing number of child pornography offenders (CPOs) are being sentenced under the United States Sentencing Guidelines. Many doubts about the guidelines have been raised, however, because the sentencing ranges they generate are often seen as too severe. An infusion of information about federal CPOs is needed to resolve this problem. This chapter summarizes several key articles about CPOs and strongly questions the validity of one line of research (Bourke & Hernandez, 2009; Hernandez, 2000) that has been frequently cited. It also presents the first published study that details demographic, criminal history, and recidivism data for a representative sample

of federal CPOs. This study found that few federal CPOs have any history of child molestation. Furthermore, none of the seventy-two CPOs who were monitored committed contact sex offenses against children.

INTRODUCTION

The great majority of offenders who are charged with a sex crime in the United States are prosecuted under state jurisdictions. A substantial number, however, are prosecuted by the federal government. At the present time, a minority of these offenders have been charged with crimes such as rape or child molestation while they were in the military or on Native American tribal reservations. The majority have been charged with crimes in which they (1) crossed state lines to meet a minor for the purpose of molestation, (2) produced child pornography, or (3) most commonly, possessed, received, or distributed child pornography. Members of the last set of groups fall under federal jurisdiction because they have either physically traveled from one state to another or have sent or received pornography via the Internet or from another state or country via the U.S. Postal Service.

THE U.S. SENTENCING COMMISSION

When a member of one of the foregoing groups is convicted of a sex offense, he or she is assigned a sentence for that offense based in part on the United States Sentencing Guidelines (USSGs) set forth by the U.S. Sentencing Commission (USSC), which Congress established as an independent entity under the judicial branch of government when it passed the Sentencing Reform Act (SRA) of 1984.[1] Ideally, each guideline will point to a sentence that is *proportional* to the "the nature and circumstances of the offense" in question and other factors that federal jurists are required by Section 3353 of Title 18 of the United States Code to consider as part of the sentencing process, including "the history and characteristics of the defendant," and "the need for the sentence ... to reflect the seriousness of the offense ... promote respect for the law ... provide just punishment ... afford adequate deterrence ... protect the public ... and ... provide ... needed ... training, medical care, or other correctional treatment" (USSC, 2009b, at 2–3). Otherwise, according to the SRA, the respect in which the law is held may be undermined, and disciplinary problems among federal prisoners may be exacerbated (USSC, 2009b, at 2).

Toward these ends, the SRA directed the USSC to establish and periodically review and revise rational and proportional sentencing policies as part of a process that combined empiricism and initiative. For example, the USSC was instructed not only to rely on "past sentencing practices 'as a starting point'" for drafting its initial guidelines but also to develop sentencing ranges that were "consistent with the purposes of [federal] sentencing" in cases where "average sentences" fell short of meeting this goal (USSC, 2009b, p. 3).[2]

The USSC was also required to adhere to a rigorous three-stage protocol in the course of discharging its mission. During *a review* stage it may solicit input from the public, advisory groups, and key informants associated with the federal criminal justice system before promulgating a guideline amendment. It also "studies relevant data, reports, and other information compiled by the Commission staff, which may include

sentencing data, case-law analysis, literature reviews, surveys of state laws, and other relevant information" (USSC, 2009b, at 5). During a *public comment* stage, it invites public comment on proposed amendments for a two-month period by publishing them in the *Federal Register* and holds at least one public hearing during this period. Then, during a *promulgation* stage, the input that is received in response to these procedures is used to refine the proposals after the end of the comment period, and a final vote is held that determines which amendments will be promulgated and submitted to "Congress for its review."

Although the promulgated amendments will take effect after a six-month period of *pendency* if Congress does not act on them, Congress has the authority to change or reject them (USSC, 2009b, pp. 5–6). Congress may also enact directives to the USSC, which is then "obliged to implement the directive in a manner consistent with the legislation" (USSC, 2009b, p. 6). Therefore, in spite of the espoused theory that the USSC is an agency within the judicial branch of the federal government that exercises "independent judgment," it seems that the content of the federal sentencing guidelines is dictated in practice by the legislative branch. The USSC itself acknowledged this problem in its 2004 *Assessment of Fifteen Years of Guidelines Sentencing*, observing that "the frequent mandatory minimum legislation and specific directives to the Commission to amend the guidelines make it difficult to gauge the effectiveness of any particular policy change, or to disentangle the influences of the Commission from those of Congress" (p. 73).

PROPORTIONALITY, REASONABLENESS, AND THE FEDERAL SENTENCING GUIDELINES

Proportionality in sentencing has rarely, if ever, been raised as a significant concern for rapists, molesters, or producers of child pornography because offenders in these groups either directly perpetrated a very harmful sex offense that is condemned by the community or were intent on doing so. Those whose sole conviction is for possessing, receiving, transporting, or trafficking child pornography have not directly perpetrated a contact sex offense against a child per their conviction, however. In addition, only a few studies have collected data that bear on the assumptions that federal CPOs have probably committed "hands-on" sex offenses against children prior to their pornography convictions or represent a high risk for doing so upon their release from custody (Hessick, in press).

LIMITATIONS OF THE FEDERAL GUIDELINES IN CHILD PORNOGRAPHY CASES

The foregoing considerations suggest that lack of proportionality and reasonableness hold the potential for becoming serious issues with respect to the great majority of federal CPOs, who are currently sentenced under Section 2G2.2 of the USSGs, if it should become apparent that the relevant guidelines are not based on adequate evidence and accurate analysis (Basbaum, 2010), or that they were crafted in the service of either the executive or legislative branch of government.[3] Stabenow (2008), drawing in part on Baron-Evans (2008), has advanced a strong argument that this is the case for several interrelated reasons. The following points, with a few supplementary

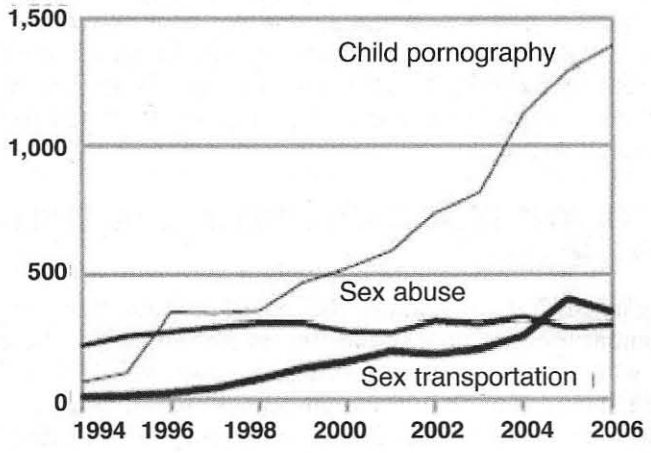
comments we have added on the basis of our review of the relevant literature, summarize his argument.

Only 112 CPOs were sentenced under the USSGs from 1994 to 1995 per pages 3 and 29 of the USSC's 1996 Report to Congress on *Sex Offenses Against Children*. Table 1.2 of the 1993 *Compendium of Federal Justice Statistics* (Bureau of Justice Statistics, 1996) indicates that federal prosecution was declined, however, in another 194 cases. Only the most dangerous offenders were therefore selected for prosecution. The dangerousness of this population is illustrated by the fact that it included a substantial percentage of producers of child pornography (e.g., 20% per page 29 of the Report) and other offenders who were bold enough to seek out child pornography through the mail and by contacting suppliers, buyers, or traders rather directly (e.g., only 31% of the cases "involved the use of a computer" per page 29). The Report also provided three examples of offenders who were sentenced under the guidelines, and none of these examples mentioned the use of a computer. This is further evidence that the focus of federal prosecutions during this early stage of application fell on relatively dangerous offenders who did not use computers in the commission of their crimes. Nonetheless, page 33 of the Report indicated that only "13 percent of pornography defendants had a history of sexual misconduct."

Over time, as Figure 2.1 shows, the number of federal prosecutions for child pornography offenses increased far more than the number of prosecutions for other sex offenses.

Many less dangerous and more timid offenders were prosecuted as a result of the expansion in scope portrayed in Figure 2.1. According to Table 17 of the USSC's 2008

Figure 2.1
Number of Federal Prosecutions for Child Pornography Offenses Where Child Exploitation Offenses Were Lead Charge



Source: Executive Office for U.S.Attorney. National LIONS database, fiscal year 2006 as reported by Bureau of Justice Statistics Bulletin ("Federal Prosecution of Child Sex Exploitation Offenders" (2007)).

Table 2.1
Sentences for Federal Child Pornography Offenders in the Mid-1990s vs. 2008

Year	Types of Child Pornography Offenses	*N*	Average # of Months
1994 & 1995[a]	Possession	22	15
1994 & 1995[a]	Distribution	66	29
1994 & 1995[a]	Production	24	79
1994 & 1995[a]	For all CPOs	112	36
2008 (FY)[b]	For first-time pornography recidivists	1,620	122
2008 (FY)[b]	By first-time offenders	1,295	112

[a]USSC, 1996 Table I. [b]USSC, 2008 Table 14.

and 2009 *Sourcebooks of Federal Sentencing Statistics* (USSC, 2008, 2009a), for example, only 10% to 11% of all defendants in child pornography cases were sentenced for production. Furthermore, the Bureau of Justice Statistics Bulletin ("Federal prosecution of child sex exploitation offenders," 2007) reported that 97% of those who were sentenced in child pornography cases used computers in the commission of their crimes (p. 2) and that only 20% of all CPOs had previously been convicted of any kind of felony (p. 5). Finally, whereas federal prosecutors declined to prosecute 63% of all cases they considered between 1994 and 1995, Table 2 of the Bulletin indicated their declination rate dropped to 40% by 2006.

The USSGs have become ever more punitive in spite of their application to a population that is less dangerous now than the population to which they were initially applied. The 2003 PROTECT Act,[4] for example, "created a five-year mandatory minimum for trafficking and receipt, raised the statutory maximum for trafficking from 15 to 20 years and for possession from five to ten years" (USSC, 2009b, p. 38). Furthermore, as Table 2.1 indicates, the average sentence length for first time CPOs is now over three times what it was for both first time and recidivist CPOs in 1994.

The changes that have been made to the USSGs are due in large part to congressional intervention (exemplified in 1991 by Amendment 780 to House Resolution 2622, in 1995 by House Resolution 1240, and in 2003 by the "Feeney amendment" to the "PROTECT Act"), oversampling of the most dangerous CPOs by the USSC (exemplified in the USSC's June 1996 *Report to Congress, Sex Offenses Against Children*), and some decisions (exemplified by Amendment 664 to the USSGs) by the USSC that apparently reflected more of a desire to implement the will of Congress than to exercise its independent judgment.

The changes that have been made to the USSGs generate sentencing ranges that

are unreasonable, because it may be shown that a "typical" child pornography defendant (one who has used a computer to trade several illegal movie clips and pictures and who has obtained a pornographic picture of an 11-year-old and another picture depicting bondage) will fall in a guideline range (well over 200 months) that is much greater than the range (well under 200 months) for a "hands on" sex offender who has brutally raped a 9-year-old over 100 times during a two-year period and has paid her mother to hold her down. As one circuit court has observed, "many of the § 2G.2.2 enhancements apply in nearly all cases . . . 94.8% involved an image of a prepubescent minor . . . 97.2% involved a computer . . . 73.4% involved an image depicting sadistic or masochistic content or other forms of violence . . . and 63.1% involved 600 or more images. . . . See United States Sentencing Commission, *Use of Guidelines and Specific Offense Characteristics for Fiscal Year 2009*" (USSC, 2009c).[5]

The guidelines for sentencing CPOs lack credibility in many cases. The U.S Supreme Court has recognized that "not all … guidelines are tied to . . . empirical evidence."[6] The history of the CPO guidelines shows they are not the result of the "careful study based on extensive empirical evidence" (p. 46) that would support a presumption that they are reasonable.[7] The "formerly mandatory" USSGs "now serve as one factor among several courts must consider in determining an appropriate sentence,"[8] and, in the interest of imposing "'a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing,"[9] courts are free to disagree with a guideline that is not the product of empirical evidence and careful study.[10]

SHOULD THE GUIDELINES FOR SENTENCING CPOS BE LESS PUNITIVE?

Quantitative data and case-specific decisions point to the conclusion that a fair number of judges are concerned about the lack of proportionality and reasonableness of the USSGs with respect to CPOs. In fiscal year 2009, for example, 1,606 CPOs were sentenced in cases where Section 2G2.2 of the USSGs applied (USSC, 2009d). Sentences that were below the guideline range were imposed in 860 (53%) of these cases while only twenty-nine sentences (1.8%) fell above the range. Several instances in which judges assigned sentences below the guidelines were also described in a 2009 article by Mark Hansen. Very recently, a *New York Times* article (Sulzberger, 2010) recounted a decision by the U.S. Court of Appeals for the Second Circuit[11] that was highly critical of Section 2G2.2 along the general lines set forth by Stabenow and "vacated a 20-year child pornography sentence by ruling that the sentencing Guidelines . . . 'unless applied with great care, can lead to unreasonable sentences' … the decision noted that the recommended sentences for looking at pictures of children being sexually abused sometimes eclipse those for actually sexually abusing a child." The same article reported that Judge Jack Weinstein of the U.S. District Court in Brooklyn has "gone to extraordinary lengths to challenge the . . . five-year sentence faced by defendants charged with receiving child pornography . . . 'I don't approve of child pornography, obviously,' he said in an interview . . . but, he also said, he does not believe that those who view the images, as opposed to producing or selling them, present a threat to children … 'we're destroying lives unnecessarily,' he said … at most, they should be receiving treatment and supervision."

In 2009 the USSC "established a review of the child pornography guidelines as a policy priority for the guidelines amendment cycle ending May 1, 2010" and compiled a *History of the Child Pornography Guidelines* (USSC, 2009b) as a "first step in the Commission's work on this priority" (p. 1). Shortly after this, the commissioners took testimony on the guidelines, including the child pornography guidelines, in hearings across the United States (Cardona, 2009; Gomez, 2009). According to U.S. District Judge William Sessions, who chairs the USSC, these hearings have elicited two opposing views (Gomez, 2009). On the one hand, "judges have been nearly unanimous that the guidelines restrict their ability to sentence convicts based on the specifics of each case and defendant." On the other, "police and prosecutors want them intact as deterrents to crime, and to use possible sentence reductions as incentives to win defendants' cooperation in investigations."

Representing the latter side of the debate, Federal Prosecutor Alexandra Gelber (2009) responded to the articles by Hansen (2009) and Stabenow (2008) by claiming that "there is some statistical evidence that consumers of child pornography may also be child contact offenders" and citing a congressional finding that "child pornography is often used by pedophiles and child sexual abusers to stimulate … 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" (Gelber, 2009, pp. 4–5). That her position is widely accepted is evidenced by the fact that both former President George W. Bush and former Attorney General Alberto Gonzalez, among others (Allen, 2009; Heimbach, 2002), have hypothesized that "the compulsion to collect child pornography images may lead to a compulsion to molest children, or may be indicative of a propensity to molest children" (U.S. Department of Justice, 2006, p. 10).

MORE KNOWLEDGE IS NEEDED TO MAKE GUIDELINE DECISIONS

In April 2010, the USSC submitted its promulgated amendments to the USSGs to Congress. At this juncture the commissioners left the child pornography guidelines unchanged. On May 18, 2010, however, the USSC announced that it would "hold a public hearing on statutory mandatory minimum penalties in the federal sentencing system . . . and their effects in the federal sentencing system" on May 27, 2010. Attorney General Eric Holder, Jr., followed up on this by disseminating a memorandum on May 19, 2010 to all federal prosecutors that they needed to pursue a line of sentencing advocacy that "given the advisory nature of the (sentencing) guidelines . . . must … follow from an individualized assessment of the facts and circumstances of each particular case." This position was different than that of his predecessors, who indicated that it was "essential to . . . ensure that all federal prosecutors adhere to the . . . Sentencing Guidelines in their . . . sentencing practices" (Ashcroft, 2003) and that prosecutors "must take all steps necessary to ensure adherence to the Sentencing Guidelines" (Comey, 2004, 2005). It has also been reiterated by U.S. Attorney Sally Yates who, representing the Justice Department's views before the USSC (Yates, 2010), observed that "for . . . some child exploitation offenses, sentences have become increasingly inconsistent" (p. 7) and indicated that "we . . . recognize that mandatory

minimum penalties should be used judiciously and only for serious offenses and should be set at severity levels that are not excessive" (p. 9).

As the foregoing events show, the sentencing guidelines are in a state of flux. Until they are clarified—and probably reclarified—it is likely that federal prosecutors will face more ambiguity with respect to their charging and sentencing recommendations in child pornography cases, that federal defenders will continue to press for variances from the guidelines, and that federal judges will experience the sentencing process, already one of the most difficult "judicial responsibilities" there is,[12] as even more challenging.

Within this context, it would seem that an infusion of information about the current population of federal CPOs would be helpful for the purpose of decision making by judges and policymakers. Do most CPOs have a history of molesting children? Are most likely to again become involved with child pornography after their release? Are most likely to molest a child after their release? Are CPOs indistinguishable from child molesters and rapists?

A REVIEW OF KEY RESEARCH ARTICLES ON CPOS

These questions should be answerable on the basis of sufficient data collection and analysis. Unfortunately, it was difficult to address them in the past because only a few quantified studies of substantial samples of CPOs were published in the behavioral sciences. Furthermore, none of these studies focused directly on the characteristics and recidivism rates of federal CPOs who were released to the community.

Additional studies that bear on the questions raised at the end of the previous section have been published recently, and under the following points we will briefly summarize nine quantified and published articles that are either frequently referenced or that we believe are particularly informative (Elliot, Beech, Mandeville-Nordent, & Hayes, 2009; Endrass, Urbaniok, Hammermeister, Benz, Elbert, Laubacher, & Rosseger, 2009; Frei, Erenay, & Dittman, 2005; Bourke & Hernandez, 2009; Seto, Cantor, & Blanchard, 2006; Seto & Eke, 2005; Seto, Hanson, & Babchisin, 2011; Webb, Craissati, & Keen, 2007; Wolak, Finkelhor, & Mitchell, 2005). This analysis does not include qualitative research, studies that did not report data for CPOs, and studies that focused on outcome measures that we felt were largely irrelevant to our concerns.

Wolak et al. (2005), pursuant to a federal grant to the National Center for Missing and Exploited Children, sent letters to a representative sample of local, state, and federal law enforcement agencies in the United States to determine how many internet-related child pornography arrests they had made in fiscal year 2000. Then they interviewed detectives about the details of 429 of these cases. Only about 14% of these cases were prosecuted in federal courts (p. 14). In general, however, 11% were known to have previously been arrested for having committed a sex offense against a minor (p. 11%). Only 3% were known to have been diagnosed with a sexual disorder. A follow-up study was not undertaken. Overall, the researchers acknowledged (p. 34) that "there is little information about the relationship between viewing child pornography and sexually victimizing children" but nonetheless concluded that "it is reasonable to view and treat child pornography possessors as at high risk for victimizing children."

Elliot et al. (2009) analyzed the presentence reports of 505 Internet CPOs and 526

contact sex offenders from a convenience sample who were referred by British courts for counseling in the community. Although the researchers did not carry out a follow-up study, they administered a number of psychological tests to their subjects. Eleven percent of the CPOs were known to have one or more contact sex offenses while this was the case for 24% of the contact offenders (pp. 81, 87). Regarding group differences, Elliot et al. observed (pp. 87–88):

> Contact offenders are characterized by a greater number of empathy distortions and cognitive distortions than Internet offenders and a greater bias toward favorable self-description . . . the lower frequency of pro-offending attitudes and beliefs that serve to legitimize and maintain sexually abuse behavior … displayed by Internet offenders suggests that they may be unlikely to represent persistent offenders or potentially progress to . . . contact sexual offenses . . . this . . . may . . . contribute positively to Internet offenders' achievement in therapeutic interventions.

Seto and Eke (2005) identified 201 registrants in the Ontario (Canada) Sex Offender Registry who were previously convicted of a child pornography offense and followed up on the new crimes committed by members of this group for a thirty-month period. Thirty-three percent of the CPOs were "adjudicated for other kinds of offenses at the time they were adjudicated for a child pornography offense" (pp. 205–206). Although the authors reported that "24% of the sample had prior contact sexual offenses" (p. 205), they did not indicate the percentage of these offenses that targeted children. They did indicate (p. 207), however, that those CPOs who had been convicted of contact sex offenses either prior to the index offense or at the same time committed more new contact sex offenses during the follow-up period (9.2%) than those whose who committed only child pornography offenses (1.3%) or child pornography offenses and nonsexual offenses (2.0%).

These results should not be generalized without further data collection because the sample was systematically selected (Michael C. Seto, personal communication, August 2011) to include many more offenders who had been convicted of producing child pornography (21%, per Seto & Eke, 2008) than the typical child pornography cohort. It also did not report the recidivism rate for a comparison group of child molesters who had never been convicted of a child pornography offense.

Webb et al. (2007) compared 90 CPOs and 120 child molesters from three sex offender outpatient counseling programs in London on demographic variables, offense-related characteristics, and the results of psychological testing. They also followed-up on any new crimes that were committed by members of this group for eighteen months. The authors reported that "one internet offender was convicted for a general offense, and two internet offenders (3%) were convicted for further internet sexual offences … 3% (of the child molesters) were charged … for further violent offenses, and 2% were charged … for further contact sexual offenses … the breach and recall rate … for child molesters was 17% whereas for internet offenders it was none" (p. 459). They also reported that 4% of the CPOs had previous sex offense convictions involving a child whereas this was the case for 20% of the child molesters (p. 456). Regarding group differences, it was concluded (pp. 462–463) that:

> The overall findings of the follow-up indicated that child molesters were more likely to fail in all areas compared to the internet sex offenders . . . internet offenders appear to be extremely compliant with community treatment and supervision sessions . . . by far the largest subgroup of internet offenders would appear to pose a very low risk of sexual recidivism.

Frei et al. (2005) analyzed the criminal histories and demographic characteristics of an exhaustive sample of thirty-three men in Lucerne, Switzerland, who were investigated on child pornography charges after user data apprehended from a pornographic Web site in the United States were given to Swiss authorities. None of the subjects had any prior convictions for child molestation (p. 491) and "there were no hints for prior psychiatric treatment in the files" with the exception that "one offender, who according to interviews with his relatives . . . seemed to be a pedophile" (p. 492). A follow-up study was not conducted. Regarding the characteristics of their subjects, the authors concluded:

> Our sample with only one unemployed person and a third of the offenders holding a superior profession . . . differed from convicted perpetrators of sex crimes who showed ... below average intelligence . . . (and) an annual income of less than $25,000 USD . . . the number of single men in our study (15) is striking . . . it seems that . . . the Internet facilitates rather a new kind of crime, namely the possession and consumption of illegal pornography, (rather) than . . . indicating a general deviant life style.

In another study that was launched after Swiss authorities received the foregoing data, Endrass et al. (2009) analyzed the criminal histories and demographic characteristics of an exhaustive sample of 231 men in Zurich, Switzerland. They also followed-up on any new crimes that were committed by members of this group for six years. During this period "nine (3.9%) of the subjects were investigated . . . for hands-off sex offenses, all of which were due to illegal pornography possession . . . two subjects (.8%) were . . . investigated for . . . child sexual abuse" (p. 4). Prior to being apprehended for downloading pornography from the U.S. Web site, "two subjects (1%) had prior convictions for hands-on sex offenses involving child sexual abuse, (and) 3.5% (n=8) had prior convictions for . . . illegal pornography" (p. 4). Regarding the characteristics of their subjects, the authors concluded (pp. 5–6):

> Descriptive analyses suggest that child pornography users are less likely to be married . . . foreign nationals were underrepresented . . . child pornography consumers are well-educated . . . only 5% of the investigated sample held an unqualified job position . . . our results suggest that users of child pornography are probably well-integrated into Swiss society . . . the consumption of child pornography alone does not seem to represent a risk factor for committing hands-on sex offenses in the present sample—at least in those subjects without prior convictions for hands-on sex offenses.

Seto et al. (2006) analyzed the criminal histories and phallometric testing respons-

es of 100 CPOs who were assessed at a Canadian agency that "provides comprehensive evaluations to males referred as a result of illegal or clinically significant sexual behaviors" (p. 611). The authors reported that "43% of the 100 child pornography offenders included in this study had been charged with a sexual offense involving a child victim" (p. 614). Finding that the CPOs responded to the test situation with "greater sexual arousal to children" than a group of child molesters and a group of rapists, they also concluded that "child pornography offending is a valid diagnostic indicator of pedophilia" (p. 613). They did not, however, assess their subjects with the criteria that are customarily used to diagnose pedophilia (American Psychiatric Association, 2000) or subdivide their CPO group into those who were Internet offenders and those who were not. They also acknowledged that the group of CPOs they studied may have been selected in such a way that they were "less representative of child pornography users in general" (p. 614).

Hernandez (2000) argued that users of child pornography "can be equally predatory and dangerous as extrafamilial offenders" after he found that a group of fifty-four CPOs who were treated at the Butner Federal Correctional Institution disclosed many more molestations in treatment than they did when they were interviewed by presentence investigators. Bourke and Hernandez (2009) conducted a second study following Hernandez's earlier procedures. They assessed two dependent variables from a review of the records of 155 CPOs who voluntarily participated in the Butner program, which Hernandez directed, and were not described as being different from the general population of federal Internet CPOs. One variable reflected the number of adjudicated and self-reported molestations reported in the presentence investigation for each CPO. The other reflected the number of adjudicated and self-reported molestations disclosed by each CPO to staff members at Butner, who apparently expected all treatment participants to make new disclosures on an ongoing basis and to pass a polygraph indicating they had "fully disclosed" their sex offenses. Participants were also told they did not have to "reveal any identifying information when listing their victims" (p. 186).

Bourke and Hernandez (2009) estimated that 26% of their subjects had previously committed either an adjudicated or nonadjudicated molestation per their presentence reports, which described a total of 75 sex crimes. They also reported that the first figure grew to 85% when treatment disclosures were added in while "the number of reported victims known at the end of treatment . . . was 1,777" (p. 187). Assuming that disclosures made in treatment reflected the "true extent" (p. 188) of the sex offense histories of CPOs, it was suggested (p. 189) that the results of the Butner studies validated the theory that CPOs harbor "pervasive and enduring" pedophilic interests that cause them to access child pornography on the Internet and that this access reinforces the "paraphilic lifestyle" of CPOs and results in "behavioral disinhibition" that makes them likely to commit more child molestations. Bourke and Hernandez also asserted that "the findings of this study underscore the importance of prison-based sex offender treatment" (p. 188).

Seto et al. (2011) averaged the results of nine published and unpublished follow-up studies to estimate the recidivism patterns of online sex offenders, including many CPOs. They also averaged the results of 24 published and unpublished studies to estimate the percentage of offenders who had committed contact sex offenses prior to

being convicted of an Internet offense. Regarding the first issue, it was reported (p. 135) that "most of the follow-up times were under 4 years . . . 2.0% . . . of the online offenders recidivated with a contact sexual offense and 3.4% recidivated with a child pornography offense ... 4.2% recidivated with a violent offense." Regarding the second, it was reported (p. 132) that "official records . . . for 4,464 online sexual offenders" indicated that "12.2% ... had prior contact sex offenses." The percentage of CPOs who had committed contact sex offenses against children was not enumerated. The authors found, however, that "the proportion of prior contact offenses was significantly lower when the estimates were based on official reports . . . than self-report," that "Bourke and Hernandez (2009) was . . . identified as an outlier in the self-report data," and that "removing this study greatly improved the model" for estimating the proportion of CPOs with prior contact offenses (p. 133). Overall, they concluded that "our results suggest there is a distinct group of online offenders whose only sexual crimes involve illegal (most often child) pornography . . . online offenders rarely go on to commit contact sexual offenses" (p. 136).

VARIATIONS IN RESEARCH DESIGNS MEDIATE THE VALIDITY OF RESEARCH RESULTS

The foregoing review indicates that researchers have used a variety of methods and measures in studying CPOs. Some of the features of these "research designs" produce clear-cut and useful results. Other research designs produce misleading results that should never have been disseminated. Those who wish to consult behavioral science articles to evaluate the status of research on CPOs might find it useful to consider the content of the articles they read in relation to principles that typify "good research design." The following items, exemplified in some of the articles we have described, enumerate these principles:

1. The populations and offense patterns that are of interest need to be carefully considered and precisely specified prior to undertaking a research project.
2. Samples of CPOs should be selected for study so that they are "representative" of the populations of interest; for example, an unbiased sample of all federal CPOs who are released to probation should be examined if the intent of a research project is to reach conclusions about federal CPOs who are released to probation.
3. Data collection efforts should revolve around dependent variables that are not artifacts of the research design in which they are embedded. Variables that derive their meaning directly from how they are defined and measured should be used over other alternatives that can only be interpreted with the aid of a dubious series of assumptions.
4. Compiling prior and new conviction rates is obviously important, but such efforts will hold even richer implications for understanding these numbers if they are supplemented by the measurement of diagnostic, demographic, psychological, or physiological constructs.

5. Comparative studies of CPOs with other sex offender groups are important for putting the significance of a set of results on CPOs into perspective.
6. The implications of the results of a research project should not be extended to issues that are beyond its scope.

Weighting the various articles in our review by the adequacy with which they have been designed, some important hypotheses about CPOs have apparently been confirmed. Over time (from 1990 to 2010) and space (Switzerland, Canada, the United States, the United Kingdom, and other countries), the great majority of CPOs have not had problems with sexual contact crimes prior to being convicted of a child pornography offense, and the great majority will not have post-conviction problems with the commission of sexual contact crimes. It also seems to be the case that CPOs, although more limited in their intimate social relations than others, are compliant with supervision and able to draw on substantial personal resources to benefit from treatment and rebuild their lives.

What is missing, however, is an understanding as to how federal child pornography offenders fit into this picture. The development of an adequate perspective on this issue is hindered by three obstacles. One is that a study of a representative sample of federal CPOs has yet to be published. Another is that the only papers on federal CPOs—the "Butner Studies" by Hernandez (2000) and Bourke and Hernandez (2009)—epitomize the class of articles, mentioned in the first paragraph of this section, that are inadequately designed and consequently misleading in their results. The last is that the results of Hernandez's endeavors have been cited repeatedly in support of governmental initiatives (U.S. Department of Justice, 2006, p. 12), political positions (Allen, 2009, p. 5; Gelber, 2009, p. 6), sentencing advocacy[13]; and congressional testimony (Heimbach, 2002, pp. 2–3; Hernandez, 2006, p. 5).

In light of the widespread citation of the Butner reports, the first step toward the development of a more adequate conceptualization of federal CPOs is to suppress the recitation of "sound bites" referring to these papers by explaining how their results were artifacts of a flawed research design. A number of different circumstances frame this explanation. For one thing, the context in which Hernandez "collected data" was one where the welfare of his "subjects" was dependent on their standing in the program he directed. From counseling some CPOs who previously participated in the Butner program we are also aware that they were motivated to avoid program termination because this would have resulted in their being placed in the general prisoner population, where they would be harassed as sex offenders. For another, as director, Hernandez could cast the definition of a sex offense in terms that were so "elastic" that it covered incidents—such as a college freshman dating a high school junior—that the average person might not think of as sex offenses. It was also impossible to verify the reliability of self-reports, because data that would identify victims were never collected. For still another, a number of former Butner patients have told us that they were expected to disclose new offenses on an ongoing basis as part of their treatment participation. One, for example, spontaneously wrote the first author a letter (C.S., personal communication, September 6, 2010) stating that "when I got into the SOTP program I was instructed to count all incidents of sexual contact regardless of

my age or the age of my 'victim'" (i.e., sexual contact). Finally, Butner patients were also expected to pass the full disclosure polygraph that Bourke and Hernandez (2009) described in the "Measures" section of their paper (p. 186). This is a significant feature, because a primary technique that is relied upon to pass this type of exam is by "overestimating the number of possible victims" (Abrams, 1991, p. 259).

So how, given the foregoing circumstances, were the Butner results produced as artifacts of Hernandez's research design? The explanation revolves in large part around the fact that subjects in psychological experiments will act the way a researcher wants them to act if they know what he or she hopes to find. Aspects of the research situation that tip subjects off to these hopes are referred to as "demand characteristics" (Orne, 1962; Fillenbaum, 1966). In the Butner research, it was a simple matter for those in the treatment program to figure out what Hernandez wanted from them. This "demand" was reinforced by expecting participation in a polygraph examination where overdisclosure is generally encouraged and by an awareness that severe disadvantages might accrue to those who, for whatever reason, were terminated from the program. Overdisclosure was also encouraged by the adoption of data collection procedures that made it impossible to verify which disclosures were accurate and which were not.

Considering these circumstances, it seems obvious that almost any offender faced with the foregoing circumstances would generate numerous disclosures, even if the great majority were false. Hernandez had the opportunity to test whether this was the case by giving those who participated in his second study different instructions than he gave to his first sample. He could have, for example, told his second sample that they would not be placed in the general prison population under any circumstances, that they were not expected to make ongoing disclosures or pass a polygraph on their disclosures, that he only wanted them to be totally honest, and that he wanted to collect victim information to verify that this was the case. Had he achieved his original results after exercising some of these options he could have claimed that his results were not due to demand characteristics. He did not to do so, however, and he has not explained why he unnecessarily repeated the operations in his first study rather than varying them so that he could test the adequacy of his research design. Furthermore, most recently Hernandez (2009) himself has questioned the results of his research by stating that "some individuals have misused the results of Hernandez (2000) and Bourke and Hernandez (2009) to fuel the argument that the majority of CP offenders are indeed contact sexual offenders and, therefore, dangerous predators. This simply is not supported by the scientific evidence."

The best explanation of Hernandez's results about prior contact sex offenses by CPOs is therefore that they were artifacts of inadequate research design, which has led at least one judge to conclude that the "Court can find no error in (the) conclusion that the Butner Study . . . 'doesn't meet scientific standards for research, and is based upon, frankly, an incoherent design for a study.'"[14]

It is also the case that the number of self-disclosed incidents of nonadjudicated sex crimes has never been regarded as an adequate standard for estimating the risk that sex offenders pose with respect to child molestation. That status is reserved for post-apprehension recidivism in the form of new arrests or convictions. In light of the importance of this measure, Bourke and Hernandez also did not adequately address the issue of dangerousness because they did not collect recidivism data, though they are well situated to do so.

After putting the inadequacies of the Butner studies in perspective, the second step toward developing a more adequate conceptualization of federal CPOs entails the collection of data on the demographic features, sex offense histories, and sexual recidivism rates of a representative sample of federal CPOs. The next section describes the characteristics of the samples that we studied for this purpose and presents the results we obtained. We also presented portions of this section at the 2009 meeting of the Association for the Treatment of Sexual Abusers (Wollert, Waggoner, & Smith, 2009).

PRIOR HISTORY AND RECIDIVISM AMONG FEDERAL CPOS

Background Information and Sample Characteristics

Both the first and third members of our research team have provided outpatient treatment services to offenders on federal supervision pursuant to contracts with the federal government that each have held for many years. One of our programs served probationers who live in a large metropolitan area on the West Coast while the other served a more rural population who live in the Midwest. Seventy-two men were referred to our programs during our tenure as federal contractors. Most of these clients were referred after they completed a period of incarceration for being convicted of a child pornography offense. Others were referred prior to being adjudicated on child pornography charges and were either placed on probation in the community or eventually sent to prison after a period of pretrial supervision that sometimes lasted from one to two years. Three of the referrals we received were convicted of producing child pornography and thus were sentenced under Section 2G2.1 of the USSGs. The rest were sentenced under Section 2G2.2.

Since almost all treatment expenses were covered under federal contract, very few referrals elected to seek out other providers. We therefore regard the cohorts that we studied as being representative of the larger population of federal CPOs. Although we also provided services to federal supervisees who were convicted of or charged with other sexual exploitation offenses, we did not include these men in our database. Our database was compiled in September 2009 from presentence investigations, police records, charging documents, psychological evaluations, and treatment records.

Demographic Data and Past Patterns of Criminality

As the first step in our analysis, we compiled data on various risk factors that are included in Static-99, an actuarial test that is used in evaluations of contact sex offenders to estimate their chances of sexually recidivating (Hanson & Thornton, 2000). We found that our clients, on the average, were 48 years old. None of our clients was convicted of a violent offense when sentenced on the child pornography charges. One was convicted of committing a violent offense prior to his pornography conviction, and two were sentenced on four or more separate occasions before their pornography convictions. Twenty-five of our clients had never lived with another person in a committed relationship for at least two years.

We also compiled information about seven additional patterns of sexual offending, presented in Table 2.2, from our records. Ten subjects had prior convictions for

Table 2.2
Types of Sex Offenses Committed by 72 Federal CPOs in Addition to an Index Offense for Child Pornography

ID#	1. Prior sex contact crimes (#)	2. Prior PCP* crimes (#)	3. Prior exposure crimes (#)	4. Prior peeping crimes (#)	5. The index crime was for a contact sex crime & PCP*	6. An attempt was made to meet with a minor	7. The victim was a family member
6				1			
7	1						No
8	1				Yes		No
14							Yes
22	1						Yes
23	2				Yes	Yes	Yes
31							No
32	1						Yes
35	1						Yes
37	1				Yes		No
41							No
45		1	1	1			No
48			1				No
54		1					No
57	1				Yes		No
62	1				Yes		Yes
65					Yes		Yes
66						Yes	No
70							
72	1						No

*PCP = Possession of child pornography or a more serious child pornography offense

Table 2.3
Summary of Recidivism Status and Supervision Performance of 72 CPOs Referred to Two Different Federally Funded Outpatient Treatment Programs

Months at Risk																	
0–12	x	x	x	x	x	x	x	x	x								
13–24	x	x	x	x	x	x	x	x	x	B	S	A	C				
25–36	x	x	x	x	x	x	x	x	x	C							
37–48	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
49–60	x	x	x	x	x												
61–72	x	x	x	x	x	x											
73–84	x	x	x														
85–96	x	x	x	N													
97–108	x	x															
109–120	x																
121–132	x																
133–144	x																
Over 144	x																

Abbreviations: x = no new contact or non-contact sex crimes; S = taken into custody for personal safety (SV*); A = had adult pornography; B = had stories about sex with children (SV); C = had child pornography; N = committed a noncontact sex offense; *SV = supervision violation.

contact sex offenses. Two had a prior conviction for a child pornography offense. Three had previously been convicted of public indecency, peeping, or both. Six were convicted of a contact sex offense when they were convicted of the index pornography offense. Only one, however, used the Internet to arrange a meeting with a minor female. Seventy-two percent (52 offenders) of all supervisees were negative for patterns of sexual conduct problems beyond their child pornography convictions. Furthermore, the patterns in Table 2.2 suggest that the 28% of supervisees in this study who were positive for additional sexual conduct problems did not commit a broad range of sex offenses.

Patterns of Recidivism Over a Four-Year Follow-up

As the second step in our analysis, we determined the number of months that each federal supervisee had "survived" in the community the last time (September 1, 2009) we updated our database. This period ended whenever a supervisee absconded, died, was taken into custody for a supervision violation, was sentenced to prison, or was charged with a new sex offense. Otherwise, it ended on the closing date. Table 2.3 breaks down the months that each supervisee was at risk by his supervision perfor-

mance and his recidivism status. Over an average span of four years, it was found that one out of seventy-two CPOs was taken into custody for possessing child pornography. Seven months after the closing date we learned that a second client had also been taken into custody for the same reason, so we modified Table 2.3 to reflect this event. Another CPO who was on active supervision was also apprehended for the commission of a noncontact sex offense other than the possession of child pornography. None of the CPOs was arrested on charges of child molestation, however, and no one who had successfully completed supervision was charged with either a contact or noncontact sex offense.

CONCLUSION

This chapter was premised on the belief that more research needs to be carried out on CPOs in general and on federal CPOs in particular to adequately address problems associated with the USSGs. After reviewing a number of issues related to the USSGs we summarized several key articles about CPOs and argued that the results of the Butner studies that have been conducted on federal CPOs are harmful for the purpose of decision making on this issue. We also presented demographic, criminal history, and recidivism data for a representative sample of federal CPOs.

This is the first report that, to our knowledge, has been compiled on the treatment performance and offense patterns of individuals referred to federally funded outpatient treatment programs after being charged with or convicted of a child pornography offense. Whereas research by the U.S. Department of Justice (Langan, Schmitt, & Durose, 2003) indicates that over 3% of child molesters released to the community are rearrested for another contact sex crime against a child during a three-year risk period, none of the CPOs in the present study were rearrested for this type of crime during a four-year survival period that censored the data of offenders who died or were taken into custody for other offenses. Since survival analysis generates larger recidivism estimates than risk period analysis (Prentky, Lee, Knight, & Cerce, 1997), this finding indicates that CPOs differ from child molesters.

The results of this study are also consistent with the results of other follow-up studies that show that CPOs do not represent a high risk of recidivism and do not have florid or violent criminal histories. Furthermore, consistent with other findings, it has been our clinical experience that the great majority of offenders in this group generally do quite well in treatment, supervision, and post-supervision, and are able to conform their behavior to society's expectations. Their responsivity to outpatient treatment, and thus the value of treatment, is reflected in the very low rate of contact sex offenses (0%) that were recorded in the study at hand and in another follow-up study that recruited CPOs from three different outpatient treatment programs (Webb et al., 2007). Finally, having interacted on at least a weekly basis with most of our clients for years, our impression is that very few—perhaps somewhere between 10 and 15%—meet the diagnostic criteria for pedophilia (American Psychiatric Association, 2000). We therefore believe it is precipitous to claim that the use of child pornography may be taken as an indicator of pedophilia (Seto et al., 2006) in the absence of research on a representative sample of federal CPOs in which physiological and psychological testing are combined with true diagnostic assessment.

The present results confirm, however, that a relatively large proportion of CPOs

have never been involved in a committed relationship. This, in turn, suggests that withdrawal, social isolation, or disrupted social relationships may be significantly related to the commission of child pornography offenses for many CPOs. Treatment of those supervisees who fall in this category might therefore place additional emphasis on the development of their social skills and on the implementation of plans for helping them effect a long-term integration with the larger community that is responsible, meaningful, and stable.

Endnotes

1. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18, 28, and 29 U.S.C).
2. Kimbrough v. United States, 552 U.S. 85, 96, 125 S. Ct. 558, 567 (2007) ("In the main, the Commission developed Guidelines sentences using an empirical approach based on . . . 10,000 presentence investigation reports.").
3. Mistretta v. United States, 488 U.S. 361, 407–408 (1989).
4. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 ("PROTECT Act"), codified at 18 U.S.C. § 3553(b)(2)(2004)).
5. United States v. Dorvee, Docket No. 09-0648-cr (2d Cir. May 11, 2010).
6. Gall v. United States, 1287 S. Ct. 586 (2007).
7. Rita v. United States, 551 U.S. 338, 351 (2007).
8. *Kimbrough*, 552 U.S. at 90.
9. United States v. Booker, 543 U.S. 220 (2005); Kimbrough, 552 U.S. at 101.
10. *Rita*, 551 U.S. at 351, 357.
11. United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010).
12. Graham v. Florida, 560 U. S. ____ (U.S. 2010), pp. 26–27.
13. United States v. Johnson, No 4:07-cr-00127 (S.D. Iowa Dec. 3, 2008), p. 5.
14. *Id.* at 18.

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