

# Extralegal Factors and the Imposition of Lifetime Supervised Release for Child Pornography Offenders

*Niquita M. Vinyard*  
Senior U.S. Probation Officer  
Eastern District of Missouri

**A LARGE BODY** of federal sentencing research has examined the effects of legal and extralegal factors on sentencing outcomes (Albonetti, 1997; Doerner & Demuth, 2010; Mustard, 2001). This literature focuses on sentence length and/or the decision to incarcerate as the dependent variable. Surprisingly, researchers have ignored a second and equally important outcome of the federal sentence—the supervised release term. Supervised release is a period of post-conviction community supervision that is imposed at the time of sentencing.<sup>1</sup> Not to be confused with parole, supervised release adds a period of supervision to be served upon completion of the sentence of imprisonment. Parole on the other hand, is a period of supervision carved out from the length of the original sentence.<sup>2</sup>

Once a sentencing court determines that a term of supervised release is authorized or required, the court must then decide the length of the term. The maximum authorized supervised release term for Class A or B felonies is five years, three years for Class C and D felonies, and one year for Class E felonies or

misdemeanors.<sup>3</sup> Interestingly, the supervised release term for child pornography offenses is not guided by the class of the felony. Instead, the length of the term is guided by 18 U.S.C. 3583(k).<sup>4</sup> Under the statute, the length of the supervised release term for child pornography offenders is a minimum of five years to life.

In determining where within the five years to life range to impose supervised release for child pornography offenders, the court is to consider statutory sentencing factors which include the nature and circumstances of the offense and history and characteristics of the offender; deterrence; public protection; and needed educational/vocational training, medical care, or other correctional treatment of the offender.<sup>5</sup> However, Congress declared harsher penalties for all child pornography offenders with specific directives to the U.S. Sentencing Commission (USSC) to include policy statements in the sentencing guidelines regarding the imposition of supervised release. According to the policy statement, if the offense of conviction is a sex

offense including child pornography offenses, the statutory maximum term of supervised release, which is a life term, is recommended.<sup>6</sup> Under the Federal Sentencing Guidelines, such policy statements are to be considered by the sentencing judge (Shockley, 2010).

If the policy statement in the guidelines recommending the maximum supervised release term for all child pornography offenses is followed directly, one would expect that the exact same sentence of lifetime supervised release would be meted out across all child pornography cases. However, only approximately 38 percent of child pornography offenders convicted in federal court in fiscal year 2010 received a life term of supervised release (USSC Sourcebook, 2010). Such data suggests two things: (1) a disconnect between Congressional will and the will of the sentencing court, and (2) the possibility of unwarranted supervised release sentencing disparities for child pornography offenders. An unwarranted sentencing disparity refers to unequal sentencing resulting from unfair, unjustifiable, or unexplained causes rather than a legitimate use of judicial discretion (Rigsby, 2010).

The length of the supervised release term imposed by the court is of particular importance for child pornography offenders subject to the enhanced supervised release provisions because the statute also provides for the revocation of supervised release resulting in the incarceration of the defendant for the

<sup>1</sup> A sentencing court is authorized and, in some cases, statutorily required to impose a term of supervised release in addition to a term of imprisonment (see general supervised release statute under 18 U.S.C. 3583 in Federal Criminal Code and Rules).

<sup>2</sup> The Sentencing Reform Act of 1984 abolished parole for federal offenders who committed their offenses on or after November 1, 1987.

<sup>3</sup> A Class A felony carries a maximum imprisonment term of life or death. A Class B felony carries a maximum imprisonment term of twenty-five years or more. A Class C felony is less than twenty-five years imprisonment but more than ten years. A Class D felony is less than ten years imprisonment but more than five. A Class E felony is less than five years imprisonment but more than one year.

<sup>4</sup> For all child pornography offenses, the general supervised release statute (18 U.S.C. 3583) is trumped by 18 U.S.C. 3583(k) which authorizes the term and length of the supervised release.

<sup>5</sup> See 18 U.S.C. 3553(a) in Federal Criminal Code and Rules.

<sup>6</sup> See Section 5D1.2(b)(2) of the USSC Federal Sentencing Guidelines Manual 2012.

remainder of the period.<sup>7</sup> For example, if a defendant who is required to register under the Sex Offender Registration and Notification Act (SORNA) engages in any conduct constituting a new sex offense, including child pornography while on supervised release, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment. Under this same example, child pornography offenders serving lifetime supervised release, if revoked, would face life imprisonment. In addition to having the threat of life imprisonment if revoked, child pornography offenders sentenced to lifetime supervised release will never be discharged from supervision.<sup>8</sup>

In this study I seek to explore whether the imposition of a life term, which represents the most severe term of supervised release, is guided solely by legal factors or whether extralegal characteristics also influence a judicial officer's decision to impose a life term of supervised release for child pornography offenders. What is currently known about the relationship between extralegal factors and sentencing outcomes generally is that minorities, men, younger individuals, and those with less education have a higher probability of incarceration and receive longer prison sentences in federal court than do whites, women, older individuals, and those with more education (Albonetti, 1997; Everett & Wojtkiewicz, 2002). Additionally, such variables have been shown to interact with one another and with legally relevant factors (Doerner & Demuth, 2010). It is unknown how these factors affect supervised release sentences for child pornography offenders.

A study of this type has multiple implications. If courts deviate from the lifetime supervised release sentence recommended by the guidelines, courts may create sentencing disparities generating doubts about fairness and uniformity of sentences. Second, this study adds to the extant sentencing literature by examining supervised release sentences. The lack of attention to this outcome is a surprising omission in federal sentencing research.

<sup>7</sup> See 18 U.S.C. 3583(e)(3) authorizing the incarceration of a defendant that violates the terms of supervised release.

<sup>8</sup> Supervision includes at least twice-monthly meetings with the probation officer either in the home, probation office, or community. The offender must also adhere to the standard conditions of supervised release (e.g., committing no new crimes) as well as special sex offender conditions including but not limited to polygraph testing, sex offender treatment, sex offender registry, no contact with children under the age of 18, restricted use of a computer/Internet, and search.

Accordingly, this research is presented as an exploratory and preliminary examination of the subject matter. Third, given the relative newness of federal child pornography adjudications, the extant sentencing literature is lacking in studies examining outcomes of child pornography offenders. Accordingly, this research provides preliminary insight into sentencing outcomes, particularly supervised release outcomes for this category of offenders. Finally, Congress has set a punitive course for child pornography offenders both statutorily with the supervised release range, and more importantly with policy directives in the guidelines for lifetime supervised release. This research should be a resource to inform Congress of which legal and extralegal factors affect whether lifetime supervised release is imposed for child pornography offenders.

In the sections that follow, I discuss the current sentencing structure of the federal courts including the specialized sentencing structure for child pornography offenses and judicial dissonance in sentencing child pornography offenders. I also review a theoretical explanation for sentencing disparities and provide a brief review of the empirical literature assessing extralegal factors that influence sentencing outcomes.

## Sentencing Structure of the Federal Courts

### *The Sentencing Reform Act of 1984 (SRA)*

Prior to 1984, federal judges possessed unfettered sentencing discretion as long as they imposed sentences within the statute. The problem with indeterminate sentences was that defendants with similar criminal backgrounds often received different sentences. As a means of limiting disparities in sentencing, Congress passed the SRA, which established a statutory framework for federal sentences (Kimball, 2011; USSC Federal Sentencing Guidelines Manual, 2012). Specifically, the SRA established the USSC to create, develop, and monitor guidelines. Judges had to use the guidelines to calculate the mandatory guideline range, which was developed on the seriousness of the offense, the particular crime, and the defendant's criminal history (Kimball, 2011). Although the guidelines were mandatory, a judge could depart from the guidelines if and only if a particular case presented atypical features. The guidelines were intended to base judicial sentencing entirely on legally relevant factors such as the seriousness of the offense and prior criminal history.

### *United States v. Booker (2005)*

After twenty years in effect, the constitutionality of the federal sentencing guidelines was successfully challenged in 2005 with the landmark *United States v. Booker* case. The Supreme Court held that the federal guidelines violated a defendant's Sixth Amendment right to a jury trial if the trial judge imposed an enhanced sentence beyond what is authorized by a jury verdict (USSC Federal Sentencing Guidelines Manual, 2012). The Supreme Court excised the mandatory nature of the guidelines, rendering them advisory. The Supreme Court reasoned that an advisory guideline system, while lacking the mandatory features that Congress enacted, retains other features that help to further congressional objectives including promoting certainty and fairness in sentencing, avoiding unwarranted sentencing disparities, and maintaining flexibility to permit individualized sentences when warranted (USSC Federal Sentencing Guidelines Manual, 2012). Excising the mandatory nature of the sentencing guidelines restored discretion to federal judges.

Currently, the sentencing guidelines function with judicial discretion in a stepwise manner for individual sentences (Hamilton, 2011). First, the sentencing court must calculate the guideline sentencing range. Second, the court determines if any departures are applicable. A departure is an adjustment from the final sentencing guideline range calculated by examining departure policy statements in the guidelines (USSC Federal Sentencing Guidelines Manual, 2012). Next, in determining a final sentence, the court reviews certain statutory sentencing factors that Congress established as general tenets for the reasonableness of an individual sentence (Rigsby, 2010). These factors found in 18 U.S.C. 3553(a) include the nature of the offense, individual defendant characteristics (e.g., age, education, vocational skills, mental/emotional condition, physical condition, family ties and responsibilities, and community ties), deterrence, public safety, the advisory guideline range, and avoiding disparities between like offenders. The court must consider all the factors in 18 U.S.C. 3553(a), including whether a variance, a sentence outside the advisory guidelines, is warranted.

### *The Booker Decision and the Imposition of Supervised Release*

Not only do the federal sentencing guidelines provide direction for judges in determining the sentence of imprisonment, the guidelines

provide guidance (though minimally) for determining the sentence of supervised release. Although the issue at hand in the *Booker* decision was the sentence of imprisonment, and although the Supreme Court was silent specifically on the sentence of supervised release, the rendering of the guidelines as advisory in effect rendered the section of the guidelines (see Chapter 5, Part D in USSC Sentencing Guidelines Manual, 2012) that addresses the imposition of supervised release advisory as well.<sup>9</sup>

## Sentencing Structure for Child Pornography Offenses

In the past 15 years, federal child pornography statutes have expanded and the statutory minimum and maximum allowable sentences of imprisonment and supervised release terms have escalated (Hamilton, 2011).<sup>10</sup> In justifying their punitive legislation, Congress has said that intrastate distribution, receipt, and possession of child pornography fuel the interstate market and are harmful to the children depicted and society as a whole (Krohel, 2011). As a means of deterring offenders, eliminating the market, and ending the continual abuse of children, Congress has said harsh punishment for all child pornography offenders is warranted (Hamilton, 2011).

Some researchers argue that the increasing punitive stance by Congress toward child pornography offenders is the result of moral panic and a political culture of fear of the sexual exploitation of children (Spearlt, 2011). Others argue that the impetus behind Congress's punitive stance is an underlying presumption that anyone involved in child pornography is really an undetected child molester (Hamilton, 2011). An exploratory psychological study on child pornography offenders by Bourke and Hernandez (2009) bolstered this presumption. They found that what judges knew at the time of sentencing about the offender's documented criminal sexual history (as found in the presentence report) vastly differed from their self-report criminal sexual history disclosed at the end

<sup>9</sup> The author contacted the USSC on January 13, 2014 to clarify the *Booker* decision on the imposition of supervised release. Statements in this section reflect the USSC's view of the *Booker* decision on supervised release sentences.

<sup>10</sup> Production of Child Pornography carries a mandatory minimum of 15 years and a maximum of 30 years. Distribution and receipt offenses carry a mandatory minimum of 5 years and a maximum of 20 years. Possession offenses have no mandatory minimum and the maximum is 10 years.

of treatment.<sup>11</sup> While the study had many limitations including generalizability, it armed Congress and those who agree with empirical evidence to justify punitive child pornography statutes and guidelines.

Sentencing discretion that judges once had in child pornography sentencing before the *Booker* decision was limited by the passing of the Protect Act of 2003, which reiterated Congress's commitment to protect children and strictly punish those who commit child pornography offenses (Kimball, 2011; Krohel, 2011).<sup>12</sup> The main justification for the act was the perception that child pornography sentences were too lenient because of the disproportionately high incidence of downward departures (Rigsby, 2010; Kimball, 2011). The act amended the then-mandatory guidelines to reduce the incidence of departures and increase the offense level in child pornography cases. The act also amended the then-mandatory guidelines to prohibit judges from considering family ties and responsibilities, and ties to the community in cases involving a minor victim. Most important, the act lengthened the supervised release term for child pornography offenders from a maximum of five years to a minimum of five years to life. Congress justified the enhanced supervised release term with deterrence and rehabilitation arguments:

[18 U.S.C. 3583(k)] responds to the longstanding concerns of federal judges and prosecutors regarding the inadequacy of the existing supervision periods for sex offenders, particularly for the perpetrators of child sexual abuse crimes, whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison. The current length of the authorized supervision periods is not consistent with the need presented by many of these offenders for long-term—and in

<sup>11</sup> At the time of sentencing, 74 percent of the offenders had no prior documented contact offense. By the end of treatment, 85 percent admitted they had at least one hands-on offense.

<sup>12</sup> The Protect Act of 2003 enacted on April 30, 2003 is a law with the stated intent of preventing abuse. "PROTECT" stands for "Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today." The Protect Act strengthened law enforcement's ability to prevent, investigate, prosecute, and punish violent crimes committed against children. One of the main provisions of the Act is increased penalties for sex offenses against children, including life imprisonment for repeat offenders (Kimball, 2011).

some cases, life-long—monitoring and oversight (Shockley, 2010, p. 356).

Before the Protect Act of 2003, some judges disregarded congressional amendments and granted downward departures for child pornography offenses (Kimball, 2011). Following the Protect Act of 2003, non-guideline sentences for child pornography offenses decreased (Krohel, 2011). However, the *Booker* decision empowered judges to exercise their discretion and the number of non-guidelines sentences increased again (Kimball, 2011). Legal researchers refer to this inconsistency of sentences as judicial dissonance on the issue of child pornography.

## Judicial Dissonance on Child Pornography

Through reviews of thousands of individual sentencing decisions and appellate decisions, legal researchers have concluded that some judges disagree with Congressional mandates and/or guidelines and use their discretion to impose non-guidelines sentences.<sup>13</sup> On the other side are judges who either agree with Congress or abide by statute and guideline policies and impose within guideline sentences. Legal researchers offer three possible explanations for why judges are imposing non-guidelines sentences. First, some judges view the current sentencing structure for child pornography offenses, particularly possession of child pornography, as too severe. The guidelines as they currently stand call for enhanced penalties if a computer/Internet was used and if images involved children under the age of twelve.<sup>14</sup> Some judges find the enhanced penalties, such as the use of the Internet, an inherent factor in the crime that unfairly increases the guidelines and use their discretion to circumvent what they believe to be harsh sentences (Rigsby, 2010).

A second explanation put forth is that some judges view child pornography as a victimless crime and/or view child pornography offenders as harmless (Hamilton, 2011). In her review of judicial justifications of non-guidelines sentences, Hamilton (2011) highlighted one judge's view: "From my experience, most of these men have no prior criminal history. They usually have healthy family lives

<sup>13</sup> It appears the difference in opinion relates to how to treat/sentence offenders convicted of possession of child pornography as opposed to more serious offenses like production of child pornography.

<sup>14</sup> According to the 2010 USSC Sourcebook, enhancements such as the use of computer/Internet and possession of images of children under twelve are factors present in over 90 percent of cases.

and productive careers.” (p. 562). Similarly, U.S. District Judge Robin J. Cauthron during her 2009 testimony to the USSC to reduce the severity of child pornography guidelines said, “It is too often the case that a defendant appears to be a social misfit looking at dirty pictures in the privacy of his own home without any prospect of touching or otherwise acting out to any person” (Cardona, 2009).

A third explanation is that child pornography offenders represent a different demographic than judges are used to encountering. Indeed, trends in federal data have distinguished child pornography offenders from the overall average defendants involved in federal prosecutions. Child pornography offenders, who account for 2.3 percent of federal prosecutions, are described as 99.3 percent male, 88.7 percent white, 35.1 percent have completed some college, 17.5 percent are college graduates and 27.2 percent are age 50 and older (USSC Sourcebook, 2010).<sup>15</sup> Kimball (2011) argues that judges are using these characteristics in addition to family ties and employment to justify non-guideline sentences. Krohel’s (2011) review of sentencing decisions of child pornography offenders highlighted one such case example. In *United States v. Grossman* (2008), the offender pled guilty to Possession of Child Pornography. The guideline sentencing range was 135 to 168 months and a supervised release range of five years to life. The judge imposed a non-guideline sentence of 60 months imprisonment and 10 years supervised release. In justifying the sentence, the judge noted he was “troubled” by the discovery that the thirty-five-year-old married father was facing more than 10 years in prison for a single count of Possession of Child Pornography. In justifying the sentence, the judge also highlighted that the offender was educated.

Notwithstanding the above, other judges in the federal judiciary concur with Congress’s position that all child pornography offenses, including possession offenses, are serious and warrant serious punishment. Like Congress, some judicial officers believe child pornography offenses fuel the interstate market and increase the demand and encourage the production of more children being sexually abused. Judges who take this position do not find the guidelines excessive and expectedly

comply with the guidelines ranges, including the policy statement to impose lifetime supervised release.<sup>16</sup>

In sum, opposing judicial perspectives on the issue of child pornography coupled with Post-*Booker* awarded discretion suggest the possibility of sentencing disparities. Rigsby (2010) likened child pornography sentences to the equivalent of a lightning strike in which congressionally mandated severe sentences like lifetime supervised release strike some offenders and miss others.

## Sentencing Disparities: A Theoretical Explanation

Studies modeling the relationship between extralegal factors and sentencing outcomes frequently use the focal concerns perspective to explain why unwarranted sentencing disparities exist (Wolfe, Pyrooz, & Spohn, 2010; Steffensmeier et al., 1998). The focal concerns perspective of case processing and court actors’ decisions provides a framework for understanding why extralegal factors such as race, gender, and age might continue to influence sentencing decisions despite the implementation of a formal guideline system (Steffensmeier et al., 1998; Ulmer, 1997; Spohn & Holleran, 2000). The underlying premise of this perspective is that one’s position in the social structure has implications for treatment in the justice system. According to this framework, judges make situational imputations about the offender’s character and expected future behavior and assess these characteristics based on three main considerations: blameworthiness, protection of the community, and practical constraints and consequences (Steffensmeier, 1980; Steffensmeier et al., 1998).

Blameworthiness centers on issues of culpability and just deserts (Steffensmeier et al., 1998). Judges’ views of blameworthiness are influenced by offense severity, offender biographical factors such as criminal history, and the offender’s role in the offense, such as being a leader or organizer (Steffensmeier et al., 1998). For example, offenders with longer criminal histories generally receive more severe punishments, because such histories suggest greater culpability (Wooldredge, 2010).

Protection of the community typically focuses on the need to incapacitate the offender and deter future crime. This also includes assessments of the offender’s future behavior such as dangerousness or recidivism (Steffensmeier & Demuth, 2001; Steffensmeier et al., 1998). For example, in describing evolving perceptions of minority crime, Mauer (1999) explains that it was not until the 1970s and early 1980s that the stereotype of the young black man evolved from petty theft to ominous predator. Such fear has resulted in minority offenders being stereotyped as more dangerous and criminally responsible (Welch, 2007). Previous research has linked the defendant’s race/ethnicity to notions of dangerousness and recidivism (Albonetti, 1991; Steen, Engen, & Gainey, 2005). The threat that minorities are thought to pose has resulted in harsher sentencing outcomes (Welch, 2007).

Practical constraints and consequences relate to how sentencing decisions impact the functioning of the criminal justice system as well as the individual defendants and their families and communities. Organizational concerns include efficiency and maintaining positive working relationships among courtroom actors, as well as being sensitive to criminal justice resources (Steffensmeier et al., 1998). Practical consequences for the individual offender include concerns about the offender’s ability to do time, health conditions, special needs, and disruption of family ties (Steffensmeier et al., 1998). For example, in the case study cited earlier (*U.S. v. Grossman*), the court highlighted its concern of disrupting Grossman’s family ties with a sentence of more than 10 years imprisonment. The court considered Grossman’s family ties in its decision to impose a non-guideline sentence.

## Empirical Research on Extralegal Sentencing Factors

Empirical studies have demonstrated that although the most powerful predictors of federal sentencing outcomes are legally relevant factors, extralegal offender factors such as race, age, and gender also play a role (Albonetti, 1997; Everett & Wojtkiewicz, 2002; Mustard, 2001; Doerner & Demuth, 2010). The federal sentencing guidelines manual devotes an entire section (see Chapter 5, Section H) to a discussion of offender characteristics in which policy statements specific to sex, race, national origin, creed, religion, and socioeconomic status are clearly identified as irrelevant and prohibited from consideration. Additional characteristics, such as

<sup>15</sup> By comparison, drug offenders, who account for 28.9 percent of federal prosecutions, are described as 87.4 percent male, 26 percent white, 14.7 percent have completed some college, 2.8 percent are college graduates, and 7.4 percent are age 50 and older (USSC Sourcebook, 2010).

<sup>16</sup> See *U.S. v. Kenrick* (2008), *U.S. v. Daniels* (2008) and *U.S. v. Washington* (2007) providing examples of courts using the policy statement in the guidelines to justify lifetime supervised release for all child pornography offenses under 18 U.S.C. 3583(k), including less serious offenses like possession of child pornography (Shockley, 2010).

age, education, vocational skills, mental and emotional conditions, physical condition, employment record, family and communities ties are identified “as not ordinarily relevant in determining if a departure is warranted” (see Chapter 5, Section H)<sup>17</sup>

### *Race Effects*

Sentencing research is inundated with empirical inquiries on the effect of race on sentencing outcomes. Conclusions on this issue are mixed. Early studies find that race has little substantive effect on sentencing outcomes (Kleck, 1981; Kramer & Steffensmeier, 1993). More recent studies have concluded that blacks, Hispanics, and Native Americans receive harsher sentences than whites (Doerner & Demuth, 2010; Everett & Wojtkiewicz, 2002; Mustard, 2001). The disagreements in the literature are largely due to differences in methodological sophistication (Zatz, 2000). For example, in their review of past race and sentencing studies, Chiricos and Crawford (1995) found that early studies failed to differentiate between the decision to incarcerate (in/out) and sentence length decisions, inadvertently clouding the influence of race on sentencing.

### *Age Effects*

Studies examining the impact of age on sentencing measure age in one of three ways: (1) a continuous variable; (2) two subgroups: “young offenders” and “old offenders”; or (3) multiple narrowly defined categories. Models that code age as a continuous variable assume a linear effect (Klein, Petersilia, & Turner, 1988; Myers & Talarico, 1987; Wolfe et al., 2010). Studies that analyze age into the two subgroups “young offender” and “old offender” do so because prior research has found that older offenders (age 50 and older) are sentenced more leniently than younger offenders (under age 50), and imprisoned older offenders receive shorter sentence lengths (Champion, 1987; Steffensmeier & Motivans, 2000). However, those studies that compartmentalized age into more narrowly defined categories found that a curvilinear relationship emerges, with those adults ages eighteen to twenty-one receiving more lenient sentences than adults ages twenty-one through twenty-nine but similar leniency to thirty to thirty-nine-year-olds (Steffensmeier, Kramer, & Ulmer, 1995). Steffensmeier et al. (1998) argue that models assuming a

linear continuous age effect are inappropriate. Age influences sentence severity in a curvilinear fashion and is best depicted by an inverted U-shape, with offenders over 50 or under 21 receiving the least severe sentences (Steffensmeier et al., 1998).

### *Education Effects*

While the guidelines cite the defendant’s education as generally irrelevant in determining a sentence, some studies have nevertheless found that those offenders who are poorly educated are sanctioned more harshly (Clarke & Koch, 1976; Kruttschnitt, 1980/1981). Mustard (2001) found offenders who did not graduate from high school received longer sentences [having no high school diploma resulted in an additional 1.2 months]. Offenders with college degrees received shorter sentences than high school graduates. College graduates were more likely to receive downward departures, less likely to receive upward departures, and more frequently receive large downward departures.

### *Socioeconomic Effects*

Few studies examine the impact of socioeconomic status on sentencing outcomes because there are few good indicators of economic status in the data (Zatz, 2000). This is true for USSC datasets. In one of the few studies that examined socioeconomic status, Mustard (2001) found that offenders with incomes less than \$5,000 were sentenced most harshly. This group received sentences 6.2 months longer than offenders who had incomes between \$25,000 and \$35,000. Mustard also found that offenders with annual income of less than \$25,000 were less likely to have their sentences reduced, and offenders with annual incomes of more than \$35,000 were more likely to have their sentences reduced. Low-income offenders were also more likely to receive upward departures.

### *Interaction Effects*

Research has shown that joint extralegal effects are often larger than individual main effects and they also show extralegal disparities that may not ordinarily emerge when examining only direct effects (Steffensmeier et al., 1998; Doerner & Demuth, 2010). For example, Steffensmeier et al. (1998) examined the main and interaction effects of race, gender, and age on sentencing outcomes in state courts in Pennsylvania. They found that young black males are sentenced more harshly than any other defendant group. Doerner and Demuth’s

(2010) analysis of interaction effects in federal courts found that race, gender, and age have a larger combined impact than the independent effects, such that young black and Hispanic males are disproportionately sentenced more harshly in federal court than any other group.

In summary, sentencing research conducted to date reveals that sentencing outcomes are influenced by extralegal factors and support the conclusion that legally irrelevant factors appear to be a source of unwarranted sentencing disparity. Omitted in the empirical literature is if and how extralegal factors also influence supervised release sentences. As noted earlier, the supervised release sentence for child pornography offenders is particularly significant because of the potential lifelong supervised release sentence.

## **Current Focus**

The current study investigates the effects of legal factors (mode of disposition, criminal history, departures, sex offender enhancement, and sentence length) and extralegal factors (age, race, education, and financial status) on the imposition of lifetime supervised release for child pornography offenders.<sup>18</sup> This study extends previous federal sentencing research in three important ways. First, I examine the sentence of supervised release, which has not been examined in prior research. Second, I use post-*Booker* data, which provides a more discretionary sentencing context in which there is greater opportunity for extralegal factors to influence supervised release outcomes. Third, I focus on child pornography offenders, as little sentencing research is available specific to this population.

I hypothesize that extralegal factors will influence the imposition of a life term of supervised release for child pornography offenders. Specifically, I expect that non-whites, younger individuals, those with less education and low socioeconomic status will have a higher probability of receiving lifetime supervised release than whites, older individuals, and those with more education and higher socioeconomic status. Moreover, as research has shown that extralegal variables interact with one another and with legally relevant factors (Doerner & Demuth, 2010), I hypothesize that age and education; age and financial status; and financial status and education may interact with and affect supervised release outcomes. For example, older age and higher

<sup>17</sup> This means that courts are not to consider these characteristics unless they are present to an unusual degree.

<sup>18</sup> Legal factors are factors in statutes and policy that are spelled out as to be taken into consideration in sentencing.

education may interact with and serve as a proxy for employability, responsibility, and reduced threat, while youthfulness and lower levels of education may interact with and serve as a proxy for higher risk. Likewise, older age and higher financial means may serve as a proxy for responsibility and reduced threat while youthfulness and less financial means may be perceived as higher risk. Finally, I reason that financial means and higher education may be perceived as low risk and limited financial resources and lower education may be perceived as high risk.

## Methods

### Data

Data collected by the USSC on offenders in federal criminal courts were used for this study. The strength of using federal sentencing data as opposed to sentencing data collected by state courts is that state courts operate under various different sentencing guidelines which make generalizability of the findings an issue. The federal system eliminates this issue with its national guidelines system.

The USSC dataset for individual offenders contains measures of (1) legal or court-related case processing information (e.g., criminal history variables, departures/variances, guideline enhancements/reductions); (2) extralegal characteristics (e.g., gender, race, educational level, age); and (3) case and sentence outcomes. The focus of this study is narrowed to 1,770 males convicted of and sentenced for child pornography offenses under the SRA between October 1, 2009, and September 30, 2010.<sup>19</sup> The dataset for the 2010 fiscal year was purposefully selected as this was the first year the USSC began isolating child pornography offenses from obscenity and prostitution offenses. This practice was instituted due to increasing research interest in

child pornography offenses. Prior to 2010, child pornography offenses were lumped together with all other sex offenses.

## Measures

### Dependent Variable

**Supervised Release.** As the present study is focused on who is receiving the most severe supervised release term (life), this variable was dichotomized so that a value of 0 indicates no imposition of lifetime supervised release and a value of 1 indicates the imposition of lifetime supervised release. The life term was selected over length of supervised release because of the severity of the sentence as well as the implication of life imprisonment if revoked.

### Independent Variables

The independent variables used in the analysis are legal variables and extralegal variables that are related to sentencing outcomes (Albonetti, 1997; Mustard, 2001; Spohn, 2006).

### Legal Measures

**Plea.** Plea bargaining is a common practice in the federal criminal justice system. Approximately 97 percent of convictions in federal courts (FY 2010) were the result of plea bargaining (USSC Sourcebook, 2010). Research has found that plea bargaining can reduce sentence severity (Kautt, 2002). Plea bargaining was included as an independent variable to determine if similar dynamics existed for supervised release outcomes. This variable was dichotomized so that a value of 1 represents that the defendant pled guilty either through a guilty plea or *nolo contendere*.<sup>20</sup> A value of 0 indicates that the defendant had a trial (bench or jury).

**Departure.** Courts can sentence an individual within the specified guideline range or impose an upward departure/variance or a downward departure/variance.<sup>21</sup> Departure is measured with three dummy variables (e.g., within-guideline sentence, upward departure/variance, and downward departure/variance), with within-guideline sentence as the reference category. As a downward departure/variance

<sup>20</sup> *Nolo contendere* is a plea in which the defendant neither admits nor disputes a charge, serving as an alternative to a pleading of guilty or not guilty.

<sup>21</sup> An upward or downward departure is a sentence that is greater or less than the advisory guideline range based upon the application of departure policy statements in the guidelines. An upward or downward variance refers to a sentence above or below the advisory guideline range based upon the court's weighing of one or more sentencing factors of 18 U.S.C 3553(a).

is a sentence lower than the guideline range, a downward departure/variance is expected to decrease the probability of the imposition of lifetime supervised release. An upward departure/variance is a sentence greater than the guideline range, so it is expected to increase the probability an offender receives lifetime supervised release.

**Criminal History.** This variable indicates whether the defendant has any criminal history, including behavior that is not eligible for the application of criminal history points (e.g., arrests). The USSC codes this variable as 0 if the offender has no criminal history and 1 if the offender has criminal history. The presence of criminal history is expected to increase the probability of an imposition of lifetime supervised release.<sup>22</sup>

**Sex Offender Enhancement.** This variable indicates whether an enhancement of Repeat and Dangerous Sex Offender (see Chapter Four - Section 4B1.5 of the 2012 U.S. Sentencing Guidelines Manual) was applied at sentencing. This enhancement is applied if the court finds that the offender committed the current federal offense after sustaining at least one sex offense conviction. This variable is coded as 0 if the enhancement was not applied and 1 if applied. This variable, which defines a pattern of sex related offending, is expected to increase the probability of an imposition of lifetime supervised release.

**Sentence Length.** The dataset provides no means of disaggregating the various charges of child pornography (e.g., Production, Receipt, Distribution, Transportation, and Possession) that could influence whether lifetime

<sup>19</sup> Originally the dataset included 1,886 offenders sentenced for child pornography offenses; however, those cases in which a term of supervised release was either not imposed or was below the statutory minimum of five years (out of range for the data) were excluded from the sample, resulting in 1,854 cases. In addition, due to the small number of women sentenced for child pornography offenses (14 cases), these cases were also excluded from the sample. The dataset did contain some missing data on some of the independent variables (sentence length, criminal history, sex offender enhancement, race, education, and fine). Listwise deletion was used to remove cases with missing data from the sample, leaving a total of 1,770 cases for analysis. Chi-square analysis was conducted to compare missing cases and cases included in the sample. The results revealed no significant difference between deleted cases and those included in the sample.

<sup>22</sup> The dataset also provides an additional indicator of criminal history with a variable labeled criminal history points. This continuous variable is the subtotal of criminal history points assigned to an offender based on the contributions of one, two, or three point offenses. Points are awarded for convictions only and apply to convictions obtained within ten or fifteen years of the commission of the federal offense. Some studies use this indicator of criminal history, but the problem with this measure is that an offender with an outdated criminal history, no matter how severe the history, would not receive any points. My indicator reflects a more accurate depiction of an offender's criminal history because it includes all arrests, countable convictions, as well as convictions that otherwise would not receive any criminal history points due to the age of the conviction. Analyses conducted using the alternate criminal history measure (criminal history points) revealed no changes to the final results.

supervised release is imposed.<sup>23</sup> Therefore, I used sentence length as a rough proxy for offense seriousness. Sentence length is a continuous variable measured in months of imprisonment. Due to the highly positive skewed nature of this variable (skewness=12.9, kurtosis=267.25), I used the natural log of sentence length. Longer sentences of imprisonment would appear indicative of greater offense seriousness, and therefore are expected to increase the probability of an imposition of lifetime supervised release.

### *Extralegal Measures*

**Age.** This variable is defined as the age of the defendant at the time of sentencing. Consistent with research that delineates age into the two subgroups of “young offenders” and “old offenders” (Steffensmeier & Motivans, 2000), as well as the fact that the average age of my sample is 42.26, I coded defendant age as a dichotomous variable, where 0 represents offenders ages 19-49 and 1 represents offenders ages 50 and over. I did not code age as a continuous variable because preliminary modeling showed that the effect of age was not linear. I also conducted a preliminary analysis of the age variable using a three-category measure (19-21; 22-49; and 50 and over) as suggested by Steffensmeier et al. (1998). There was no significant difference in the likelihood of lifetime supervised release between those ages 19 to 21 and 22 to 49, which suggests that my two-category measure of age is appropriate. Based on research that finds older offenders are sentenced more leniently, I expect offenders age 50 and over will have a lesser probability of being sentenced to a life term of supervised release.

**Race.** This variable indicates the defendant's self-reported race to the probation officer at the time the presentence report was prepared. Due to the sample being mostly white (88.6 percent), this variable was dichotomized such that a value of 1 represents whites and a 0 value represents nonwhites. The nonwhite category includes defendants identified as black (3.2 percent), Hispanic (6.4 percent), and other (1.8 percent). Based on prior research that finds nonwhites punished more harshly, I expect nonwhites will have a greater probability of being sentenced to a life term of supervised release than whites.

**Education.** This variable indicates the highest level of education completed by the defendant. Education is measured with four dummy variables (e.g., less than high school, high school graduate, some college, and college graduate), with less than high school as the reference category. I chose to maintain the refined disaggregation of the variable rather than use a dichotomous measure (e.g., less than high school=0, high school and above=1) to see if different levels of education influenced the imposition of lifetime supervised release. Mustard (2001) measured education with four dummy variables and found differences in sentence length based on levels of education. Accordingly, I expect offenders with lower levels of education will have a greater probability of being sentenced to a life term of supervised release than their counterparts.

**Fine.** A variable representing socioeconomic status such as income is not available in the current dataset. The best proxy is the imposition of a fine at sentencing. The court imposes a fine on all offenders they determine are able to pay this penalty. An offender's ability to pay a fine is based upon the offender's net worth and net monthly cash flow documented in the presentence report. This variable was dichotomized so that a value of 1 represented that a fine was imposed and a 0 value indicated that a fine was not imposed. I expect offenders that did not incur a fine, which represents a rough proxy for lower socioeconomic status, will have a greater probability of being sentenced to a life term of supervised release.

### **Analytic Technique**

To test the effects of legal and extralegal factors on supervised release outcomes of child pornography cases, the first step is to regress lifetime supervision (1=yes, 0=no) on the legally relevant variables (plea, departure, criminal history, sex offender enhancement, and sentence length). Logistic regression is used because the dependent variable is dichotomous. Next, extralegal variables (race, age, education, and fine) are added to the model to see if they explain lifetime supervision above and beyond the effect of the legally relevant variables. Finally, a series of two-way interaction terms (age and education; age and fine; and fine and education) are added to the model to assess if there are interaction effects. The conditional effects of race are not considered due to the small percentage of nonwhites in the sample.

### **Findings**

Table 1 displays descriptive statistics for all cases and for the data partitioned by offenders sentenced to lifetime supervised release and no lifetime supervised release. Bivariate analyses (Chi-Square Test for Independence and Independent Samples t-test) are also displayed. Full sample descriptive statistics reveal an overwhelming majority pled guilty (95.5 percent), a little more than half received a downward departure/variance (55.5 percent), more than half of the offenders had a criminal history (62.4 percent) and the average sentence of imprisonment was 120.4 months. The finding that more than half the total sample received a downward departure/variance appears consistent with researchers' argument of dissonance in child pornography sentencing. One of the explanations put forth by legal researchers for non-guideline sentences is the different demographic characteristics of child pornography offenders compared to the overall average offender involved in federal prosecutions. Indeed, the sample consists of mostly white offenders (88.7 percent), with 29.7 percent of the sample age 50 and older, a little more than half (52.4 percent) had some college or were college graduates, and only about 10 percent of the sample had less than a high school education. Although not shown in Table 1, the offenders ranged from 19 to 82 years of age with an average age of 42.26 years.

Disaggregating the sample into those who received a life term (38.3 percent) compared to those who did not get life (61.7 percent) also revealed interesting dynamics. Not surprising, there were stark and significant differences between the groups for departure, criminal history, sex offender enhancement, and sentence length. Compared to those who received lifetime supervised release, a higher percentage of those not sentenced to lifetime supervised release received downward departures/variances, while a lower percentage had criminal history, received the sex offender enhancement, and were sentenced within or above the guideline range (upward departure/variance). With regard to sentence length, those who received lifetime supervised release had an average imprisonment sentence almost twice that of those who did not get life.

Percentages for all of the extralegal variables appeared relatively similar between the groups. Compared to those who received lifetime supervised release, a lower percentage of those not sentenced to lifetime supervised release were age 50 and older and had less

<sup>23</sup> All charges of child pornography are lumped together as “Child Pornography.” Regardless of the charge, all child pornography offenses carry the same statutory supervised range of five years to life.

than a high school education. Only age differed significantly between the groups.

### Logistic Regression Models

Logistic regression was used to assess the impact of legal and extralegal factors on the likelihood of an imposition of lifetime supervised release. First, legal factors were included in the model. The results of the logistic regression are presented in Table 2

(Model 1). The full model containing all of the predictors was statistically significant,  $\chi^2(6, N=1,770) = 205.348$ ,  $p < .001$ , indicating that the model was able to distinguish between child pornography offenders who received an imposition of lifetime supervised release and those child pornography offenders who did not. The model as a whole explained 14.9 percent (Nagelkerke R squared) of the variance in imposition of lifetime supervised

release, and correctly classified 68.9 percent of cases. Several of the legal factors made a statistically significant contribution to the model. The strongest predictor of an imposition of lifetime supervised was sentence length (natural log). A 10 percent increase in sentence length increases the odds of being sentenced to lifetime supervised release by a factor of 1.08, controlling for other factors

**TABLE 1.**

*Descriptive Statistics and Chi-Square for Independence / Independent Samples T-Test*

Measure	Full Sample N=1,770	Life Supervised Release n=678	No Life Supervised Release n=1,092	Chi-Square / T-Test (Phi/Cramer's V)/ Eta Squared)
<i>Legal Variables</i>				
Plea		38.3%	61.7%	0.073 (0.009)
Pled Guilty/nolo contendere	95.5%	95.7%	95.4%	
Trial	4.5%	4.3%	4.6%	
Departure				50.812*** (0.169)
Within guideline range sentence	42.1%	51.5%	36.1%	
Upward depart/variance	2.4%	3.5%	1.6%	
Downward depart/variance	55.5%	45.0%	62.3%	
Criminal History				27.135*** (0.125)
Yes	62.4%	70.1%	57.3%	
No	37.6%	29.9%	42.7%	
Sex Offender Enhancement				35.020*** (0.144)
Yes	3.1%	6.2%	1.1%	
No	96.9%	93.8%	98.9%	
Sentence Length (months)				8.585*** (0.040)
Mean Sentence Length (Months)	120.40	173.14	87.65	
Standard Deviation	172.39	252.01	77.31	
Sentence Length (log)				12.175*** (0.077)
Mean Sentence Length (Months)	4.30	4.75	4.11	
Standard Deviation	1.16	1.01	1.17	
<i>Extralegal Variables</i>				
Age				4.139* (0.050)
Age (19-49)	70.3%	67.4%	72.1%	
Age (50 and over)	29.7%	32.6%	27.9%	
Race				0.891 (0.024)
White	88.7%	89.7%	88.0%	
Nonwhite	11.3%	10.3%	12.0%	
Education				3.215 (0.043)
Less than HS	10.3%	11.7%	9.5%	
High School	37.3%	38.0%	36.8%	
Some College	34.7%	33.8%	35.4%	
College Grad	17.7%	16.5%	18.3%	
Fine				0.002 (-0.003)
Not imposed	86.2%	86.3%	86.1%	
Imposed	13.8%	13.7%	13.9%	

\*  $p < 0.05$ ; \*\*\*  $p < 0.001$

in the model.<sup>24</sup> Surprisingly, for offenders who pled guilty, the odds of receiving lifetime supervised release increase by a factor of 1.7 compared to those offenders who had a trial. As anticipated, receiving a downward departure/variance decreased the odds of receiving lifetime supervised release by a factor of .78. Upward departure/variance (which is expected to increase punishment) was not statistically significant.

Next, extralegal variables were added to the model to see if they explain lifetime supervision above and beyond the effect of the legally relevant variables. The results of the logistic regression are presented in Table 2 (Model 2). The model as a whole explained 15.5 percent (Nagelkerke R squared) of the variance of the imposition of lifetime supervised release, and correctly classified 68.6 percent of cases. Of the extralegal factors added to the model, only age is significant. For offenders age 50 and older, the odds of receiving lifetime supervised release increased by a factor of 1.3 compared

to offenders younger than age 50, controlling for all other factors.

The third step of the modeling strategy involves testing for the possibility of two-way interaction effects between age and education, age and fine, and fine and education. These interaction terms were added one at a time into the model containing legal and extralegal variables. The results of the models containing these interaction terms are presented in Table 3. For all models, legal variables including plea, downward departure, and sentence length (log) continued to be significant. None of the interaction terms were statistically significant.

### Discussion

This study builds on research that examines unwarranted disparity in sentencing by looking at the effects of legal and extralegal factors on a sentencing outcome that has not been studied: lifetime supervised release. Legal factors including downward departure/variance and sentence length exerted significant effects in their expected direction across all models. These findings are not surprising considering these factors align with the focal concerns notion of blameworthiness. Judges' views of

blameworthiness are influenced by offense severity and offender biographical factors such as criminal history (Steffensmeier et al., 1998). Sentence length, which is a rough proxy for offense seriousness, is indicative of offenders being more culpable, while a downward departure/variance is indicative of offenders being less culpable.

While research typically finds that pleading guilty results in more lenient sentences, for child pornography offenders pleading guilty resulted in a higher probability of receiving lifetime supervised release. While this result is counterintuitive, it is possible this finding may also be explained by the focal concerns notion of blameworthiness. At the federal level, when the court accepts a guilty plea of a child pornography offense, the assistant U.S. attorney describes the evidence that would have been presented if the case had proceeded to trial. The evidence includes graphic descriptions of the child pornographic images and/or videos. In addition, the defendant also has to advise the judge in his or her own words what he or she did and describe the images he or she possessed, distributed, received, or produced. It is plausible that the graphic and

<sup>24</sup> To calculate the unit increase in Y for a 10 percent change in X, I divided .775 (logged coefficient) by 10, then computed the exponent of that number to get the effect of a 10 percent change in X on the odds of Y.

**TABLE 2.**  
*Logistic Regression of Lifetime Supervised Release on Legal and Extralegal Variables*

	Model 1			Model 2		
	B	SE	Exp(B)	B	SE	Exp(B)
Intercept	-4.469	0.511***		-4.582	0.559***	
Plea	0.558	0.256*	1.746	0.551	0.259*	1.734
Upward Departure	-0.003	0.334	0.997	-0.002	0.336	0.998
Downward Departure	-0.248	0.111*	0.780	-0.233	0.111*	0.792
Criminal History	0.159	0.112	1.173	0.169	0.115	1.185
Sex Offender Enhancement	0.614	0.356	1.848	0.614	0.358	1.848
Sentence Length (log)	0.775	0.085***	2.170	0.790	0.086***	2.203
White				0.128	0.169	1.136
High School Graduate				-0.186	0.180	0.830
Some College				-0.231	0.183	0.794
College Graduate				-0.101	0.207	0.904
Fine				0.039	0.155	1.040
Sex Offender Age ≥ 50 (SOA≥50)				0.284	0.116**	1.329
	Model $\chi^2 = 205.348^{***}$ R <sup>2</sup> = 0.149			Model $\chi^2 = 214.788^{***}$ R <sup>2</sup> = 0.155		
N = 1,770	* p≤0.05; ** p≤0.01; ***p≤0.001			Abbreviations: SE = standard error		

**TABLE 3.**  
Interaction Models (Age\*Education; Age\*Fine; Fine\*Education)

	B	SE	Exp(B)	
<b>Model 1 (Age*Education)</b>	Constant	-4.523	0.566***	0.111
	Plea	0.545	0.259**	1.724
	Upward Departure	0.011	0.337	1.011
	Downward Departure	-0.239	0.112**	0.788
	Criminal History	0.170	0.115	1.185
	Sentence Length (log)	0.789	0.086***	2.201
	Sex Offender Enhancement	0.620	0.358	1.859
	White	0.136	0.170	1.146
	High School Graduate	-0.272	0.204	0.762
	Some College	-0.316	0.209	0.729
	College Graduate	-0.036	0.248	0.965
	Fine	0.046	0.155	1.047
	Sex Offender Age $\geq$ 50 (SOA $\geq$ 50)	0.029	0.389	1.029
	SOA $\geq$ 50 *HS Graduate	0.377	0.435	1.458
	SOA $\geq$ 50 *Some College	0.353	0.433	1.424
SOA $\geq$ 50 *College	-0.066	0.462	0.994	
<b>Model 2 (Age*Fine)</b>	Constant	-4.579	0.559***	0.010
	Plea	0.553	0.259**	1.739
	Upward Departure	-0.013	0.337	0.987
	Downward Departure	-0.235	0.111**	0.791
	Criminal History	0.165	0.115	1.180
	Sentence Length (log)	0.792	0.086***	2.208
	Sex Offender Enhancement	0.601	0.358	1.824
	White	0.127	0.169	1.135
	High School Graduate	-0.181	0.180	0.834
	Some College	-0.229	0.183	0.795
	College Graduate	-0.102	0.207	0.903
	Fine	-0.076	0.200	0.927
	SOA $\geq$ 50	0.240	0.125	1.271
	SOA $\geq$ 50 *Fine	0.289	0.314	1.336
	<b>Model 3 (Fine *Education)</b>	Constant	-4.630	0.562***
Plea		0.547	0.259**	1.729
Upward Departure		-0.004	0.337	0.996
Downward Departure		-0.236	0.112**	0.790
Criminal History		0.169	0.115	1.184
Sentence Length (log)		0.792	0.086***	2.208
Sex Offender Enhancement		0.628	0.358	1.873
White		0.123	0.170	1.131
High School Graduate		-0.125	0.191	0.888
Some College		-0.180	0.194	0.835
College Graduate		-0.057	0.224	0.945
Fine		0.495	0.514	1.640
SOA $\geq$ 50		0.282	0.116**	1.326
Fine * High School		-0.579	0.586	0.561
Fine*Some College		-0.481	0.577	0.618
Fine*College	-0.431	0.594	0.650	

heinous nature of the evidence coupled with the defendant admitting guilt and describing his or her offense conduct may magnify the defendant's culpability in the eyes of the court. In contrast, in a trial, a defendant is not likely to admit guilt nor take the stand, resulting in the possibility of de-magnification of culpability. Irrespective of the possible explanations put forth for this significant finding, as there is no significance found at the bivariate level, it is possible that this finding is just noise due to the small number of cases that had trials.

Of all the extralegal factors considered in this study, age exerted a significant effect in predicting those child pornography offenders sentenced to a life term of supervised release. This result is contradictory to findings in the most recent extant sentencing literature on the effects of age and sentencing, which finds that younger offenders are more likely than older ones to be punished more harshly. One might suggest that the effect of age may be influenced by the criminal history of the older offender being greater than that of a younger offender (the older offender having had more time to offend than a younger offender). While this seems plausible, I suspect that criminal history has little to no bearing on the effect of age.<sup>25</sup> Instead, I surmise that it is based on the focal concerns notion of protection of the community. Protection of the community draws on attributions similar to blameworthiness but is distinct in that it focuses on the need to incapacitate or control the offender or to deter would-be offenders (Steffensmeier et al., 1998). This also includes assessments about dangerousness or recidivism. Predictions about dangerousness and risk of recidivism are based on attributions predicated on the nature of the offense, case information, criminal history, and demographic characteristics of the offender such as employment, education, age, or family history (Steffensmeier et al., 1998). For example, Kimball (2011) reviewed a sentencing opinion where the judge cited the defendant's youthful age and immaturity as reason for a downward variance (see *U.S. v. Polito*). This justification for a downward variance based on youthfulness suggests that younger offenders may be perceived as "getting caught up" in child pornography based on their immaturity or that their entanglement may have more innocent

<sup>25</sup> The effect of age remained significant using the alternate measure of criminal history (criminal history points) provided in the dataset.

origins.<sup>26</sup> The flip side may be the perception that older and mature offenders “know better.” That is, someone age 60 may be less likely to be perceived as accidentally “getting caught up” and their entanglement in child pornography may have less innocent origins.

The notion that older age may be viewed as a greater threat may also be due to the age discrepancy between older offenders and the depicted minors. According to the USSC Sourcebook 2010, virtually all child pornography offenders (96.3 percent) possessed images of minors who were prepubescent or under the age of twelve. The idea of an offender over age 50 receiving sexual gratification from images depicting the sexual assault of children under the age of twelve, including infants and toddlers, may be unsettling for judges. Another possible rationale for this finding is that the average age of child pornography offenders sentenced in fiscal year 2010 was age 42.26. If judges on average are seeing this age offender in the courtroom, then it may play in their focal concerns that older child pornography offenders may be at most risk to re-offend.

Contrary to my hypothesis, extralegal predictors including race, education, and imposition of a fine exerted no significant effect. These factors have been shown to influence sentencing decisions for the overall average offender in federal court, yet we know from the literature and the data presented in this study that child pornography offenders are not the overall average federal offender, at least not in terms of demographic characteristics. With this in mind, it may be possible that race, education, and socioeconomic status do not come into play in sentencing decisions of child pornography offenders as they do with the overall average offender involved in federal prosecutions. Instead, it may be possible that other extralegal statuses such as family ties and employment inform the sentencing decisions of child pornography offenders more so than race, education, and socioeconomic status.

Under the previous mandatory federal guidelines, family support and employment history were generally irrelevant in determining departures from the guidelines. In fact,

one of the main provisions of the Protect Act of 2003 was to amend the then-mandatory guidelines to prohibit judges from considering family and community ties in cases involving a minor victim (Krohel, 2011). Now that the guidelines are advisory in nature, these statuses have become relevant for some judges (Hamilton, 2011; Krohel, 2011). Hamilton (2011) and Krohel’s (2011) reviews of sentencing decisions found that in cases where defendants received sentencing reductions, it was common for judges to express that they were impressed by the defendant’s family support and/or career. One judge was quoted as saying “aside from the offense, the defendant has led a law abiding life, and with his wife, who has stood by his side throughout, he has raised a good family and been a mainstay in his community.” (Hamilton, 2011, p. 562). Other judges give weight to the defendant’s career as a reason for non-guideline sentences. Examples of careers receiving non-guideline sentences include military personnel, physicians, and teachers (Hamilton, 2011). At this time, it is not possible to empirically test the influence of these statuses on lifetime supervised release decisions, because the USSC does not collect data on these variables.

Another extralegal status that may influence sentencing decisions is mental health. Research has shown that mental health conditions like schizophrenia have been linked to stereotypes of dangerousness (Markowitz, 2011). Through the presentence report, the sentencing court is made aware of any mental health and/or emotional conditions the offender may suffer as well as any medications prescribed. Accordingly, a judge may consider the mental health status of the offender as a focal concern in determining which individuals require enhanced supervision in order to protect the public. In other words, it seems plausible that an offender with a severe mental illness may be perceived as dangerous and thus more likely to receive lifetime supervised release than an offender with no mental health condition. As with family ties and employment, it is not possible to empirically test the influence of mental health on supervised release outcomes, because the USSC does not collect data on this variable.

Contrary to my hypothesis, no interaction effects were found in this study. Perhaps this finding, like overall findings, suggests a different dynamic occurs with child pornography sentencing. That is, legal and extralegal factors may not influence sentencing decisions for child pornography offenders the way the

extant literature finds for the overall average offender involved in federal prosecutions. Although this issue was not my primary focus, my findings compared to the extant literature suggest that extralegal effects on sentencing outcomes for child pornography offenders may be different than for other categories of offenders. For clarity, a direct comparison between child pornography offenders and average federal offenders (e.g., drug offenders) cannot be made because previous sentencing studies examine a different outcome variable (e.g., sentence length and/or the decision to incarcerate). Deeper examination of this issue could be the subject of future research.

One of the major limitations of this research was being unable to disaggregate the various charges of child pornography. We know from the literature review that offense seriousness is a significant factor for some judges in sentencing child pornography offenders within or outside of the guidelines range. In this study, using sentence length as a rough proxy for offense seriousness has provided some evidence, although crudely, that offense seriousness is a major factor driving judicial decisions to impose lifetime supervised release as it should. Analytic models run with all legally relevant variables except sentence length (log) account for 7.6 percent of the variance in lifetime supervised release. When sentence length (log) is included, the models account for 14.9 percent of the variance in lifetime supervised release and 15.5 percent when extralegal variables are added.

The legal literature suggests that judges may be more likely to use their discretion and impose non-guideline sentences (e.g., downward departure/variance) for offenses they believe to be less serious (e.g., possession of child pornography versus production of child pornography). Based on this, some judges might be more likely to consider extralegal factors as a basis for a downward departure/variance. The case study cited earlier (*U.S. v Grossman*) is one such example. In that case, the sentencing court was troubled by the amount of prison time Grossman was facing for a single count of Possession of Child Pornography and imposed downward variance based on Grossman’s age, education, and family ties.

The notion of offense seriousness guiding judicial discretion may also be explained by the focal concerns notion of practical constraints and consequences. I can only speculate that judges may be constrained or liberated by the seriousness of the offense in

<sup>26</sup> A news article highlighted 19-year-old Neil Geckle who was charged with child pornography offenses after he downloaded photos of high school girls he “friended” from Facebook then took pictures of his penis next to the photos. He then uploaded the defiled photos to the victims’ Facebook pages. When confronted with the charges, the 19-year-old pleaded ignorance, telling police he “didn’t think it was a big deal” (Moraff, 2012).

considering practical and social costs of lifetime supervised release. For example, judges may think about financial costs to the government in supervising an offender for life, especially if the judge does not believe the seriousness of the offense warrants life supervision. The current dataset does not allow for examination of this issue, but future studies using a mixed methodology approach could interview federal judges to see if offense seriousness constrains or liberates consideration of extralegal factors as well as practical and social costs of lifetime supervision.

There are additional limitations that should be considered. As previously discussed, extralegal predictors including race, education, and imposition of a fine exerted no significant effect. With regard to race, perhaps there were not enough non-whites in my sample to locate a statistically significant relationship. Although education was significant in some studies (Mustard, 2001), it was not significant in this study. Almost 90 percent of the sample had at least a high school education. If the sample of cases in the less-than-high-school category were larger, there might have been a significant effect. Future research may benefit from merging multi-year data to boost cases to better disaggregate the effects of race and education. With regard to the fine variable, it may be possible that there was no effect because this variable is not a true indicator of socioeconomic status. In other words, the fine variable was unable to exert any predictive power because it is not a direct measure of socioeconomic status.

Another limitation of this study is that I only examined the most severe term of supervised release—life. Future research should also look at supervised release as a continuous variable; however, researchers will have to determine how to quantify the life term. An additional avenue of future research is to examine the impact of sex crime scandals that recently occurred (e.g., Jacee Dugard case, etc.) on supervised release outcomes. A potential research strategy would be to conduct a time series analysis of the probability of child pornography offenders sentenced to lifetime supervised release before and after the scandals received intense public scrutiny. In this sense, it would be interesting to see how these cause célèbre cases influence lifetime supervised release imposed by the court. In other words, do judges respond to moral panics or their perceptions of the public's concern? Another avenue would be to examine inter-district variation and how this would operate in terms

of child pornography cases. Kautt (2002) found that inter-district variation influences sentencing decisions in federal courts.

## Conclusion

Prior empirical federal sentencing studies have repeatedly found that in addition to legally relevant factors, extralegal factors influence federal sentencing outcomes. The purpose of this study is to examine whether similar dynamics exist for lifetime supervised release sentences of child pornography offenders. What makes this sentencing study particularly interesting is the political context of child pornography sentencing in that Congress has explicitly advised federal judges that all child pornography offenders should be punished harshly, specifically with the recommendation for lifetime supervised release.

The results of this study support legal research that finds a disconnect between congressional will and the will of the sentencing court. In this study, only 38.3 percent of child pornography offenders received lifetime supervised release. Legal researchers have suggested that the differences in sentences among child pornography offenders stems from judicial dissonance on this issue. A few reasons were suggested for the dissonance, including extralegal demographic characteristics. My results showed that only age had an effect above and beyond the effects of legally relevant variables. But the variance explained by the models is so low that it suggests the unpredictability of sentences mentioned by Rigsby (2010). The discussion section keyed in on other possibilities driving judicial decisions, including family ties, employment records, and mental health.

To this end, it is not clear what is truly driving supervised release sentences of child pornography offenders. It could be a combination of legal and extralegal factors and a simple policy disagreement with Congress. If Congress truly wants lifetime supervised release sentences for all child pornography offenders, they may legislate an amendment to 18 U.S.C. 3588(k) eliminating the statutory range of five years to life to include life as the mandatory supervised release sentence. This in effect could eliminate judicial discretion in supervised release sentences as well as eliminate unwarranted sentencing disparities.

## References

- Albonetti, C. A. (1991). An integration of theories to explain judicial discretion. *Social Problems*, 38, 247-266.
- Albonetti, C. A. (1997). Sentencing under the federal sentencing guidelines, effects of offender characteristics, guilty pleas, and departures on sentencing outcomes for drug offenses, 1991-1992. *Law and Society Review*, 31, 789-822.
- Bourke, M., & Hernandez, A. (2009). The 'Butner study' redux: a report of the incidence of hands-on child victimization by child pornography offenders. *Journal of Family Violence*, 24, 183-191.
- Cardona, F. (2009, November 29). Federal judges argue for reduced sentences for child-porn convicts. *The Denver Post*. Retrieved from <http://www.denverpost.com>.
- Champion, D. J. (1987). Elderly felons and sentence severity: Interregional variations in leniency and sentencing trends. *Criminal Justice Review*, 12, 7-14.
- Chiricos, T. G., & Crawford, C. (1995). Race and imprisonment: a contextual assessment of the evidence. Pp. 281-309 in Darnell F. Hawkins (Ed.), *Ethnicity, race and crime: perspectives across time and place*. Albany, NY: State University New York Press.
- Clarke, S. H., & Koch, G.G. (1976). The influence of income and other factors on whether criminal defendants go to prison. *Law and Society Review*, 11, 57-92.
- Doerner, J. K., & Demuth, S. (2010). The independent and joint effects of race/ethnicity, gender, and age on sentencing outcomes in U.S. Federal Courts. *Justice Quarterly*, 27, 1-27.
- Everett, R. S., & Wojtkiewicz, R. A. (2002). Difference, disparity, and race/ethnic bias in federal sentencing. *Journal of Quantitative Criminology*, 18, 189-211.
- Federal Criminal Code and Rules. (2010). Thomsom Reuters.
- Hamilton, M. (2011). The efficacy of severe child pornography sentencing: Empirical validity or political rhetoric. *Stanford Law and Policy Review*, 22, 545-585.
- Kautt, P. M. (2002). Location, location, location: inter-district and inter-circuit variation in sentencing outcomes for federal drug trafficking offenses. *Justice Quarterly*, 19, 633-671.
- Kimball, K. (2011). Losing our soul: Judicial discretion in sentencing child pornography offenders. *Florida Law Review*, 63, 1515-1548.
- Kleck, G. (1981). Racial discrimination in criminal sentencing: A critical evaluation of the evidence with additional evidence on the death penalty. *American Sociological Review*, 46, 783-805.

- Klein, S., Petersilia, J., & Turner, S. (1988). *Racial equity in sentencing*. Santa Monica, CA: Rand.
- Kramer, J. H., & Steffensmeier, D. (1993). Race and imprisonment decisions. *The Sociological Quarterly*, 34, 357-376.
- Krohel, H. (2011). Dangerous discretion: Protecting children by amending the federal child pornography statutes to enforce sentencing enhancements and prevent non-custodial sentences. *San Diego Law Review*, 48, 623-676.
- Kruttschnitt, C. (1980/1981). Social status and sentences of female offenders. *Law and Society Review*, 15, 247-266.
- Mauer, M. (1999). *Race to incarcerate*. New York: New Press.
- Markowitz, F. E. (2011). Mental illness, crime, violence: Risk, context, and social control. *Aggression and Violent Behavior*, 16, 36-44.
- Moraff, C. (2012, May 10). Overzealous child porn law could ruin Main Line teen's life. *Phillymag.com* Retrieved March 23, 2014, from <http://www.phillymag.com/news/2012/05/10/excessive-child-porn-laws/>
- Mustard, D. B. (2001). Racial, ethnic, and gender disparities in sentencing: Evidence from the U.S. Federal Courts. *Journal of Law and Economics*, 44, 1-30.
- Myers, M. A., & Talarico, S. M. (1987). The social contexts of criminal sentencing. New York: Springer-Verlag.
- Rigsby, L. (2010). A call for judicial scrutiny: How increased judicial discretion has led to disparity and unpredictability in federal sentencings for child pornography. *Seattle University Law Review*, 33, 1319-1347.
- Shockley, B. (2010). Protecting due process from the Protect Act: The problems with increasing periods of supervised release for sexual offenders. 67 *Washington and Lee Law Review*, 353-399.
- Spearlt. (2011). Child pornography sentencing and demographic data: Reforming through research. *Federal Sentencing Reporter*, 24, 102-108.
- Spohn, C. (2006). Sentencing decisions in three U.S. district courts: Testing the assumptions of uniformity in the federal sentencing process. *Justice Research and Policy*, 7, 2-27.
- Spohn, C., & Holleran D. (2000). The imprisonment penalty paid by young, unemployed, black and Hispanic male offenders. *Criminology*, 38, 281-306.
- Steen, S., Engen, R., & Gainey, R. (2005). Images of danger and culpability: Racial stereotyping, case processing, and criminal sentencing. *Criminology*, 43, 435-468.
- Steffensmeier, D. (1980). Assessing the impact of the women's movement on sex-based differences in handling of adult criminal defendants. *Crime and Delinquency*, 26, 344-357.
- Steffensmeier, D., & Demuth, D. (2001). Ethnicity and judges' sentencing decisions: Hispanic-black-white comparisons. *Criminology*, 39, 145-178.
- Steffensmeier, D., Kramer, J. H., and Ulmer, J. T. (1995). Age differences in sentencing. *Justice Quarterly*, 12, 584-601.
- Steffensmeier, D., & Motivans, M. (2000). Older men and older women in the arm of criminal law: Offending patterns and sentencing outcomes. *Journal of Gerontology*, 55, 141-151.
- Steffensmeier, D., Ulmer, J. T., & Kramer, J.H. (1998). The interaction of race, gender and age in criminal sentencing: The punishment costs of being young, black, and male. *Criminology*, 36, 763-798.
- Ulmer, J. T. (1997). *Social worlds of sentencing: Court communities under sentencing guidelines*. Albany, NY: State University of New York Press.
- U.S. Sentencing Commission (2012). *Guidelines manual: Chapters one, two, four and five*. Washington, DC: Author.
- U.S. Sentencing Commission (2010). *Sourcebook of federal sentencing statistics*. Washington, DC: Author.
- Welch, K. (2007). Black criminal stereotypes and racial profiling. *Journal of Contemporary Criminal Justice*, 23, 276-288.
- Wolfe, S. E., Pyrooz, D., & Spohn, C. (2010). Unraveling the effects of offender citizenship status on federal sentencing outcomes. *Social Science Research*, 40, 349-362.
- Wooldredge, J. (2010). Judges' unequal contributions to extralegal disparities in imprisonment. *Criminology*, 48, 539-576.
- Zatz, M. (2000). The convergence of race, ethnicity, gender, and class on court decision making: Looking toward the 21<sup>st</sup> century. In National Institute of Justice (Ed.), *Criminal Justice 2000* (Vol. 3, pp. 503-552). Washington, DC: National Institute of Justice.