

Egregious Flaws Discredit the *Butner Redux* Study: Effective Policies for Sentencing  
Federal Child Pornography Offenders Require Findings Based on Valid Research Principles

Richard Wollert

Member

Mental Health, Law, and Policy Institute

Simon Fraser University

Burnaby, British Columbia, Canada

Alexander Skelton

Principal Advisor

Psychology

New Zealand Department of Corrections

**To appear in L. Dubin & E. Horowitz (eds.), *Caught in the Web of the Criminal Justice System*. London: Jessica Kingsley Publishing Co.**

**Correspondence concerning this article should be addressed to Richard Wollert, Ph.D., P.O. Box 61849, Vancouver, WA 98666. Phone: (360) 737-7712. E-mail:**

**[rwwollert@aol.com](mailto:rwwollert@aol.com)**

Egregious Flaws Discredit the *Butner Redux* Study: Effective Policies for Sentencing  
Federal Child Pornography Offenders Require Findings Based on Valid Research Principles

Abstract

The Pornographic Attraction Theory (“P-A-T”) was prominently paraphrased in a *Journal of Family Violence* article (Bourke & Hernandez, 2009) alleging that child pornography offenders (CPOs) treated at the Butner Federal Correctional Institution disclosed committing many undetected contact sex offenses before being convicted on child pornography charges. The Butner Study and a related earlier study have been used to influence the U.S. Sentencing Commission’s guidelines for sentencing CPOs when their results are merely artifacts of methodological flaws known as “demand characteristics.” The present article describes this problem and reviews credible research with federal and non-federal CPOs showing they are less dangerous and more responsive to apprehension than the Butner results and the PAT suggest. Other methodological flaws are enumerated that may produce sensational but invalid claims about prior contact sex offenses. The importance of formulating CPO sentencing guidelines on the basis of defensible research findings and methodology is stressed.

*Keywords:* federal child pornography offenders, Butner Study, United States Sentencing Commission, child pornography sentencing guidelines, sexual recidivism

Egregious Flaws Discredit the *Butner Redux* Study: Effective Policies for Sentencing  
Federal Child Pornography Offenders Require Findings Based on Valid Research Principles

Many professionals and laypersons believe that pedophiles, convicted contact child molesters, and undetected molesters are predisposed to watch pornographic depictions of children on the Internet. It is also believed that those who have downloaded child pornography – that is, child pornography offenders (CPOs) – experience an increase in the intensity of deviant sexual fantasies and a decrease in inhibitions that results in recurrent sexual misconduct in the form of child molestation. This behavior is assumed to be resistant to treatment and punishment.

One corollary of this commonsense conception, which we call the Pornographic Attraction Theory (“P-A-T”), is that CPOs are mentally ill. Another is that they are sexually dangerous. Still another suggests that the Internet sophistication of CPOs makes them more dangerous than convicted child molesters (Gelber, 2009; Heimbach, 2002).

The PAT was prominently paraphrased in an article by Drs. Michael Bourke and Andres Hernandez published in the *Journal of Family Violence* (Bourke & Hernandez, 2009). Titled *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Victimization by Child Pornography Offenders*, this article alleged that CPOs under the supervision of Bourke and Hernandez at the Butner Federal Correctional Institution Sex Offender Treatment Program (SOTP) disclosed committing many undetected contact sex offenses that occurred prior to being convicted of a child pornography offense. Some disclosures were verbal in nature, but a large number were recorded by program participants in the course of completing a form called the “Personal History Questionnaire” (PHQ) on multiple occasions.

The Bourke and Hernandez article, and an earlier similar conference presentation by

Hernandez (2000a), are significant because they have been used as evidence by some (Allen, 2009; Gelber, 2009; Heimbach, 2002; Smith, Grassley, & Sensenbrenner, 2012) to influence the United States Sentencing Commission (USSC) to (1) increase or (2) retain CPO sentencing guidelines that others (Baron-Evans, 2008; Basbaum, 2010; Hansen, 2009; Specter & Hoffa, 2011; Stabenow, 2008; Stabenow, 2011; *U.S. v. Dorvee*, 2010; *U.S. v. Grober*, 2010) have characterized as excessively punitive and indiscriminate. Regarding issue (1), “sentences of imprisonment...have substantially increased...because of... amendments resulting from the PROTECT ACT” (U. S. Sentencing Commission, 2012, p. x; also see *U.S. v. Grober*, 2010) that Congress passed three years after Hernandez’ first presentation in 2000. The impact of this and other amendments is underscored by the fact that the average sentence length for first time CPOs, most of whom have been convicted for the “non-production” offenses of receiving, possessing, transporting, or distributing child pornography, is now over three times what it was for both first time and recidivist CPOs in 1994 (112 months vs. 36 months; U.S. Sentencing Commission, 1996, Table 1; U.S. Sentencing Commission, 2008, Table 14; Wollert, Waggoner, & Smith, 2012, Table 2.1).

Regarding issue (2), several determinants of longer sentences – called “enhancements” – have come to be so commonly encountered that they “apply to the vast majority of offenders...and ... fail to meaningfully distinguish among offenders in terms of their culpability and dangerousness” (U.S. Sentencing Commission, 2012, p. 11). Over the last decade many federal judges have become concerned that such enhancements in the CPO sentencing guidelines undermine the principle of proportional sentencing (U.S. Sentencing Commission, 2010). These concerns, in turn, have given rise to a crisis where judges have increasingly resisted enhancements and the guidelines by making “downward departures” from the guidelines so that most non-

production cases receive prison terms below those specified in the guidelines. Trying to reverse this trend, and apparently without input from well-qualified behavioral scientists, some legislators (Smith et al., 2012) and prosecutors (Gelber, 2009) have cited the Bourke and Hernandez (2009) article as an argument for steadfast adherence to the guidelines. The *Butner Redux* claims have also been treated as “legislative fact” (Larson, 2012) in the absence of issue-specific expert testimony by some federal judges. One, for example, selected a 121-month guideline term of incarceration for a nonproduction defendant with no criminal history on the argument that CPOs “have appallingly high rates of recidivism” and “the *Butner Study* ... certainly raises the prospect that a correlation exists between viewing deviant pornography and committing a hands-on offense” (*U.S. v. Cunningham*, 2010). Another picked a 97-month guideline sentence because the *Butner Study Redux* “suggests that most who appear to be lookers are, in fact, doers” and its “findings ... justify ... harsh punishments for child pornographers” (*U.S. v. Crisman*, 2014).

Hernandez’ reports have also been cited by fellow psychologists at the Bureau of Prisons as a rationale for the preventive civil commitment, under the Adam Walsh Act, of a subset of federal prisoners who have fully completed their assigned sex offense sentences (Lee, Li, Lamade, Schuler, & Prentky, 2012). State legislation for the preventive detention of such individuals, referred to as “sexually dangerous persons” or “sexually dangerous predators,” was first passed in 1990 (American Psychiatric Association, 1999). A huge volume of research has been carried out on these legal concepts since that time. Nonetheless, science has been unable to show that it is possible for professionals or laypersons to use them reliably to identify individuals who meet the criteria (Ewing, 2011; Prentky, Janus, Barbaree, Schwartz, & Kafka, 2006; Wollert, 2007).

The methods that Hernandez (2000a) and Bourke and Hernandez (2009) used to elicit data from their supervisees and the findings they obtained have been criticized on various grounds from different quarters. Psychological researchers Seto, Hanson, and Babchishin (2011) characterized the contact sex offense rate reported in *Butner Redux* as an “outlier” (p. 133) that far exceeded each of the rates in 23 other projects, including studies based on self-report that examined the same issue (pp. 128-130). CPOs who were Butner residents have disseminated a report accusing the study of being a “fraudulent execution of the Adam Walsh Act” (Neuhauser, Francis, & Ebel, 2011) and quoting psychiatrist Dr. Richard Krueger as alluding to “SOTP’s treatment participants’ ‘incentive to lie’” (p. 8). When Dr. Gene Abel, another eminent psychiatrist, testified at a public hearing on CPOs held by the USSC, he was asked about the quality of the Butner data. He replied that “if you don’t participate in that program, you’re out ... so it’s a very select group” (U. S. Sentencing Commission, 2012; Bourke, 2012, pp. 6-7). Federal judge Robert Pratt, after hearing testimony from Iowa behavioral scientist Dr. Dan Rogers on the methodological inadequacy of the Butner procedures, held 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’” (*U.S. v. Johnson*, 2008). Another federal judge who was told by government attorneys that civil commitment respondent Markis Revland “admitted” to 149 incidents of “hands-on sexual abuse” in his PHQs concluded he “invented the 149 incidents” because he was fearful of being returned to a prison where he had been raped and stabbed. The judge further observed that Revland’s PHQ was “unbelievable on its face” (*U.S. v. Revland*, 2011). Regarding the reason for this, journalist Rachel Aviv (2013) reported that

*At a professional workshop, Hernandez explained that he created a climate of “systematic pressure,” so that inmates would “put all the cards on the table,” abandoning a “life style of manipulation.” Patients were required to compose lists of people they had sexually harmed, which they updated every few months. At daily community meetings, when offenders insisted they had nothing left to disclose, other prisoners accused them of being in denial or “resistant to change.” If they failed to accept responsibility, they were expelled from the program.*

Aviv was also told by former Butner participant Clyde Hall that he was encouraged by “patients who had been formally designated ‘mentors’” to augment his confessions. He told Aviv he submitted his complete list of self-reported crimes to the Butner staff on three occasions but that “the third plan came back to me with basically the same note, saying, ‘We want more information.’”

Members of our research team have repeatedly criticized the Butner Studies in a technical report (Wollert, 2008), a presentation at the annual meeting of the Association for the Treatment of Sexual Abusers (ATSA; Wollert, Waggoner, & Smith, 2009), a book chapter (Wollert et al., 2012), and in testimony before the USSC (Wollert, 2012). Like Judge Pratt and others, we have argued that the methodology underlying the Butner Projects does not meet standards for research to be considered “scientifically reliable” in federal courts of law (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993). On the contrary, our view is that the validity controls in the Butner studies were inadequate, that their implementation produced a high error rate, and that the results have not achieved acceptance by the scientific community.

*Butner Redux* is also devoid of legal credibility because of ethical problems and inconsistencies with the Codes of Federal Regulation that govern the protection of BOP research

subjects and BOP research projects. Regarding the first issue, the National Institutes of Health's *Institutional Review Board Guidebook* states that "the nature of incarceration may conflict with the ethical principle of **autonomy**, captured in the **Nuremberg Code** provision requiring that the subject 'be so situated as to be able to exercise free power of choice, without the intervention of any element of ... duress ... or other ulterior form of ... coercion (Office for Protection from Research Risks, 1993; emphases in the original). Hernandez' self-admitted creation of "*a climate of 'systematic pressure'*" (Hernandez, 2000b) is clearly at odds with this principle.

Several examples reflect the second problem. One is that all "research" supported by the BOP "must be approved ... by an Institutional Review Board (IRB)" per 28 CFR §101(a)(1). *Butner Redux*, however, has never been listed among the IRB-approved projects registered at Butner.<sup>2</sup> Another is that CFR §512.16(a) requires researchers to "give each participant a written informed consent statement" but we have not found any reference to such a statement among the materials that describe the Butner projects. Still another is that the PHQ responses of Butner patients were used as SVP evidence even though 28 CFR §512.11(2) specifies that "research information identifiable to a particular individual cannot be admitted as evidence ... in any ... judicial ... proceeding without the written consent of the individual."

Regarding the last issue, CFR §512.20 clearly indicates that investigators of any IRB-approved research project have complete freedom to publish their results as long as they "acknowledge the Bureau's participation," indicate their publication does not express the Bureau's views, and provide the Bureau's Office of Research with two copies of the publication, "for informational purposes only," before submitting it. Manuscripts for unauthorized projects will, of course, not speak to some of these points. Although *Butner Redux* included a disclaimer, it did not indicate that the BOP participated in the project or provide the Bureau with copies of



the *Redux* manuscript before submitting it to JOFV (Garrett, 2007). These omissions are further evidence that *Butner Redux* did not have IRB approval and, in the words of BOP spokesperson Traci Billingsley, “was not a Bureau of Prisons study” (Vanderpool, 2011). This conclusion, in turn, provides a framework for understanding why Assistant BOP Director for Information Policy Judith Garrett (2007) attempted to recall *Butner Redux* in a letter to JOFV’s co-editors and Springer publications because it “did not meet ‘agency approval’” (Sher & Carey, 2007).<sup>3</sup>

Therefore, although *Butner Redux* has been published, its quality falls so far below that of the average professional journal article that the *Journal of Family Violence* should now publish a retraction or corrective article that adequately describes the study’s unacceptable flaws. We submitted an original article with this end in mind to JOFV’s current editor Bob Geffner and negotiated with him for several years regarding its publication. He ultimately declined to publish it but indicated he would consider a “commentary” or “letter to the editor” in its stead.

We decided against further negotiations with JOFV and Springer Publications because it seemed to us that neither a comment nor a letter to the editor would stimulate further action by the psychological or legal communities that might lead to a genuinely curative result. The remaining sections of this chapter are part of an alternative strategy for achieving this goal. The first describes the methodology and results of the Butner Projects. The second explains how the results of these projects were artifactually produced by demand characteristics that fatally contaminated the procedures used by Bourke and Hernandez for data collection. The third and fourth sections review the results from credible research with federal and non-federal CPOs that show they are not as mentally ill or dangerous as the Butner results suggest. The Discussion stresses the importance of relying on sound research methodologies for the purpose of developing just and effective policies for sentencing and supervising federal CPOs in the future.

### **A Description of the Butner Projects and the Results They Reported**

In his 2000 conference paper, Hernandez proposed that users of child pornography “can be equally predatory and dangerous as extrafamilial offenders” after he found that a group of 54 CPOs who completed PHQs and polygraph exams during sex offender treatment at the Butner SOTP disclosed more molestations than were reported in their federal presentence investigation reports (PSRs). Bourke and Hernandez (2009) conducted a second study with a larger group of CPOs following Hernandez’ earlier procedures. They assessed two outcome variables from a review of the records of 155 CPOs who voluntarily agreed to participate in the Butner SOTP, which Hernandez directed. One of the variables recorded by Hernandez and Bourke reflected the number of adjudicated and self-reported molestations reported in the PSR 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 that they did not have to “reveal any identifying information when listing their victims” (p. 186).

Bourke and Hernandez (p. 187) estimated that 26% of their subjects, who were not described as being different from federal CPOs in general, had previously committed either an adjudicated or nonadjudicated molestation per their PSRs, 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. This access, in turn, 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) that could, of course, only be provided to CPOs given sentences long enough to accommodate it.

### **The Butner Results Were Artifactually Produced by Inadequate Research Methods**

We criticized the Butner projects in our papers and presentations because they included many different methodological flaws. One very troubling feature was that the welfare of Hernandez’ “subjects” was dependent on their standing in his program. From interviewing or counseling CPOs who had been at Butner, we learned they were fearful of program termination. If this happened, it was possible that they would be returned to the general population of prisoners from which they were referred, where they would be harassed as sex offenders. Another problem was that Hernandez’ results were over inclusive or misleading way because he did not define what he meant by a “sex offense.” Boyfriend-girlfriend relationships between 15 year-olds and 13 year-olds might therefore be counted in the same way that father-daughter relationships were counted. It was also impossible to verify the accuracy of reports because CPOs were told not to identify victims, and treatment participation forms promised confidentiality. Still another problem that several Butner patients revealed was that staff members pressured them to overestimate their offenses or disclose new offenses on an ongoing basis. One former patient, for example, spontaneously wrote a letter to one of us (C.S., personal communication, 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’”. Another was required to complete the PHQ on three occasions within the span of a single year. 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 holds significant implications for a study based on self-report data because a technique that is widely used to pass this exam entails “overestimating the number of possible victims” (Abrams, 1991, p. 259).

We also described how these circumstances interacted with one another to artifactually produce Hernandez’ results. This explanation relied heavily on the fact that subjects in psychological experiments will act the way a researcher wants them to act if they know what the researcher hopes to find. Aspects of a data collection situation that tip subjects off to this agenda are referred to as “demand characteristics” (Fillenbaum, 1966; Orne, 1962). It was a simple matter for offenders in the Butner program to figure out what Hernandez wanted from them and offenders who stayed in the program were likely to comply with this demand because its existence was reinforced by polygraph examinations, repeated PHQ administrations, and the fact that many participants were expelled after “we ... put the heat on them” even though all admissions were “prescreened” and “went through me” (Hernandez, 2000b). Over-disclosure was also encouraged by the adoption of data collection procedures that made it impossible to verify the accuracy of disclosures.

This analysis led us to conclude that almost any offender faced with the pressures built into the Butner Program would generate so many possible false disclosures as to make it very difficult to differentiate cohort members in terms of their treatment needs, culpability, or dangerousness. We also pointed out that Hernandez could have assessed whether his results were artifacts of his methods by changing his instructions in his second project. He could have, for example, told the second group of CPOs that they would not be placed in the general prison population under any circumstances, that they weren’t expected to make ongoing disclosures or

pass a polygraph, that they were only expected to be totally honest, and that he wanted to collect victim information to verify their truthfulness. Had he achieved his original results after exercising some of these options, he could have claimed that his results were not due solely to demand characteristics. He did not do so, however.

Although Bourke and Hernandez (Bourke, 2012, items 1, 10, & 11) have denied pressuring Butner inmates to overdisclose victims, or expelling anyone for “failing to disclose,” the information we collected from different sources over several years points to a conclusion that is diametrically opposed to their claim. Our initial concerns arose when one of us wrote a technical report (Wollert, 2008) after a couple of former Butner participants in his sex offender counseling program claimed they were pressured to make false confessions. After finishing that report he discussed his findings with Dr. Jason Smith, who was the Director of the Iowa Civil Commitment Unit for Sex Offenders and also supervised an outpatient program that provided counseling services to CPOs referred to him per a federal contract. Dr. Smith indicated he had heard the same allegations from some of his clients. We alluded to these disclosures in our ATSA presentation (Wollert et al., 2009) and subsequently received 7 unsolicited confirmations that they were correct – one from C.S., two from other Butner inmates, one from a Butner releasee, and three from the authors of the “Fraudulent Butner Study” (Neuhauser, Francis, & Ebel, 2011). Prior to testifying before the USSC, one of us also had the opportunity to interview and evaluate two CPOs at Butner after reviewing several thousand pages of file materials. In the course of carrying out these procedures it became evident that one man was expelled for not disclosing more offenses after failing a polygraph. Although his counterpart completed the program, he spontaneously observed that “a lot of times you had stuff in the PHQ just to make the staff happy so they didn’t kick you out ... they dangled that over your head the whole time.”

Another psychologist who evaluated whether other Butner inmates met the SVP criteria had reached the same conclusion and told us that the number of sex offenses in the files of his evaluatees “were all highly inflated, out of programmatic expectation ... in order to remain in the program, it was expected that you would disclose new victims on quarterly progress reports ... you can imagine how the numbers ‘grew.’” Aviv, in her 2013 *New Yorker* article, also described how inmates “shared victim lists” to generate new confessions and kept “cheat sheets” in their cells so that they would not forget the ages of fictitious victims that they had disclosed.

Overall, we have periodically collected data for five years from many sources that point to the conclusion that at least 14 Butner participants felt compelled to overdisclose victims or were expelled from the program because their disclosures were considered inadequate. A number in this group have sworn, under penalty of perjury, that their allegations were inflated during court proceedings. This evidence, and Dr. Hernandez’ admission about his “climate of pressure,” confirms that overt demand characteristics had a clear and robust impact on the number of offenses reported in Bourke and Hernandez’ article.

### **Recent Research on Federal CPOs Contradict the Butner Results and Related Expectations**

In addition to our methodological criticisms, we argued that Hernandez’ dependent measure – the number of past sex crimes reported under duress – was useless for estimating either the sexual dangerousness of federal CPOs, or the chances that they would sexually recidivate after being released from prison. Regarding sexual dangerousness, one of the most accurate ways of assessing this issue is through the administration of a valid actuarial test for this purpose. Such tests place little weight on self-report, but focus instead on the number of charges or convictions for sex offenses and violent offenses that are recorded in their official criminal histories. They also do not attempt to weight undetected offenses because there is no reliable

method for doing so (Wollert, 2006). Regarding sexual recidivism, the most direct way of studying this issue as it relates to federal CPOs is to simply compile recidivism data on a representative sample of federal CPOs who have been released from prison.

A number of studies have been conducted since 2010 that are relevant to these issues. The first was the product of a joint effort among members of our research team (Wollert et al., 2012). Prior to this we had published articles on sex offender risk assessment (e.g., Wollert, 2006; Wollert, Cramer, Waggoner, Skelton, & Vess, 2010) and diagnostic reliability (Wollert, 2007; Wollert & Cramer, 2011). We were also clinicians and, in that capacity, had personally counseled over 3,000 sex offenders, evaluated over 1,000 for treatment or sentencing, and consulted or testified in 200 sexually dangerous person proceedings. The majority of these referrals involved contact offenses, although a substantial number were for noncontact offenses such as exposing, peeping, or possession of child pornography.

Between 1999 and late 2009, one of us provided psychological evaluations and treatment to 55 CPOs under federal supervision in the Portland metropolitan area. Some clients were required to make nominal co-payments, but the federal contract under which these services were provided covered most treatment costs. As a result, supervisees who participated in the program represented a near exhaustive sample of federal offenders with child pornography index offenses in the local area.

All CPOs in this program were counseled with an approach called the “containment model.” According to the USSC’s 2012 Report to Congress, this “approach relies on therapy to address the offender’s internal controls, supervision to provide external criminal justice control measures, and uses polygraph to monitor internal controls and compliance with external controls” (p. A-3). Although “widely considered to be a ‘best practice’ to be implemented in

supervising sex offenders, including federal child pornography offenders” (U.S. Sentencing Commission, 2012, p. *xiv*), the containment model does not endorse the Butner Model of exerting extreme “systematic pressure” on clients to elicit as many sex offenses as possible. It concentrates instead on helping offenders disclose the range of illegal sexual behaviors they have enacted so that each of these possible problems may be addressed in treatment.

Our impression of federal CPOs, within the containment model perspective, was different than the picture painted by Bourke and Hernandez. Only a handful seemed affected by compulsive urges. On the contrary, they generally struck us as ashamed of their pornography offenses, motivated to succeed, well-educated, responsive to treatment, compliant with supervision, and nonrecidivistic.

To further analyze the features of this group, we compiled a computerized spreadsheet in 2009 on all 55 CPOs who had participated in the program from documents in their files. These documents often included PSRs, police records, charging sheets, psychological evaluations, and treatment reports. We recorded each CPO’s birthdate, date of program admission, and his status on 10 possible offense-related risk factors that were included on the Static-99R, one of the most widely-used instruments for assessing sex offender recidivism risk (Helmus, Thornton, Hanson, & Babchishin, 2011). We also recorded the date whenever a client absconded from supervision, died, or was taken into custody. This made it possible to automatically calculate each person’s time at risk in the community.

Another member of our team used the containment model to counsel 17 CPOs under a federal contract in Iowa. Data for these supervisees were added to the data for the Portland supervisees to increase the size of our data base. One supervisee in the Portland program was sentenced under §2G2.1 of the USSC Guidelines for producing child pornography and two



supervisees with this background were placed in the Iowa program. All other supervisees were sentenced under §2G2.2, which is applied to non-production CPOs.

Analyzing our survival data as of September 1, 2009, we found that two out of 72 CPOs were taken into custody and adjudicated for possessing child pornography over an average risk period of 4.0 years. Another CPO who was on active supervision was apprehended for the commission of a non-contact sex offense (peeping), two were apprehended for technical violations, and one absconded but was returned to continue his supervision. Most importantly, no one was arrested on charges of committing a contact sex offense or attempting to do so. Ninety-two percent of our clients succeeded in completing their supervision without being revoked, and no one who successfully completed supervision was charged with either a contact or a non-contact sex offense.

Tabulating data that pertained to the Static-99R, we found our clients were 48 years old on the average, but that 35% had never been involved in a long-term committed relationship. Regarding contact offense data, 14% had previously been convicted of contact sex offenses, 8% were sentenced for a contact offense with their index pornography offense, and 3% had tried to meet with a minor for sexual reasons. Overall, 21% had contact offense convictions (n=15). Regarding noncontact offenses, 3% had prior convictions for possessing child pornography, 3% had prior convictions for public indecency, and 3% had prior convictions for peeping. Overall, 6% had prior noncontact offenses. Regarding targets of offending, 37% of the victims of contact and noncontact offenses were family members. Regarding other markers of criminality, no client was sentenced for a violent crime with his index offense, one had a prior conviction for violence, and 2 had four prior sentencing dates. A low level of risk for our cohort as a whole was reflected

in the fact that 72 % were negative for all of the sexual conduct problems we selected for analysis, except for being convicted of a pornography offense.

To examine this issue further we used the foregoing data to compute the total Static-99R score for each offender in our sample. The average score for our 72-person cohort was one point. According to the 99R's actuarial table (Helmus et al., 2011), one would expect a five-year recidivism rate of 4 % for a cohort having a score of one. The average 99R score for the 11 CPOs with prior convictions for contact sex offenses was 3 points. In this case the 99R table leads to a 5-year expected recidivism rate of 7.5 %. These results, being overestimates of our obtained recidivism rate, support the advice of the instrument's developers (Harris, Phenix, Hanson, & Thornton, 2003) that Static-99R should not be used to estimate CPO recidivism risk among those with no contact offenses.

The PAT and the results of the Butner Study also propose that CPOs are "pedophiles." To evaluate this theory it is useful to keep in mind that Pedophilia is characterized by a strong compulsive element: Those who meet the criteria must have longstanding "recurrent, intense sexually arousing fantasies (or) sexual urges" towards prepubescent children that cause sexual misconduct, marked distress, or interpersonal difficulty (American Psychiatric Association, 2013, p. 697). It is also believed that "the disorder usually begins in adolescence" (American Psychiatric Association, 2000, p. 571), because this is the developmental period when sexual orientations are established. The 6-year recidivism conviction rate for "exclusive" and "non-exclusive" pedophiles released from prison after being convicted of child molestation is 13% (Eher, Rettenberger, Matthes, & Schilling, 2010), but exclusive pedophilia is associated with a recidivism rate that is four times as high (41%; Wollert & Cramer, 2012).

Applying these criteria and facts to the theory that CPOs are pedophiles, one would expect to find that the CPOs in our programs were young, had a history of contact sex offenses against children, had a 4-year recidivism rate by arrest of close to 10%, viewed child pornography the first time they obtained sexually explicit material over the Internet, and were unable to desist from viewing child pornography after being apprehended. This was not the case in that our clients, on average, were in their late forties. Although 20% had been convicted of offenses against children, none were re-arrested for new contact offenses during a 4-year follow-up period. This result may be attributable in part to the effects of the containment model, but our clients' history of pornography offending was still not suggestive of pedophilia. They usually viewed adult pornography when they began accessing sexually explicit materials on the Internet. Then they accessed pornography depicting adolescents. Eventually they viewed depictions of prepubescent children. With the exception of a few cases, their misuse of the Internet also stopped after they were apprehended and sentenced.

These patterns do not support the theory that most CPOs are pedophiles. They are more consistent with the view that illegal use of the Internet is a learned disorder that is "shaped" by a process that involves reinforcement, satiation, searching for more graphic material, and additional reinforcement (Young, 2001; McCarthy, 2010, p. 184). This has important treatment implications because a learned disorder is amenable to psychotherapy, particularly "cognitive-behavioral" (U.S. Sentencing Commission, 2012) and "relapse prevention" (Hudson & Ward, 2000) modalities, while a preferential and compulsive paraphilia may require pharmacological as well as psychological interventions.

The impetus for the second relevant study was a memorandum by U.S. Judge Jack Weinstein that directed the U.S. Parole and Probation Office of the Eastern District of New York

to prepare a report for him on the treatment and supervision of CPOs under the district's supervision (Stabenow, 2011). In response, Probation Officer Lawrence Andres, Jr., sent Judge Weinstein a memorandum in May 2011 indicating that the district had supervised a total of 108 CPOs since 1999 using the Containment Model. Officer Andres reported that

*Approximately 20% ... disclosed a prior victim [sexual contact with a minor (under 18)<sup>4</sup> that occurred before the term of supervision which was never reported to law enforcement or another treatment agency] either via clinical polygraph examination or self-report during the term of supervision. It is the policy of the probation department and treatment provider to advise offenders that any such disclosure will not be used against them for the pursuit of new criminal charges, so long as they do not provide identifying information. As such, they are encouraged to only report the age, gender, and details of the sexual contact in an effort to gain the offender's trust and provide the basis for continued honesty in treatment.*

Regarding the issue of recidivism, Officer Andres informed Judge Weinstein that “only 1” CPO had “committed a new sexual contact offense while under the supervision of this department ... this offender admitted to current sexual contact of a 9 year-old female family member.” Eighty-seven percent of the New York cohort also succeeded in not having their supervision revoked.

The timeframe for Officer Andres' review was almost the same as ours. The supervision success rate was also comparable. Although risk periods were not calculated using our methods, it seems safe to assume that the average risk period for CPOs in the New York cohort was about four years long. It also seems reasonable to combine the New York cohort with ours on the assumption they come from the same underlying population. This resulted in an overall base rate

of convictions for contact sex offenses over a four-year period of about one percent (1/180 = .6%).

The New York District program encouraged the disclosure of offenses within the context of participation in counseling and polygraph examinations. It was similar to our programs in these respects. It was also similar to our programs in that its director, to the best of our knowledge, has never endorsed the use of “systematic pressure” to elicit disclosures (McCarthy, 2012). It therefore used some of the self-report procedures that Bourke and Hernandez (2009) used, but not all of them. Twenty percent of the New York supervisees made new disclosures. This percentage stands in stark contrast to the Butner results, which reported that 59% of the cohort without previous convictions made disclosures. Statistical testing shows that the 20% New York rate is significantly smaller than the 59% Butner rate ( $z=6.3, p<.0001$ ).

Still more information is available on federal CPOs as a result of two studies that the USSC carried out and included in its recent Report to Congress. One, designed to map out the rates of “criminally sexually dangerous behaviors” (CSDB) among CPOs, tabulated data from the PSRs for three exhaustive samples of 2,696 nonproduction offenders (U.S. Sentencing Commission, 2012, Chapter 7). Counting only prior convictions as offenses, the Commission assigned 9% of its sample (n=243) to the most serious category of child contact sex offenders, 2% (n=53) to the second most serious category of adult contact sex offenders, 2% (n=54) to a third most serious category of having convictions for a child pornography offense and a non-contact sex offense that involved a child, and 2% (n=56) to the least serious category of having a prior child pornography conviction. Thirteen percent of all CPOs were classified as having engaged in CSDB when offenders who were assigned to more than one category were removed from less serious categories.

The Commission also conducted an alternative study that reassigned offenders to CSDB categories with a more inclusive method that counted prior convictions (n=406), PSR “Findings” without convictions (n=464), and PSR “Allegations” (n=88). Nineteen percent (n=499) were assigned to the first category with this method, 4% (n=110) to the second, 10% (n=270) to the third, and 3% (n=79) to the fourth.

Thirty-six percent of all CPOs were classified as being positive for having engaged in CSDB with this alternative definition. The 23 percent difference between this result and the result based on convictions shows how the magnitude of CSDB among CPOs may change as a function of a change in definitions. Nonetheless, even an inclusive definition did not lead the Sentencing Commission to classify most CPOs as having engaged in CSDB.

The Commission’s second relevant study compiled recidivism rates on an exhaustive sample of 610 CPOs released in fiscal years 1999 and 2000, over a follow-up period that was 102 months long on the average and over 60 months long for 95% of the group (U.S. Sentencing Commission, 2012, Chapter 11). Eleven members of this cohort were convicted of new contact sex crimes (Table 11-1), 9 were convicted of new non-production child pornography offenses and 86% of all recidivistic outcomes occurred in the first 4 years after release (Figure 11-2). This suggests that about 1.5% of those in the follow-up group ( $11 \times .86 = 9$ ;  $9/610 = 1.5\%$ ) were convicted of new contact sex crimes in a 4-year risk period, and 1.3% ( $9 \times .86 = 8$ ;  $8/610 = 1.3\%$ ) were convicted of new non-production child pornography crimes. The presence of CSDBs did not differentiate between general recidivists and non-recidivists (p. 302) or sexual recidivists and non-recidivists (pp. 303 & 309). It was also reported that those in the follow-up group were 41 years old on average in 1999 and 2000, had “some college” education, and were employed

when they were arrested. These demographic characteristics matched the demographic characteristics of our cohort.

To extend this line of research as part of the chapter at hand we analyzed the criminal histories of all 504 defendants who were convicted of an “index” child pornography offense in New Zealand between July 1, 2002 and June 30, 2012. All offenders were tracked for at least 3 years and 10 years of follow-up data were available for some of them. We found that 18% (n=95) were previously or concurrently convicted of committing some type of contact sex offense. About 2% of the full sample committed contact sex offenses after their index offense while this was also the case for the 92 offenders with a history of contact offenses against children. Five percent of the full sample recidivated with another child pornography offense.

Taken together, the results of these other projects contradict the Butner studies by suggesting that only a small minority of federal CPOs are dangerous pedophiles. They are also at odds with the Butner view that almost all federal CPOs have committed contact sex offenses and that they are prone to recidivate. Finally, they show that disclosures of past sexual misconduct can be manipulated by incorporating strong demand characteristics into a research design, but that inflated estimates of past sexual misconduct are useless for predicting future misconduct by CPOs. The simplest and most reasonable explanation for this is that nonproduction CPOs are unlikely to recidivate because they are responsive to apprehension, sentencing, and treatment.

### **Research on Non-federal CPOs Is Consistent with Research on Federal CPOs**

Assessing the characteristics of those who expose themselves to an emergent forensic condition like Internet child pornography requires the introduction of the condition to a population and the identification of offenders. It also takes time to compile group data as well as

case studies. The dissemination and clarification of research findings can occur only in the wake of these other endeavors.

In light of the relatively recent advent of the Internet, it is not surprising that only a limited amount of research has been published on the recidivism rates and actuarial status of non-federal CPOs. The research that is available, however, is consistent with the results we have summarized about federal CPOs. Regarding the issue of recidivism, for example, Seto and his colleagues (Seto et al., 2011) averaged the results of nine published and unpublished follow-up studies of offenders who were primarily non-federal CPOs to derive estimates of sexual and violent recidivism. Observing that “most of the follow-up times were under 4 years” (p. 135), they reported that “3.4% ... of the online offenders recidivated with a contact sexual offense and 3.6% recidivated with a child pornography offense ... 4.2% recidivated with a violent offense.” One Canadian study in their analysis (Seto & Eke, 2005), which included a large number of production offenders, found that CPOs with a history of contact sex offense convictions committed more new contact sex offenses over a 30-month follow-up period (9.2%) than CPOs with no contact offenses (1.3%). Taken together, such recidivism patterns led them to conclude that “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” (Seto et al., 2011, p. 136).

Regarding the issue of actuarial scores, Wakeling and her colleagues (Wakeling, Howard, & Barnett, 2011) obtained results that were also consistent with what we reported. They found that 99% of a large cohort of British CPOs did not have high scores on an actuarial instrument for sex offenders known as the Risk Matrix 2000. They also found that the sexual recidivism rate



for this group was only 1.6%, but that it was four times higher – at 6.7 % – for those with low scores who were classified as “Generalist Sexual Offenders” rather than internet sex offenders.

Research on non-federal CPOs, which we have reviewed in more detail in our book chapter (Wollert et al., 2012, pp. 2-8 to 2-12), is also consistent with our clinical observations. Regarding the prevalence of paraphilias, for example, Wolak reported that only 3% of several hundred suspects arrested primarily by state authorities for internet child pornography were known to have been diagnosed with a sexual disorder (Wolak, Finkelhor, & Mitchell, 2005). The same pattern was apparent in a sample of 33 Swiss CPOs, among whom “there were no hints of psychiatric treatment in the files” except for one person who “appeared to be paraphilic” on the basis of interviews with his relatives (Frei, Erenay, Dittman & Graf, 2005, p. 492).

A similar level of comparability is evident from research on the personality and demographic characteristics of diverse contemporaneous CPO samples. Comparing British child molesters with CPOs, Webb reported that “child molesters were more likely to fail in all areas compared to the internet offenders ... internet offenders appear to be extremely compliant with community treatment and supervision” (Webb, Craissati, & Keen, 2007, pp. 462-463). McCarthy (2010) found that a group of U.S. CPOs, including 51 child molesters and 56 non-molesters, spent 21 hours per week viewing child or adult pornography; 55% had never been married, 67% had attended or completed college, and contact offenders were twice as likely as noncontact offenders to be diagnosed with Pedophilia. Endrass and his research team (Endrass et al., 2009) documented a similar pattern after studying an exhaustive sample of 231 CPOs from Zurich. In particular, they stated that

*Child pornography users are less likely to be married...(and) 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.*

### **Discussion**

Sex offenders, as a group, are feared and hated by members of the public (Levenson, Brannon, Fortney, & Baker, 2007) and policy makers (Meloy, Curtis, & Boatwright, 2013). Research that reports glowing results in the development of effective methods for identifying or managing sex offenders may therefore encourage the adoption of laws or policies for achieving these goals. Studies that report the most sensational results may also have the greatest potential for impacting legislation and policies. This is sometimes the case even though the studies in question are unpublished, unreplicated, or have a basis in procedures that are not accepted by the scientific community.

While lay persons, the courts, and legislators frequently cite behavioral research, perhaps more often when it supports a favored theory, psychology graduate students who take courses on statistics, measurement theory, and research methods courses learn that a host of issues threaten the validity of findings associated with behavioral research. Results obtained on a small and highly “selected” sample, for example, cannot be attributed to a more diverse group with any meaningful degree of certainty. Alternatively, a poorly-defined outcome measure will overestimate the prevalence of a more specific outcome (Ackerman & Burns, 2016). Such errors of design, which include demand characteristics like those in the Butner Study, must be controlled to obtain findings that are interpretable and useful for the selection of sentences for those with disabilities and others. Table 1 describes and illustrates a number of procedures that

are likely – in the absence of adequate controls – to produce erroneous estimates of prior contact sex offenses. It also describes methods of controlling these flaws.

[Insert Table 1 here]

Congress established the USSC when it passed the Sentencing Reform Act of 1984 (Public Law No. 98-473, Stat. 1987). The primary purpose of the Commission is to use empiricism and sound judgment to promulgate sentences and sentencing policies for federal crimes that are proportional to the “nature and circumstances” of each crime at the same time they achieve several other sentencing goals (U.S. Sentencing Commission, 2009, pp. 2-3). Disproportional sentences are unacceptable not only because they are unfair, but also because they potentially undermine respect for the law and exacerbate disciplinary problems among those who are incarcerated.

In 2009, after studying the history of the federal guidelines for sentencing child pornography offenders, the Commission concluded that the guidelines had reached a crossroads in their evolution (U.S. Sentencing Commission, 2009, p. 54). On the one hand, it pointed out that Congress had a “continued interest” in increasing criminal penalties for child pornography offenses. Some of this interest, as we have suggested, is probably due to the dissemination via professional channels of sensationalized findings based on weak research designs such as those in Table 1. On the other hand, the Commission observed that the downward departure rates of sentencing courts signaled that many judges perceived the guidelines as too severe.

Having identified this conflict, the Commission “established a review of the child pornography guidelines as a priority” (U.S. Sentencing Commission, 2009, p. 54). During the next several years it examined relevant laws and professional literature, analyzed recidivism and criminal history data for thousands of federal CPOs, and received testimony from researchers,

treatment providers, attorneys, law enforcement officers, victim advocates, and judges during a two-day public hearing in Washington, D.C.

The Commission recently submitted a summary of its review to Congress. It concluded that “stakeholders, including the sentencing courts, increasingly feel that they ‘are left without a meaningful baseline from which they can apply sentencing principles’ in non-production cases” (U.S. Sentencing Commission, 2012, December, p. iii) ... “the current guideline produces overly severe sentencing ranges for some offenders, unduly lenient ranges for other offenders, and widespread inconsistent application” (p. xxi). To address this problem it recommended that the length of the sentences imposed on non-production offenders should be determined by the content of their collections and the sophistication of their methods of offending, the extent of their involvement in Internet communities dedicated to child sexual exploitation, and the presence of CSDB beyond a current child pornography offense (pp. xvii-xviii). Incorporating these ideas into a tentative guidelines framework, the Commission proposed (p. 321) that

*The presence of aggravating factors from any of these three categories, even without the presence of any aggravating factors from the other two categories, warrants enhanced punishment ... The presence of aggravating factors from multiple categories generally would warrant a more severe penalty than the presence of aggravating factors from a single category.*

Will the child pornography guidelines of the future resolve the problems with the existing guidelines? The Commission’s recognition that the guideline penalties are very severe in some cases, and its willingness to consider options that may address this issue, is a promising sign. Another is its recognition that many factors that have been used for the purpose of sentencing

enhancements are encountered so frequently that they are useless for discriminating offenders in terms of their culpability and dangerousness.

Nonetheless, compiling a just and useful set of guidelines that govern a set of crimes that are widely reviled is a daunting challenge, one that will most likely require much patience combined with a compelling set of arguments based on meaningful research results obtained with defensible methodologies. One finding that meets this standard is that the PAT is invalid and consequently lacks merit as an argument for retaining or changing any of the guidelines. Another is that CPOs without a prior history of contact convictions are unlikely to recidivate.

There is a risk, however, that the Commission's deliberations may be skewed in a counterproductive direction by invalid, emotionally appealing, and oversold conclusions that – like those in the Butner reports – proceed from unwarranted assumptions, vacuous constructs, unachievable goals, and speculative theories. This is a real concern because a number of claims or theories in the Commission's 2012 Report lack strong justification. Furthermore, these points are repeated at various locations. Although repetition may be useful for emphasizing core conclusions and promoting their acceptance by lay audiences, it does nothing to actually validate them. It may, paradoxically, have the effect of impeding policy development because erroneous beliefs – like “all sex offenders recidivate” – often take years to dislodge once they are in place. Table 2 summarizes some of the most troubling claims and theories in this category, references their locations in the Commission's Report, and explains why they are of concern and deserve careful scrutiny.

[Insert Table 2 here]

Overall, the USSC's Report observed that “most stakeholders in the federal criminal justice system consider the non-production child pornography sentencing scheme to be seriously

outmoded” (p. iii). Although the Commission has not yet promulgated a specific set of proposals for updating the guidelines, it has studied this issue extensively and has framed out some of the themes it intends to develop further. The Commission will also hopefully carry out further research on these themes and continue to submit frequent proposals to Congress for improving the guidelines.

The Butner studies illustrate how policy research can have serious negative effects when results-oriented (Rozelle, 2007, p. 597) data collection is emphasized at the expense of methodological and ethical considerations. With this lesson in mind, we believe that future child pornography guidelines promulgated by the Commission will be optimized if it relies on replicated findings from projects with adequate subject protections, tests promising conceptions through the application of the questions posed in the *Daubert* decision, considers how well-intended research projects may be invalidated by the types of design flaws in Table 1, exercises caution in evaluating the weak claims and theories in Table 2, and continues to invite input regarding its empirical efforts from a diverse range of behavioral scientists who are well-versed in research design and methodology.

## References

- Abel, G. G. (2012, February). *Child pornography offending*. Testimony to the U. S. Sentencing Commission: Washington, D.C. Retrieved from <http://www.ussc.gov>
- Ackerman, A. R. & Burns, M. Bad data: How government agencies distort statistics on sex-crime recidivism. *Justice Policy Journal*, 13 (1), 1-23.
- Abrams, S. (1991). The use of polygraphy with sex offenders. *Annals of Sex Research*, 4, 239-263.
- Allen, E. (2009, October). *Written testimony to the United States Sentencing Commission's Regional Hearing*. Retrieved from <http://www.ussc.gov>
- American Psychiatric Association. (1999). *Dangerous sex offenders*. Washington, D.C.: Author.
- American Psychiatric Association. (2000). *Diagnostic and statistical manual of mental disorders* (4<sup>th</sup> ed. -TR). Washington, D.C.: Author.
- American Psychiatric Association. (2013). *Diagnostic and statistical manual of mental disorders* (5<sup>th</sup> ed.). Washington, D.C.: Author.
- Andres, L. (2011, May 16). [Memorandum to the Honorable Jack B. Weinstein]. New York, NY: Author.
- Aviv, R. (2013, January). The science of sex abuse: Is it right to imprison people for heinous crimes they have not yet committed? *The New Yorker*. Retrieved from <http://www.newyorker.com>
- Baron-Evans, A. (2008). *Rita, Gall and Kimbrough: A Chance for Real Sentencing Improvements*. Retrieved on August 29, 2016 from [https://www.researchgate.net/publication/265121978\\_Rita\\_Gall\\_and\\_Kimbrough](https://www.researchgate.net/publication/265121978_Rita_Gall_and_Kimbrough)

- Basbaum, J. (2010). Inequitable sentencing for possession of child pornography: A failure to distinguish voyeurs from pederasts. *Hastings Law Journal*, *61*, 1281-1306.
- Bourke, M. L. (2012, May 17). Letter to U.S. Sentencing Commission Chairperson Judge Patti Saris. Retrieved from <http://www.ussc.gov>
- Bourke, M. L. & Hernandez, A. E. (2009). The “Butner Study” redux: A report of the incidence of hands-on victimization by child pornography offenders. *Journal of Family Violence*, *24*, 183-191. doi: 10.1007/s10896-008-9219y.
- Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 2795 (1993)
- Eher, R., Rettenberger, M., Matthes, A., & Schilling, F. (2010). Stable dynamic risk factors in child sexual abusers. *Sexual Offender Treatment*, *5* (1), 1-12.
- Endrass, J., Urbaniok, F., Hammermeister, L., Benz, C., Elbert, T., Laubacher, A., & Rossegger, A. (2009). The consumption of Internet child pornography and violent and sex offending. *BMC Psychiatry*, *9*, 43-50. doi: 10.1186/1471-244X-9-43.
- Ewing, C. P. (2011). *Justice perverted: Sex offense law, psychology, and public policy*. New York: Oxford University Press.
- Fillenbaum, S. (1966). Prior deception and subsequent experimental performance: The “faithful” subject. *Journal of Personality and Social Psychology*, *4*(5), 532-537.
- Frei, A., Erenay, N., Dittman, V., & Graf, M. (2005). Paedophilia on the Internet: A study of 33 convicted offenders in the Canton of Lucerne. *Swiss Medicine Weekly*, *135*, 488-494.
- Garrett, J. S. (April 2007). [Letter to Springer Publications and Journal of Family Violence co-editors Michael Hersen and Vincent Hasselt]. Retrieved from <http://www.richardwollert.com>



Gelber, A. (2009). *Response to "A Reluctant Rebellion"*. Unpublished manuscript, U.S.

Department of Justice Criminal Division at Washington, D.C.

Hansen, M. (2009, June). A reluctant rebellion. *American Bar Association Journal*, 95(6), 54-59.

Harris, A., Phenix, A., Hanson, R., & Thornton, D. (2003). *Static-99 coding rules revised – 2003*. Unpublished manuscript. Ottawa, Canada: Solicitor General Canada.

Heimbach, M. J. (2002, May). *Internet child pornography*. Retrieved from

<http://www.fbi.gov/congress/congress02/heimbach050102.htm>

Helmus, L., Thornton, D., Hanson, K., & Babchishin, K. (2011). Improving the predictive accuracy of Static-99 and Static-2002 with older sex offenders: Revised age weights. *Sexual Abuse*, 24, 64-101. doi: 10.1177/1079063211409951.

Hernandez, A. (2000a, November). *Self-reported contact sexual offenses by participants in the Federal Bureau of Prisons' Sex Offender Treatment Program: Implications for Internet sex offenders*. Paper presented at the Annual Conference of the Association for the Treatment of Sexual Abusers, San Diego, CA.

Hernandez, A. (2000b, June). *Special needs offenders: FCI Butner Sex Offender Treatment Program* (Parts One and Two). Available from the Federal Judicial Center, <http://www.ntis.gov/nac>. Order number: AVA20973VNB4CFP.

Hudson, S. M. & Ward, T. (2000). Relapse Prevention: Assessment and treatment implications. In D. R. Laws, S. M. Hudson, & T. Ward (Eds.). *Remaking relapse prevention with sex offenders: A sourcebook* (pp. 102-122). Newbury Park, CA: Sage.

Larson, A. O. (2012). Confronting Supreme Court fact-finding. *University of Virginia Law Review*, 98, 1255-1312.

Lee, A. F., Li, N., Lamade, R., Schuler, A., & Prentky, R. (2012). Predicting hands on

- child sexual offenses among possessors of internet child pornography. *Psychology, Public Policy, and Law*, *18*, 644-672. doi:10.1037/a0027517.
- Levenson, J.S., Brannon, Y., Fortney, T. & Baker, J. (2007). Public perceptions about sex offenders and community protection policies. *Analyses of Social Issues and Public Policy*, *7*, 1-25. doi: 10.1111/j.1530-2415.2007.00119.x.
- McCarthy, J. (2012, February). *The assessment and treatment of child pornography offenders and the motivation to collect child pornography*. Testimony to the U. S. Sentencing Commission: Washington, D.C. Retrieved from <http://www.uscc.gov>
- McCarthy, J. (2010). Internet sexual activity: A comparison between contact and non-contact child pornography offenders. *Journal of Sexual Aggression*, *16*, 181-195. doi: 10.1080/13552601003760006.
- Meloy, M., Curtis, K. & Boatwright, J. (2013). The sponsors of sex offender bills speak up: Policy makers' perceptions of sex offenders, sex crimes, and sex offender legislation. *Criminal Justice and Behavior*, *40*, 438-452. doi: 10.1177/009385481212455740.
- Mossman, D. (2006). Another look at interpreting risk categories. *Sexual Abuse*, *18*, 41-63. doi: 10.1177/107906320601800104.
- Neuhauser, J. C., Francis, S., & Ebel, P. (2011, May). *The Butner Study: A Report on the Fraudulent Execution of the Adam Walsh Act by the Federal Bureau of Prisons*. Unpublished manuscript. Butner, NC. Retrieved from [http://rsoresearch.files.wordpress.com/2012/01/butner\\_study\\_debunking\\_kit.pdf](http://rsoresearch.files.wordpress.com/2012/01/butner_study_debunking_kit.pdf).
- Office for Protection from Research Risks (1993). Institutional Review Board Guidelines. Washington, D.C.: Author.

- Orne, M. T. (1962). On the social psychology of the psychological experiment: With particular reference to demand characteristics and their implications. *American Psychologist, 17*, 776-783.
- Prentky, R. A., Janus, E., Barbaree, H., Schwartz, B., & Kafka, M. (2006). Sexually violent predators in the courtroom: Science on trial. *Psychology, Public Policy, and Law, 12*, 357-393.
- Rozelle, S. D. (2007). *Daubert*, Schaubert: Criminal defendants and the short end of the science stick. *Tulsa Law Review, 43*, 597-607.
- Sandler, J. C., Freeman, N. & Socia, K. (2008). Does a watched pot boil? A time-series analysis of New York State's Sex Offender Registration and Notification Law. *Psychology, Public Policy, and Law, 14*, 284-302. doi: 10.1037/a0013881.
- Seto, M. C. & Eke, A. (2005). The criminal histories and later offending of child pornography offenders. *Sexual Abuse, 17*, 201-210. doi: 10.1007/s11194-005-46-5-y.
- Seto, M. C., Hanson, R. K., & Babchishin, K. M. (2011). Contact sexual offending by men with online sexual offenses. *Sexual Abuse, 23*, 124-145. doi:10.1177/1079063210369013.
- Sher, J. & Carey, B. (2007, July 19). Debate on child pornography's link to molesting. *The New York Times*. Retrieved from <http://www.nytimes.com>
- Smith, L., Grassley, C. E., & Sensenbrenner, F. J. (2012, February 14). Letter to U. S. Sentencing Chairperson Judge Patti Saris. Washington, D.C.: United States Congress.
- Specter, A. & Hoffa, L. (2011, September). A quiet but growing judicial rebellion against harsh sentences for child pornography offenses – should the laws be changed? *The Champion, 33*(6). Retrieved from <http://www.nacdl.org/champion.aspx?id=22897>

Stabenow, T. (2008, July 3). Deconstructing the myth of careful study: A primer on the flawed progression of the Child Pornography Guidelines. Retrieved from

<http://mow.fd.org/3%20July%202008%20Edit.pdf>

Stabenow, T. (2011). A method for careful study: A proposal for reforming the child pornography guidelines. *Federal Sentencing Reporter*, 24 (2), 108-136.

doi: 10.1525/fsr.2011.24.2.108.

U. S. Sentencing Commission (1996). *Report to Congress: Sex Offenses Against Children, Findings and Recommendations Regarding Federal Penalties*. Retrieved from

[http://www.ussc.gov/r\\_congress/SCAC.htm](http://www.ussc.gov/r_congress/SCAC.htm)

U. S. Sentencing Commission (2008). *Sourcebook of federal sentencing statistics*. Retrieved from <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm>

U.S. Sentencing Commission (2009). History of the child pornography guidelines. Retrieved from <http://www.ussc.gov>

U.S. Sentencing Commission (June 2010). Results of survey of United States district judges January 2010 through March 2010. Retrieved from <http://www.ussc.gov>

U.S. Sentencing Commission (2012). *Report to Congress: Federal child pornography offenses*. Retrieved from <http://www.ussc.gov>

U.S. v. Crisman, 39 F. Supp.3d 1189 (D. New Mexico, July 22, 2014)

U.S. v. Cunningham, 680 F.Supp.2d 844 (N.D. Ohio, January 26, 2010)

U.S. v. Dorvee, 616 F.3d 174; 2010 App. Lexis 16288 (2d Cir., May 11, 2010)

U.S. v. Grober, 624 F.3d 592 (3d Cir., October 26, 2010)

U.S. v. Johnson. 588 F.Supp. 2d 997 (S.D. Iowa, December 3, 2008)

U.S. v. Revland. No. 5-06-HC-02212 (E.D. North Carolina, December 23, 2011)

- Vanderpool, T. (May 19, 2011). Child pornography arrests and prosecutions are on the rise – and perhaps, on occasion, going too far. *The Tucson Weekly*. Retrieved from <http://www.tucsonweekly.com>
- Wakeling, H. C., Howard, P., & Barnett, G. (2011). Comparing the validity of the RM2000 scales and OGRS3 for predicting recidivism by internet sexual offenders. *Sexual Abuse, 23*, 146-168. doi: 10.1177/1079063210375974.
- Webb, L., Craissati, J., & Keen, S. (2007). Characteristics of Internet child pornography offenders: A comparison with child molesters. *Sexual Abuse, 19*, 449-465. doi: 10.1177/107906320701900408.
- Wolak, J., Finkelhor, D., & Mitchell, K. (2005). Child pornography possessors arrested in Internet-related crimes: Finding from the Online Victimization Study. Retrieved from [http://www.missingkids.com/en\\_US/publications/NC144.pdf](http://www.missingkids.com/en_US/publications/NC144.pdf)
- Wollert, R. (2006). Low base rates limit expert certainty when current actuarial tests are used to identify sexually violent predators: An application of Bayes's Theorem. *Psychology, Public Policy, and Law, 12*, 56-85. doi: 10.1037/1076-8971.12.1.56
- Wollert, R. (2007). Poor diagnostic reliability, the Null-Bayes Logic Model, and their implications for sexually violent predator evaluations. *Psychology, Public Policy, and Law, 13*, 167-203. doi: 10.1037/1076-8971.13.3.167
- Wollert, R. (2008). *A summary of the treatment offense histories of men who were supervised by federal pre-trial and probation services after being charged with or convicted of possession of child pornography*. Unpublished manuscript. Portland, OR.

- Wollert, R. & Cramer, E. (2011). Sampling extreme groups invalidates research on the Paraphilias: Implications for DSM-5 and sex offender risk assessments. *Behavioral Sciences and the Law*, 29, 554-565.
- Wollert, R., Cramer, E., Waggoner, J., Skelton, A., & Vess, J. (2010). Recent research (N=9,305) underscores the importance of using age-stratified actuarial tables in sex offender risk assessments. *Sexual Abuse: A Journal of Research and Treatment*, 22, 471-490. DOI: 10.1177/1079063210384633.
- Wollert, R. (2012, February). *The implications of recidivism research and clinical experience for assessing and treating federal child pornography offenders*. Testimony to the U. S. Sentencing Commission: Washington, D.C. Retrieved from <http://www.ussc.gov>
- Wollert, R. & Cramer, E. (2012, October). *Reverse Phi: A computerized spreadsheet for estimating Bayesian conditional probabilities from phi coefficients*. Paper presented at the Annual Conference of the Association for the Treatment of Sexual Abusers, Denver, CO.
- Wollert, R., Waggoner, J., & Smith, J. (2012). Federal child pornography offenders do not have florid offense histories and are unlikely to recidivate. In B. Schwartz (Ed.), *The Sex Offender, Volume VII* (pp. 2-1 to 2-21). Kingston, N.J.: Civic Research Institute.
- Wollert, R., Waggoner, J., & Smith, J. (2009, October). *Child pornography offenders do not have florid offense histories and are unlikely to recidivate*. Poster session presented at the annual meeting of the Association for the Treatment of Sexual Abusers, Dallas, TX.
- Young, K. S. (2001). *Tangled in the Web: Understanding cybersex from fantasy to addiction*. Bloomington, IN: Authorhouse.

## Footnotes

<sup>1</sup> “A legislative fact,” according to Larson (p. 1256), “gets its name ... because it relates to the ‘legislative function’ or policy-making function of the court ... the central feature of a legislative fact is that it ‘transcends the particular dispute,’ and provides descriptive information about the world which judges use as foundational ‘building blocks’ to form and apply legal rules.”

<sup>2</sup> We verified this by accessing <http://clinicaltrials.gov> .

<sup>3</sup> Sher and Carey’s *New York Times* article implied that the BOP suppressed publication of *Butner Redux*. Our analysis of the CFRs and Ms. Garrett’s letter, which we obtained with a FOIA request, shows this implication is most likely inaccurate and unfair to the BOP. The implications of the *NYT* article may nonetheless have strengthened the hand of those advantaged by *Butner Redux* so that political considerations overrode well-justified objections to its publication. Ms. Garrett’s letter is posted at <http://www.richardwollert.com> .

<sup>4</sup> During a personal telephone call with Mr. Andres we learned that anyone under 18 years old was considered a minor and a thus a victim of a sex offense for the purpose of his review. Within this framework a 40 year-old CPO who had sex with a 16 year-old high school junior when he was a 19 year-old college student would be counted as having committed a prior contact sex offense. This is obviously not in the same category of misconduct as a 35 year-old man who molests his sister’s five year-old daughter. Researchers who wish to study undisclosed sex offenses should therefore differentiate sexual contacts between adults and prepubescent children from other types of sexual behavior. They will otherwise potentially mislead their audience.

Table 1.

*Research Design Flaws That Produce Artificial Estimates of Prior Contact Sex Offenses (PCSOs) For Federal CPOs*

Type of Flaw	Definition	Example (Artificial Effects in Parentheses)	Possible Solutions
Misleading dependent measures	An outcome is underestimated by a narrow definition or inflated by a broad definition.	The definition of a PCSO includes sex between a 19 year-old and a 16 year-old. (This produces high rates in both offender and non-offender samples).	Have experts specify definitions. Compare a full range of outcomes.
Nonrepresentative sampling	Data are collected from subjects who come from the extremes of a reference group.	An ad solicits interviews from “pedophiles” and the PCSO rate they report is attributed to federal CPOs. (The rate for CPOs is misestimated because a minority of CPOs are pedophiles.)	Carefully define the reference group. Use procedures to select representative samples.
Obvious demand characteristics	Research procedures are adopted that are so transparent that subjects know the results that researchers hope to obtain.	Counts of PCSOs are based on unverified self-reports from patients in treatment programs where a premium is placed on high levels of disclosure. (Clients give their therapists whatever they want).	Minimize demands. Compile disclosure rates for different procedures. Verify disclosures.
Masked effects	Data from different offender populations are averaged.	Four of 25 CPOs report a PCSO. Sixty of 100 convicted molesters do so. The data are pooled and a 51% rate is reported. (The high rate for the molesters hides the lower rate for the CPOs).	Test if groups differ on the data. Report data separately if groups differ.
Overinterpretation	Data collected from a single group are treated as though they are valid and uniquely characterize the group.	A sample of CPOs is called “dangerous” after a 25% rate of PCSOs is obtained. (The rate may be seen in a different light if it is reported by non-sex offenders.)	Compare data for non-offenders and non-sex offenders with CPO data.
Lack of cross-validation	The accuracy of a test for detecting individuals with a target problem is calculated without replication.	A test identifies 80% of those CPOs with a PCSO in a developmental sample. (Accuracy is almost always overestimated when a test is developed.)	Collect data from other samples and compare accuracy rates.



Table 2.

*Claims and Theories in the USSC’s Report to Congress on Child Pornography Offenders that Lack Strong Justification*

Claim and/or Theory (Locations in Parentheses)	Reasons for Concern
<p>Criminally sexually dangerous behaviors (CSDBs) are relevant to Adam Walsh Act civil commitment proceedings against CPOs and revising the Sentencing Guidelines because it is a reliable construct that meaningfully differentiates between CPOs (xix, xxi, 174, 314, 319, 321, 325).</p>	<p>The reliability for identifying CSDBs is unstudied. No research indicates the CSDB construct is correlated with any external variable. CSDBs may not discriminate between CPOs who have accessed chat rooms. CSDBs should not be confused with the Adam Walsh concept of “serious difficulty controlling behavior.”</p>
<p>Scientists agree that CPOs with CSDBs differ from CPOs with only one pornography sentence. One reason is the first group is more likely to recidivate (170, 303, 308, 314, 319).</p>	<p>The likelihood ratio (LR) of the CSDB construct for predicting recidivism does not differ from 1.0 (Fig. 11-4, p. 302). This means it is invalid for picking out recidivists (Mossman, 2006). Convincing validity data need to be compiled for the construct to merit scientific acceptance.</p>
<p>The USSC’s study that defines recidivism as RAP sheet arrests is credible because researchers agree that (1) arrests index recidivism better than convictions and (2) many offenses, being undetected, are not on offender RAP sheets (x., 295, 296, 315).</p>	<p>Reliability studies are more effective than surveys for picking recidivism definitions. Convictions are advantageous because they don’t inflate recidivism. The temptation to attribute undetected offenses to CPOs should be tempered by the finding that 95% of all new sex crimes are committed by first time offenders (Sandler, Freeman, &amp; Socia, 2008).</p>
<p>Viewing pornography does not potentiate child molestation among typical CPOs but it may have a “tipping point effect” on some who may be susceptible to this if other risk factors are present (vii). An offender’s noncriminal sexual behavior may estimate recidivism even if the behavior is not a criminal offense (x., 169).</p>	<p>The first view is a speculative reincarnation of the PAT, one that is contradicted by the finding that 84% of those CPOs who committed contact sex offenses did so before they began collecting pornography (McCarthy, 2010, p. 193). The second thesis has never been empirically confirmed.</p>
<p>Researchers are developing actuarial instruments for use with CPOs (xiv). (Readers may thus anticipate that evaluators will soon be able to identify which CPOs will recidivate on the basis of their past behavior or other characteristics).</p>	<p>CPOs have a recidivism rate that is below 5%. Past experience indicates that psychological tests for populations with such a low recidivism rate generate unacceptably high rates of error. The results of actuarial test development, in other words, are not worth the costs.</p>