

FROM PEER-TO-PEER NETWORKS TO CLOUD COMPUTING: HOW
TECHNOLOGY IS REDEFINING CHILD PORNOGRAPHY LAWS

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ABSTRACT

Child pornography circulating in cyberspace has ballooned into the millions. To punish this flood, the law must accurately delineate culpable conduct. Technology such as peer-to-peer networks has erased the divisions among traders of child pornography, and, therefore, the differentials in punishment have lost their underpinnings. The current sentencing controversy surrounding child pornographers is merely the tip of the iceberg of the larger need to revamp the offenses themselves.

This paper provides a framework for a normative critique of the offenses and their sentences. It suggests the law could better reflect technology by comporting with a refined harm rationale that rests on the fundamental injury to the victim's dignity and privacy. Drawing on comparisons to diverse laws such as the Geneva Convention's ban on photographs of prisoners of war, this paper states all traders in child pornography violate the rights of the children depicted and therefore inflict harm, albeit at different levels. Accordingly, the paper proposes three categories: producers, traders, and seekers of child pornography with base sentences varying accordingly. Starting at the same base level, the Sentencing Commission could then propose enhancements or departures to distinguish among the traders and their individual culpability.

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INTRODUCTION

Congress has aggressively banned activity involving child pornography and has issued numerous directives to the United States Sentencing Commission (“Commission”) to increase punishment. As a result, prosecutions and sentences have risen dramatically.¹ With the demise of mandatory sentencing,² a growing number of district court judges have deviated downward from the sentencing Guidelines, particularly in possession cases. The debate over the appropriate sentences for convicted child pornographers has also intensified among scholars, judges, legislators and the general public. Either through judicial rejection of guideline suggestions or through direct action by the Commission, sentencing reform appears likely.³ However, the concentrated focus on sentencing overlooks a vital broader inquiry into the offenses themselves and the changes technology has wrought in how they are committed.

This paper seeks to fill this gap and provide a framework for a normative critique of the offenses and their sentences. It contends that laws enacted to address physical world issues of child pornography dissemination are obsolete in the virtual world. It was clear

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¹ Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer of the Flawed Progression of the Child Pornography Guidelines* (2008); available at http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf. For example, the 1987 guideline range for a person who distributed five images of a 12-year old, one of which depicted was 12-18 months; by 2004 it was 188-235 months. *Id.* See notes infra for a discussion of the impact of this report.

² See *United States v. Booker*, 543 U.S. 220 (2005).

³ The Sentencing Commission is currently in the midst of a multi-year review of the child pornography guidelines, which it deemed a “priority.” See U.S. SENTENCING COMMISSION, *THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES* 1, 54 (2009), available at http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf <http://www.ussc.gov/research.htm>. [“Comm’n Report”].

in the late 1970s when investigative reporters first exposed the child pornography market, who fell into the categories of transporters, distributors and receivers.⁴ For example, in the past Suspect Sam would get child pornography from a smut peddler and his possession of it would not even be a crime.⁵ Today, Suspect Sam most likely gets his child pornography from his home computer and, by downloading images, he both receives and possesses the images. Current law dictates that Suspect Sam gets minimum sentence of five years for receiving the images, and up to ten years for possessing them (with no mandatory minimum for the possession.) In addition, simply because Sam used a computer to commit the offenses, his sentence would be increased.⁶

To further illustrate the impact of technology, if Suspect Sam downloaded the image from a peer-to-peer application and stored them in a shared on-line folder, in addition to the receiving and possessing charges, he could also be charged with distributing the image.⁷ These redundancies are not merely sentencing issues; more essentially there is an overlap in charges since the very same action gives rise to multiple offenses. The once-clear divisions between distribution, transportation and receipt are blurred in cyberspace. Thus, examining the child pornography statutes is a requisite to addressing current sentencing controversies. Meaningful scrutiny must be grounded in the rationale for the ban on child pornography—the harm to the children depicted.

This article first traces the history of the child pornography laws and sentencing policy. Part II explains the technologies that have caused some of the current controversies, and then in Part III describe how they have blurred the offenses. Finally,

⁴ ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 649 (1986).

⁵ See *Osborne v. Ohio*, 495 U.S. 103 (1990) [Final Report].

⁶ See *infra* notes 50-52 and accompanying text.

⁷ See *infra* notes 132-133 and accompanying text.

Part IV will make suggestions as to how the law could better reflect technology and comport with a refined harm rationale. Courts, legal scholars, and medical experts have explained the harm includes the sexual abuse captured in the images and the psychological injury the victim endures knowing the images are being viewed. This article develops the harm rationale further by explaining the harm rest on a fundamental injury to the victim's human dignity and privacy. Drawing on comparisons to diverse laws such as the Geneva Convention's ban on photographs of prisoners of war because it is an affront to their dignity, this paper states all traders in child pornography violate the rights of the children depicted and therefore inflict harm, albeit at different levels. It suggests that a statutory scheme that divides pornographers into three groups: producers, traders, and seekers would best reflect how technology has changed the manner in which pornography is gathered and spread. Sentences could be calibrated accordingly to punish for the harm inflicted by the pornographers.

PART ONE: BACKGROUND

a. Current law: Federal laws enacted to protect children from child pornographers divide into two main categories: First, Congress has enacted a stringent ban on producing of child pornography, with a mandatory minimum sentence of 15 years.⁸ Second, Congress has banned all aspects relating to the trafficking of child pornography, including transporting, distributing, receiving, possessing, accessing, soliciting, or advertising child pornography.⁹ Congress has mandated minimum five year sentences for transporting, distributing, and receiving, while the other offenses have no

⁸ 18 U.S.C.A. § 2251 (2008).

⁹ 18 U.S.C.A. § 2252A (2008).

minimum sentence.¹⁰ The following subsection provides a chronology of legislative and judicial action on pornography offenses, with complementary sentencing guidelines. The piecemeal and reactive development of the law demonstrates why deep structural changes are presently needed.

b. Legislative and Judicial History

Following an increased public awareness of the scourge of child pornography in the late 1970s, Congress passed the Protecting of Children Against Sexual Exploitation Act of 1977.¹¹ The Act punished commercial producers,¹² transporters, distributors and receivers of obscene child pornography¹³ During this same time period, states were also enacting their own bans on child pornography without the obscenity requirement.¹⁴ This led to the 1982 landmark ruling in *New York v. Ferber*,¹⁵ where the United State Supreme Court held child pornography was not protected by the First Amendment even if it was not obscene because it was "intrinsically related to the sexual abuse of children."¹⁶ It

¹⁰ *Id.* at §§ (b)(1)-(2). Attempts are punished the same as the completed offenses. *Id.*

¹¹ Pub. L. No. 95-225, 92 Stat. 7 (1977)(codified at 18 U.S.C.§§ 2251-2253 (1978). *See generally*, Attorney General's Report, *supra* note 4 at 408-415 (1986); Eva Klain, et al, *.Child Pornography: The Criminal Justice Response* 12 (NCMEC 2001).

¹² Pub. L. No. 95-225, 92 Stat. 7 (1977)(codified at 18 U.S.C.§§ 2251) (Supp. II 1978) (amended May 21, 1984). The commercial purpose requisite stemmed from an erroneous assumption by Congress that pecuniary gain was the driving force behind the creation and trading of child pornography. *See* Annemarie Mazzone, UNITED STATES V. KNOX: PROTECTING CHILDREN FROM SEXUAL EXPLOITATION THROUGH THE FEDERAL CHILD PORNOGRAPHY LAWS, 5 *Fordham Intell. Prop. Media & Ent. L.J.* 167. It became clear by the lack of successful prosecutions under the 1977 act that the commercial purpose limitation was thwarting enforcement efforts. Moreover, future Congressional investigation revealed that child pornography rings were a cottage industry among like-minded individuals. *Id.* at 182, *see* Audrey Rogers, *Protecting Children on the Internet, Mission Impossible?* 61 *Baylor L. Rev.* 323 (2009).

¹³ Pub. L. No. 95-225, 92 Stat. 7 (1977)(codified at 18 U.S.C.§§ 2252). (Supp. II 1978) (amended May 21, 1984). The obscenity requirement was based on congressional fear that the courts would strike the legislation as unconstitutional without it. *See* Amy Adler, *Inverting the First Amendment*, 149 *U. Pa.L. Rev.* 921, 928-29 (2001).

¹⁴ Adler, *supra* note 13 at 929-32 .

¹⁵ 458 U.S. 747 (1982).

¹⁶ *Id.* at 759.

reasoned the materials produced were a permanent record of the children's participation and the harm to the child was exacerbated by their circulation.¹⁷ The Court recognized the dignitary harm inflicted by child pornographers by observing that they violate “the individual interest in avoiding disclosure of personal matters.”¹⁸

Following *Ferber*, Congress amended the original federal child pornography legislation to remove the obscenity and commercial purpose requirements.¹⁹ Congressional hearings leading to the amendments found much of the trade between child pornographers was by gift or exchange, so the commercial purposes requisite unnecessarily limited the reach of the law.²⁰ Thus from very early on, Congress was aware purveyors of child pornography were motivated by more than money;²¹ this impulse has been greatly exacerbated by technology.²²

The hearings also revealed that production of child pornography was so clandestine that between 1978 and 1984, only one person was convicted for producing child pornography.²³ Thus, the need to stop the flow, rather the production of child pornography became the preferred route for prosecutors. The difficulty of reaching producers has not abated as statistics show most child pornography is produced in countries with little or no effective laws against child exploitation.²⁴

¹⁷ *Id.*

¹⁸ *Id.* at 760, n.10 (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

¹⁹ Child Protection Act of 1984, Pub. L. No. 99-292, 98 Stat. 204 (1984)(codified at 18 U.S.C. §§ 2251-2253 (1984)).

²⁰ *Mazzone*, *supra* note 13 at 182. Congress also found the obscenity requirement posed enormous hurdles for prosecutors given the complexity of obscenity rules and standards. *Id.* at 183.

²¹ *See, e.g.*, *E.D. v. C.R.*, 792 F.Supp.2d 343, 369-70 (E.D.N.Y.2011).

²² *Id.* at 372-74.

²³ *See* Final Report, *supra* note 4 at 604-05.

²⁴ *E.D. v. C.R.*, 792 F.Supp.2d 343, 368 (E.D.N.Y. 2011).

Originally, there was no federal ban on possessing child pornography in large part because the Supreme Court had previously ruled possession of obscene materials was protected by the First Amendment.²⁵ However, in *Osborne v. Ohio*²⁶ the Court ruled the mere possession or viewing of child pornography victimized children and the State could prohibit it.²⁷ The *Osborne* Court reiterated pornography is a permanent record of a victim's abuse that causes the "child victims continuing harm by haunting the children in years to come."²⁸ In addition, it reasoned that banning possession would protect future victims of child pornography by drying up the market for it.²⁹ Congress reacted to *Osborne* and passed the Child Protection Restoration and Penalties Enhancement Act of 1990 that banned possession of three or more images child pornography.³⁰

The advent of computer technology led to Congressional concerns that existing legislation was out of date. In the 1996 it expanded the definition of child pornography to encompass images that "is or appears to be, a minor engaging in sexually explicit

²⁵ See *Stanley v. Georgia*, 394 U.S. 557 (1969). The *Stanley* Court reasoned that prohibiting the possession of obscene materials in one's home was inimical to the very premise of the First Amendment's protection against state interference with what a person thinks, reads or views in the privacy of his home. It specifically rejected the state's claim that it had a legitimate interest in banning the possession of obscene material because it may lead to sexual violence. The *Stanley* Court stated that not only was there no empirical evidence that supported the State's claim, but that crime prevention is better served by "education and punishment for violations of the law" than by criminalizing anticipatory conduct. *Id.* at 566-7. The *Stanley* Court also rejected the State's contention that criminalizing possession was needed to support the state's ban on the distribution of obscene materials, reasoning that this need did not justify a ban on what a person read or viewed in his home.

²⁶ 495 U.S. 103 (1989).

²⁷ *Osborne*, 495 U.S. at 109. The Court distinguished its ruling in *Stanley* holding that the State's interest in protecting children by banning possession of child pornography outweighed a defendant's First Amendment rights because of the harm inflicted to children by all involved in the child pornography chain.

²⁸ *Id.*

²⁹ *Id.* at 110. The *Osborne* court also added a new prospective rationale for the possession ban: to thwart the use of images to seduce new victims. *Id.* at 111.

³⁰ 18 U.S.C.A. § 2252. The legislation banned the possession of three or more images of child pornography. *Id.* Subsequent legislation banned possessing any images, but created an affirmative defense for possession of less (sic) than three images and took steps to destroy the images and reported them to the authorities. 18 U.S.C.A. § 2252A(5)(d).

conduct.”³¹ The Supreme Court struck down the ban on virtual child pornography because its production did not abuse actual children³²; Congress responded with the 2003 PROTECT Act that, among other things outlawed computer-generated pornography that is “indistinguishable” from a real depiction, and created five-year minimum sentence for transporting, receiving or receiving child pornography.³³ Part of the PROTECT Act included a new pandering provision with the same statutory sentence rules as the possession offense.³⁴ Accordingly, even if images of child pornography are computer-generated, the speech offering or seeking them can be proscribed.³⁵ Further acknowledging the impact of technology, in 2008 Congress expanded the ban on

³¹ 18 U.S.C.A. § 2256(8)(B)(repealed 2003). Congress’ ban on pornographic images of such virtual children was based on Congressional findings of compelling state interests in protecting actual children from all child pornography, whether depicting real or virtual children. The legislative history of the CPPA was premised on thirteen findings, including that that pedophiles use images of child pornography to seduce actual children to engage in sexual conduct by reducing their inhibitions and desensitizing them. Child Pornography Prevention Act of 1996, Pub.L.No. 104-208, §121, 110 Stat. 3009, 3009-26. *See generally* Rogers, *supra* note at 328. Additionally, it found that both real and virtual child pornography whetted the appetite of molesters by fueling their fantasies and stimulating their desire to molest an actual child. Congress found further that the child pornography prosecutions would be increasingly difficult as images of virtual children become indistinguishable from actual victims of child pornography. Second, it included as child pornography materials that are “advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.” 18 U.S.C.A. § 2256(8)(D)(repealed 2003)

³² 535 U.S. 234 (2002). The majority also rejected the government’s indirect harm arguments. It ruled the risks of virtual pornography whetting the appetite of child molesters, or being shown by molesters to seduce children was too remote to support an abridgement of constitutionally protected speech. *Id.* at In addition, the majority disagreed with the government’s position that prohibiting virtual pornography is necessary to dry up the market for actual child pornography because they are part of the same market. *Id.* at It noted the reverse—that allowing virtual pornography could in fact protect children by drying up the market of actual child pornography. The majority also upheld challenges to the CPPA’s pandering section that prohibited materials that “conveyed the impression” that they were of a minor engaged in sexually explicit conduct.” *Id.* at The Court noted that the provision prohibited possession of a sexually explicit film containing no minors merely because it was promoted as containing minors. *Id.*

³³ *See* Prosecutorial Remedies and Tools Against Exploitation of Children Today Act (PROTECT Act) of 2003, Pub. L. No. 108-21, § 501(5), 117 Stat. 650, 676. The constitutionality of the “indistinguishable” language is untested.

³⁴ 18 U.S.C.A. § 2252A(a)(3)(B). The statute punishes a person who knowingly “advertises, promotes, presents, distributes, or solicits” child pornography. *Id.* The Supreme Court upheld the constitutionality of the pandering provision and ruled that offers to engage in illegal activity were excluded from First Amendment protection. *United States v. Williams*, 553 U.S. 285 (2008).

³⁵ *See generally* Rogers, *Mission Impossible*, *supra* note 12.

possession to include “accessing with the intent to view” on-line images of child pornography after defendants had successfully argued they did not possess images unwittingly stored in their computers.³⁶

c. Sentencing History

Parallel to congressional and judicial actions on child pornography offenses was the development of sentencing Guidelines. Congress included mandatory minimums and maximums in many of the child pornography laws,³⁷ and directed the Sentencing Commission to establish Guidelines to implement the Sentencing Reform Act of 1984, which created the mandatory sentencing Guidelines.³⁸ The Guidelines were meant to limit judicial discretion, provide for more uniformity in sentences, and reflect the purposes of punishing those who commit federal offenses.³⁹ From the outset, the Commission labeled transporting, receiving or distributing offenses as “trafficking” in child pornography.⁴⁰

³⁶ 18 U.S.C.A. § 2252A(a)(5)(B). *See generally*, Ty E. Howard, *Don't Cache Out Your Case: Prosecuting Pornography Possession Laws Based on Images Located in Temporary Cache Files*, 19 Berkeley Tech. L. J. 1227 (2004).

³⁷ *See, e.g.*, 18 U.S.C.A. 2252 §(b)

³⁸ Sentencing Reform Act of 1984, Pub. L.no. 98-473, Ch. II, §212 (a), 98 Stat. 1837 (1984). *See* Comm'n Report, *supra* note 3. To do so, the Guidelines are structured so that each offense has base offense level, which is then adjusted up or down by applying special offense characteristics. For example, the current base level for receiving child pornography is 22; special offense characteristics include adding 2 levels if the images involved a child under 12 years old, 4 levels if the images portrayed sadistic behavior, and 2 levels for use of a computer; decreases by 2 levels are made if the defendant did not intend to distribute the material. *See* U.S.S.G. 2g 2.2. *See generally* Orin S. Kerr, *Computer Crime Law* 278-79. The court can then make additional upward or downward modifications based on the specific circumstances of the defendant, the crime or the victim. For example, if the defendant accepts responsibility for his actions, the offense level is decreased by 2 levels. U.S.S.G.3E1.1. With that final offense level calculation, the defendant's criminal history is considered and categorized. The Guidelines then provide a sentencing table that assigns a sentencing range. For example, in the previous receiving child pornography example, if the defendant's final offense level is 26, and he has no prior offenses so that his criminal history category is I, the Sentencing Table would call for a sentencing range of 63-78 months. Orin S. Kerr, *Computer Crime Law* 278-79.

³⁹ Comm'n Report, *supra* note 3. *See* 18 U.S.C.A. §3553(a)(2)(19). The four punishment rationales can be summarized as retribution, deterrence, incapacitation, and rehabilitation.

In a foreshadowing of current sentencing controversies, when possession was federally outlawed in 1991, the Commission amended the Guidelines by moving the receipt offense to the new possession guideline because it determined “receipt is a logical predicate to possession.”⁴¹ This change lasted less than one month because of strong Congressional objection to the reduced penalty for receiving child pornography.⁴² The Commission continued to recognize the overlap between possession and receipt but separate Guidelines existed for trafficking offenses and possession offenses until 2004 when the Commission finally consolidated them.⁴³ As will be discussed below, the consolidation of sentencing criteria without changes in offense categories only served to worsen sentencing controversies.⁴⁴

Over the years, the Commission added numerous offense enhancements based on what it assessed to be aggravating factors, such as depicting prepubescent children⁴⁵ or of sado-masochistic attacks on children.⁴⁶ While some were made after the Commission conducted detailed study of empirical data, other enhancements resulted solely from Congressional directive. The most controversial today are the discussed below.

d. *Current Sentencing Controversy*

⁴⁰ Comm’n Report *supra* note 3 at 14-16. At that time, there were only two offense characteristics increase triggers: minor under 12 and distribution based on retail value. *Id.* See notes 137-151 and accompanying text *infra* for a discussion of the significance of the distribution enhancement.

⁴¹ Comm’n Report *supra* note 3 at 20.

⁴² *Id.* at 20-22.

⁴³ *Id.* at 42. With the consolidation, the Commission added a two-level *decrease* if defendant’s conduct was limited to receipt without intent to distribute. *Id.* at 48. It did so specifically to ameliorate the disproportionality in sentences that the mandatory minimum was apt to create because it found that simple receipt was very similar to simple possession cases. *Id.*

⁴⁴ See PART THREE *infra*.

⁴⁵ See U.S.S.G. § 2G2.2 (b) (2)(two-level enhancement)

⁴⁶ See U.S.S.G. § 2G2.2 (b) (4)(four- level enhancement)

A chorus of scholars and judges have criticized the Guidelines are more the product of public hysteria over child pornographers than tied to a rational assessment of the goals of punishment.⁴⁷ For example, a leading critic of the current sentencing regime, Troy Stabenow, noted in his widely-cited report, “The flaw with U.S.S.G. § 2G2.2 today is the average defendant charts at the statutory maximum, regardless of Acceptance of Responsibility and Criminal History.”⁴⁸ He outlines how the Commission increased the Guidelines based on Congressional directives, such as the PROTECT Act’s mandate of 5-year minimums for trafficking offenses, rather than on empirical studies.⁴⁹

For example, at the same time Congress made its first (failed) attempt to ban computer-generated child pornography in 1996, it also directed the Sentencing Commission to increase sentences whenever a computer is used in child pornography offenses.⁵⁰ It did so but cautioned such a broad application did not adequately differentiate between computer users, who, in 1996 could range from a simple downloader to a “large-scale commercial pornographer who can upload, send and post illegal images.”⁵¹

⁴⁷Arlen Spector & Linda Dale Hoffa, *A Quiet but Growing Judicial Rebellion Against Harsh Sentences For Child Pornography Offenses — Should the Laws Be Changed?* available at <http://www.nacdl.org/champion.aspx?id=2289>; Jelani Jefferson Exum, *Making the Punishment Fit the (Computer) Crime: Rebooting Notions of Possession For The Federal Sentencing Of Child Pornography Offenses*, 16 Rich. J.L. & Ttech. 8 (2010), Carissa Byrne Hessick, *Disentangling Child Pornography From Child Sex Abuse*, 88 Wash.U. L. Rev. 853(2011); Stabenow, *supra* note 1. *See generally* Melissa Hamilton, *The Efficacy Of Severe Child Pornography Sentencing: Empirical Validity Or Political Rhetoric?*, 22 Stan. L.& Pol’y Rev. 545 (2011).

⁴⁸ Stabenow, *supra* note 1 at 26. A WESTLAW search conducted on Feb. 13, 2012 showed 16 federal circuit court and 23 district court citations to the report.

⁴⁹ *Id.* at 13-15

⁵⁰ Comm’n Report, *supra* note 3 at 26-27, 30. The Congressional directive was contained in the 1995 Sex Crimes Against Children Prevention Act. *Id.* at 26.

⁵¹ SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES at 29 (1996), available at <http://www.ussc.gov/congress/SCAC.HTM>

The Commission's promise to monitor the array of computer usage is all the more necessary today because computer technology has fundamentally altered the child pornography landscape. While only 28% of defendants used a computer to commit child pornography offenses in 1995, by 2008 96% of defendants used one, today that number is most likely 100%.⁵² This ubiquitous use is at the heart of the criticism of the enhancement.⁵³ More significantly, the abilities the Commission ascribed only to sophisticated commercial operators, such as posting and uploading, can be performed by anyone today on his personal computer or tablet. Thus, the enhancement is flawed because the very nature of computer capabilities make the trafficker/purveyor distinction meaningless.

Another enhancement that has garnered extensive criticism is for the number of images possessed. First added in 2004, it did not have the benefit of empirical study or the standard notice and public comment period.⁵⁴ Because computer technology allows individual to gather hundreds of images with the click of a mouse, some have criticized this enhancement as inconsequential in assessing blameworthiness.⁵⁵ Professor Douglas Berman has echoed Stabenow's findings and has testified that sentencing enhancements such as use of a computer "is irrational because logically and factually, the characteristics are simply not genuine aggravating factors. Rather, they are inherent in just about any downloading offense."⁵⁶

⁵² Stabenow, *supra* note 1 at 15, Comm'n Report, *supra* note 3 at 30.

⁵³ See, e.g., Stabenow, *supra* note 1 at 15-16; Exum, *supra* note 49; Hessick, *supra* note 49.

⁵⁴ Comm'n report *supra* note 3 at n.190; Stabenow, *supra* note 1 at 19-24.

⁵⁵ See, e.g., United States v. Hanson, 561 F. Supp. 2d 1004 (E.D. Wis. 2008); C.R v. E.D, 762 F. Supp2d See generally Stabenow, *supra* note 1 at 19-23; Ian N. Friedman, et al, Child Pornography Sentencing : The Road Here and the Road Ahead, 21 Fed. Sent. R. 83 (2008)

⁵⁶ United States v. Grober, 595 F.Supp.2d 382, 397 (D.N.J. 2008), *aff'd*, 624 F.3d 592 (3d Cir. 2010).

Other scholars criticize the sentences as premised on improperly finding possession of child pornography is as bad or worse than the child abuse that created it.⁵⁷ They assert this parity fails to recognize the derivative nature of the child pornography offenses in that images are unlawful only because they are recording and then spreading images of actual abuse.⁵⁸ These scholars are particularly critical when derivative actors in the child pornography market receive sentences longer than actual abusers.⁵⁹ Critics further claim part of the increase is based on an unproven preventative rationale that possessors of child pornography are more likely to abuse children.⁶⁰ Some studies have shown a correlation,⁶¹ but the critics point out they are empirically flawed, and fail to show causative link.⁶²

In addition to scholarly criticism, surveys of district court judges conducted by the Commission in 2009 show that 70% believed the Guideline range for possession was too high; 69% thought the range for receipt was too high; 30% believed that of the distribution range.⁶³ Circuit courts have also expressed reservations about the Guideline ranges. For example, the Second Circuit in *United States v. Dorvee*, found that a 240 month sentence for distribution of child pornography was substantively unreasonable.⁶⁴ It

⁵⁷ Adler, *supra* note 13 at 985 (“Child pornography law conflates act and images.”); Hessick, *supra* note 49 at 864-65.

⁵⁸ *Id.*

⁵⁹ See Stabenow, *supra* note 1 at 29, 38; Hessick, *supra* note 49 at 867-70.

⁶⁰ *Id.*

⁶¹ See Michael L. Bourke & Andres E. Hernandez, *The ‘Butner Study’ Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 J Fam Viol 183 (2009); NCMEC

⁶² See Hessick, *supra* note 49 at 875-77 ; Ian Friedman, et al., *Sexual offenders: How to Create a More Deliberative Sentencing Process*, 33 Champion 12 (Nat’l Assoc. of Criminal Defense Lawyers, Inc. 2009) <http://www.nacdl.org/Champion.aspx?id=14684>.

⁶³ *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) citing United States Sentencing Comm’n, *Results of Survey of United States District Judges January 2010 through March 2010* (June 2010),

⁶⁴ 616 F.3d 174 (2d Cir. 2010).

was troubled that the Guidelines for trafficking offenses were not based on empirical data, but on Congressional directive.⁶⁵

There are courts and scholars supportive of the Guidelines.⁶⁶ For example, in testimony before the Sentencing Commission, Ernie Allen, President of the National Center for Missing and Exploited Children, explained that as with other illegal contraband, child pornography needs to be stopped at the point of production and at distribution and possession.⁶⁷ He pointed out that the Supreme Court has found a causal link between the demand for images and the possession and distribution of the images.⁶⁸ Some have discounted the oft-cited Stabenow report as fundamentally flawed. For example, one district court judge noted Stabenow fails to identify the characteristics of the “average offender” who charts at the statutory maximum, but when one does so, it is person has “more than 600 images of prepubescent child pornography containing sadistic and masochistic images.”⁶⁹

It is telling that the Commission itself has criticized the direction Congress was taking. With the Sentencing Commission’s call for public hearing on child pornography

⁶⁵ *Id.* at 184-85. It also found that the district court made procedural errors in calculating the sentence. *Id.* at 121-182

⁶⁶ *See, e.g.*, United States v. Phillips, 2010 WL 3219530 (N.D.Ohio); United States v. Cunningham, 680 F.Supp.2d 844 (N.D.Ohio 2010). (detailed criticism of Stabenow report); United States v. Fiorella, 602 F.Supp.2d 1057(N.D.Iowa 2009); *See* generally, Exum, *supra* note 79 at 22-23.

⁶⁷ *See* Statement of Ernie Allen, President and CEO, National Center for Missing & Exploited Children, Regional Hearing before the U.S. Sentencing Commission, October 20, 2009, *available at* http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=4144.

⁶⁸ *Id.* at 6-7 (citing New York v. Ferber, 458 U.S. 747(1982); Osborne v. Ohio, 495 U.S. 103 (1989).

⁶⁹ United States v. Cunningham, 680 F.Supp.2d 844, 852 (N.D.Ohio 2010).

sentences, even the Justice Department has agreed sentencing enhancements based use of a computer and for number of images involved in a crime need to be reassessed.⁷⁰

Both sides make some sound arguments. There is validity to critics' arguments that derivative harm is typically less blameworthy than direct harm.⁷¹ However, this position does not necessarily and by definition encompass all persons in direct and indirect contact with children. A derivative user may in fact be inflicting more harm than the producer of the image. Take, for example, a recent case in which an elementary school principal surreptitiously recorded boys' genitals as they used the bathroom and pled guilty to producing child pornography.⁷² Here the harm suffered by the victims was the embarrassment and distress at knowing the images were being circulated; they were not physically abused in the creation of them. Thus we cannot say that all harm following the production of images is less blameworthy; a more nuanced approach that focuses on case specifics would a better measure of harm.

The danger, however, of the intensity of the criticism of current sentences is that it has caused some to dismiss the premise that any harm has occurred. Many defendants

⁷⁰ June 28, 2010 Letter to Sentencing Commission, http://sentencing.typepad.com/files/annual_letter_final_062810.pdf. "We believe the Commission should complete its review of the sentencing Guidelines applicable to child exploitation crimes and prepare a report to Congress that might include recommendations for reforming the current child exploitation Guidelines. The goal of any such reform would be to update the Guidelines to address changing technology and realities surrounding these offenses, improve the consistency of sentences across child exploitation crimes, and ensure that the sentences for certain child exploitation offenses adequately reflect the seriousness of the crimes.

⁷¹ Some disagree. *See* Hessick, *supra* note 49 at 866 (citing critics).

⁷² <http://www.csmonitor.com/USA/Justice/2011/1122/Child-pornography-Former-elementary-school-principal-gets-30-years> (lasted visited on Dec. 6, 2011). The FBI also found 32,000 images and over 12,000 videos of child pornography in his home, mostly obtained via the Internet. One might question whether the display was the "lascivious exhibition of genitals" as required to qualify as child pornography. 18 U.S.C.A. 2256, as it appears the boys were merely urinating in the bathroom. *See* United States v. Johnson, 639 F.3d 433 (8th Cir.2011); United States v. Kemmerling, 285 F.3d 644 (8th Cir. 2002); United States v. Dost, 636 F.Supp. 828, 832 (S.D.Cal.1986), *aff'd sub nom.*, United States v. Wiegand, 812 F.2d 1239 (9th Cir.)

claim possession is a “victimless” crime⁷³, and while some lower courts agree, more reasoned courts have soundly rejected the notion that derivative use of child pornography is victimless.⁷⁴ Other the other hand, mulish support of the current sentencing regime in face of the mounting criticism of them risks continued judicial nullification and randomized sentences. While Congress has sought to acknowledge the impact of technology on child pornography offenses, it has done so only by expanding the range of prohibited activities. It would be wise for Congress to also see technology as a limiting force in that labels no longer define distinct behaviors, and therefore the differential punishment scheme is increasingly devoid of rationale.

When we add to the sentencing controversy the new problem of how technology has conflated the offenses, we are left with a situation in dire need for reform. Essential to the solution is an understanding of the technological changes to the manner in which the child pornography crimes are being committed. The next section traces these changes.

PART TWO: THE GROWTH OF TECHNOLOGY

As child pornography legislation developed over time, so did computer technology. The late 1970’s early 1980’s saw the first spread of computers from isolated

⁷³ *See, e.g.*, United States v. D’Andrea, 473 F.3d 859 (8th Cir. 2007); United States. v. Rogers, 423 F.3d 823 (8th Cir.2005), State v. Berger, 134 P.3d 378(Ariz.,2006).

⁷⁴ *See, e.g.*, United States v. Goff, 501 F.3d 250, 259 (3d Cir.2007)(criticizing district court’s reasoning that possession offense had no real victim) United States v. Cunningham, 680 F.Supp.2d 844, (N.D.Ohio 2010)(criticizing courts that see possession as a victimless crime)

government and industrial use to everyday personal usage.⁷⁵ Around the same time, connectivity between computers was evolving. In the 1970s, computer engineers at research institutions throughout the United States began to link their computers together using telecommunications technology. The first networking card was created in 1973, allowing data transfer between connected computers.⁷⁶ In time, the network, originally limited to academic and military institutions, spread and became known as the Internet.⁷⁷

As computers were linked, sharing files and having on-line discussions were becoming increasingly popular. The first Internet discussion system, “Usenet,” developed in 1979.⁷⁸ Its main purpose was the exchange of text-based messages, but through attachments, allowed users to encode files and distribute them to participating subscribers of Usenet newsgroups.⁷⁹

⁷⁵ http://en.wikipedia.org/wiki/History_of_personal_computers. Some credit the release of the IBM Home computer in 1981 that was affordable for home owners and standard consumers as opening up everyday usage. http://tclevents.com/byte/index.php?option=com_content&view=article&Id=66:tech-evo&catId=37:fp-rokstories. The same year, Microsoft released the MS-DOS operating system, which was easy to operate. *Id.*

⁷⁶ http://tclevents.com/byte/index.php?option=com_content&view=article&Id=66:tech-evo&catId=37:fp-rokstories.

⁷⁷ http://www.computerhistory.org/internet_history/internet_history_70s.html. The Advanced Research Projects Agency Network (ARPANET), was the world's first operational packet switching network and the core network of a set that came to compose the global Internet. The network was funded by United States Department of Defense for use by its projects at universities and research laboratories. With packet switching, a data system could use one communications link to communicate with more than one machine by collecting data into datagrams and transmit these as packets onto the attached network link, whenever the link is not in use. Thus, not only could the link be shared, much as a single post box can be used to post letters to different destinations, but each packet could be routed independently of other packets. Bill Stewart, *Arpanet—The First Internet*, LIVING INTERNET, (Jan. 07, 2000), *available at* http://www.livinginternet.com/ii_arpanet.htm

⁷⁸ See generally, Note, *FEDERAL COURTS ACT AS A TOLL BOOTH TO THE INFORMATION SUPER HIGHWAY-- ARE INTERNET RESTRICTIONS TOO HIGH OF A PRICE TO PAY?*, 44 New England L. Rev. 935 (2010); Usenet was originally written by computer scientist at UNC to help communicate with Duke. http://www.computerhistory.org/internet_history/internet_history_70s.html

⁷⁹ <http://en.wikipedia.org/wiki/Usenet>.

Between 1979 and the mid 1990s, file sharing was done through Usenet and bulletin board systems (BBS).⁸⁰ Thousands of BBSs sprang up, creating active virtual communities. The “alt” hierarchy enabled the Usenet community to exercise freedom of speech by allowing anyone to group a group, such as *alt.sex*.⁸¹ Bulletin boards and Usenet eventually became obsolete as the Internet grew in popularity.⁸²

In the 1990s the tandem spread of applications like e-mail and the World Wide Web, and the development of fast networking technologies like Ethernet⁸³ saw computer networking become commonplace.⁸⁴ The number of computers that are networked has grown explosively, from one million in 1992⁸⁵ to over two trillion by 2011.⁸⁶ A very large proportion of personal computers regularly connect to the Internet to communicate and receive information. "Wireless" networking, that use mobile phone networks, has meant networking is becoming increasingly pervasive.⁸⁷

While file sharing was initially done through Usenet and Bulletin Boards, in 1999, Napster was released.⁸⁸ It was a centralized system in that it indexed and stored music

⁸⁰ See generally, <http://en.wikipedia.org/wiki/Usenet>; U.S. Gov't Accountability Office, *File—Sharing Programs: Peer-to-Peer Networks Provide Ready Access to Child Pornography* 11 (2003) <http://www.gao.gov/new.items/d03351.pdf>.

⁸¹ http://www.livinginternet.com/u/ui_alt.htm

⁸² <http://en.wikipedia.org/wiki/Usenet>.

⁸³ Ethernet is computer connectivity hardware that was developed by Xerox Parc (a research and development company) See <http://en.wikipedia.org/wiki/Ethernet>

⁸⁴ www.networlddirectory.com/general/computers/computer-basics/computer-applications.html

⁸⁵ http://www.computerhistory.org/internet_history/internet_history_90s.html

⁸⁶ <http://www.internetworldstats.com/stats.htm>

⁸⁷ <http://en.wikipedia.org/wiki/Computer>

⁸⁸ <http://en.wikipedia.org/wiki/Napster>; M. Eric Johnson, Dan McGuire, Nicholas D. Willey *The Evolution of the Peer-to-Peer File Sharing Industry and the Security Risks for Users*, http://www.tuck.dartmouth.edu/cds-uploads/publications/pdf/30750383_1.pdf

files users of Napster made available on their computers for others to download. Files were transferred directly between the users after authorization by Napster.⁸⁹ It became extremely popular and in 2001 Napster was sued by several recording companies. Napster lost in court against these companies and was eventually shut down.⁹⁰

The next technological milestone was the development of decentralized file sharing systems.⁹¹ The decentralized systems allow users to directly connect to each others' files, rather than going through a central index site.⁹² In 2001, Kazaa was released, with users mainly exchanging music files and other file types, such as videos, applications, and documents over the internet.⁹³ Until its decline in 2004, Kazaa was the most popular file sharing program in the world.⁹⁴ As with Napster, it faced (and lost) numerous copyright infringement suits, until it declined in use and popularity.⁹⁵

New iterations of file-sharing networks, such as Limewire and BitTorrent, continue to allow no-cost, decentralized, peer-to-peer file sharing.⁹⁶ Furthermore, file sharing software evolved, so that computer users no longer had to be install and configure

⁸⁹ *Id.*

⁹⁰ *Id.*; A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

⁹¹ See Johnson, et al, *supra* note 88.

⁹² <http://computer.howstuffworks.com/kazaa3.htm>

⁹³ *Id.*

⁹⁴ http://en.wikipedia.org/wiki/Computer#History_of_computing.

⁹⁵ See, e.g., Sony BMG Music Entertainment v. Tenenbaum, 660 F.3d 487 (1st Cir. 2011).

⁹⁶ See MGM v. Grokster, 545 U.S. 913 (2005). In 2010, the recording industry obtained a permanent injunction against Lime wire, shutting down its operation. See <http://download.limewire.com/injunction/Injunction.pdf>. Shortly thereafter, unnamed developers released a new version entitled Limewire Pirate edition. See generally, http://en.wikipedia.org/wiki/Gnutella#cite_note-0

sophisticated multiple file sharing programs.⁹⁷ Today, peer-to-peer members need only download the compatible software from the Internet to become part of the network and be able download digital files from other members of that network.⁹⁸ They can also upload or post their files onto the network.⁹⁹

As crucial aspect of peer-to-peer file sharing is that the default setting for these networks is that downloaded files are placed in the user's "shared" folder, which allows others in the network to access his files.¹⁰⁰ A user must affirmatively change his network setting to disable this sharing feature.¹⁰¹ The network is designed to encourage sharing by providing faster downloading if the user allows sharing.¹⁰² As the Internet has grown, so too has on-line child pornography.¹⁰³ By 2005, child pornography over the Internet was a 2.5 billion dollar-a-year industry, consisting of over 4.2 million pornographic websites and approximately 372 million pornographic pages.¹⁰⁴ The file-sharing network Gnutella has reported receiving 116,000 requests for child pornography in 2010.¹⁰⁵ The ability to seek, download and share files has completely changed the landscape for many

⁹⁷ Andrew Eichner, *File Sharing: A Tool For Innovation, Or A Criminal Instrument?* 2011 B.C. Intell. Prop. & Tech. J. 1

⁹⁸ E.D. v. C.R., 792 F.Supp.2d 343 (E.D.N.Y. 2011).(E.D.N.Y.)

⁹⁹ *Id.*

¹⁰⁰ *See, e.g.*, United States v. Layton, 564 F.3d 330, 335 (4th Cir.2009); United States v. Carani, 492 F.3d 867, 875-76 (7th Cir.2007); United States v. Griffin, 482 F.3d 1008 (8th Cir. 2007)

¹⁰¹ *See* United States v. Carani, 492 F.3d 867 (7th Cir. 2007)

¹⁰² United States v. Geiner, 498 F.3d 1104, 1110-11 (10th Cir. 2007)

¹⁰³ U.S. Gov't Accountability Office, *File—Sharing Programs: Peer-to-Peer Networks Provide Ready Access to Child Pornography* 11 (2003) available at <http://www.gao.gov/new.items/d03351.pdf>. *See also* U.S. Dep't of Justice, the National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress 11 (Aug.2010) (listing internet distribution channels);

¹⁰⁴ *See* Jerry Ropelato, *Internet Pornography Statistics, Internet Filter Reviews* (2005), available at <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html>.

¹⁰⁵ *Pornography Industry is Larger than the Revenues of the Top Technology*, available at <http://blog.cyrtalk.com/2010/01/web-porn-revenue/> (Jan. 1, 2010). *See generally*, Exum, *supra* note 49.

industries, notably in the legitimate entertainment world. It has had the same dramatic impact in the child pornography arena.

The newest technology is cloud computing where files are stored in a shared pool of computer resources on the Internet, accessible from any computer.¹⁰⁶ Users do not download and install applications on their own device or computer; all processing and storage is maintained by the cloud server.¹⁰⁷ The latest commercial uses promote file storage and access. For example, a person may store files from his computer onto a cloud service provider, such as Dropbox .¹⁰⁸ The cloud system allows him to access his files from any computer by logging onto his cloud server. A cloud user may permit shared access to his files by designating users.¹⁰⁹ Thus, similar to peer-to-peer networks, once a person allows access to his files, others may do so at any time. Unlike peer-to-peer networks, private cloud services requires that a person designate who may have shared access.

The cloud is just the latest battleground between law enforcement and child pornographers. The ability of child pornographers to use cloud computing for their wares has already been recognized. While some cloud providers are employing filtering techniques to suppress access to illegal images, there is a growing concern the cloud will

¹⁰⁶ See Peter Mell, Timothy Gance, *The NIST Definition of Cloud Computing*, available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>

http://www.economist.com/node/14637206?story_id=14637206 (2009)

¹⁰⁷ *Id.*

¹⁰⁸ <http://www.nytimes.com/2011/10/28/technology/dropbox-aims-to-solidify-its-place-with-businesses.html>

¹⁰⁹ Mell, *supra* note 106.

provide deeper cover for pornographers.¹¹⁰ At the same, cloud technology is beginning to raise possession and distribution questions.¹¹¹

PART THREE- THE LINES BLUR

As file sharing networks have proliferated, participants in the child pornography industry can no longer be defined by terms suited for a bricks-and-mortar world rather than a virtual world. We need to consider more fundamentally whether the problem is not just the piecemeal growth of offenses and enhancements, but whether the activities prohibited no longer have meaningful distinctions in the Internet age.

In the late 1970s when investigative reporters first exposed the child pornography market, it was clear who fell into the categories of transporters, distributors and receivers (possession was not a crime yet).¹¹² For example, the defendant *Ferber* was the owner of an adult bookstore who knowingly sold films of underage boys masturbating.¹¹³ Once sold, those films were distributed, and were no longer available for Ferber to resell. In contrast, take the person today who uploads a child pornography video to a peer-to-peer network and then leaves his file open. The video is never depleted; even if someone downloads it, the original is still available for further downloads. As the following discussion explores, the ramifications of this new technology is causing a collapse of easily definable offenses and a swell of fresh defense challenges.

¹¹⁰ See generally, Martin Kaste, *A Click Away: Preventing On-line Child Porn Viewing*, available at <http://www.npr.org/templates/story/story.php?storyId=129526579>; Rob Gillen, *Digital Forensics and the Cloud*, available at <http://fedscoop.com/digital-forensics-and-the-cloud/>

¹¹¹ See notes 184-186 and accompanying text *infra*.

¹¹² Final Report, *supra* note 4 at 649.

¹¹³ *United States v. Ferber*, 458 U.S.747 (1982).

a. *Receiving v. possessing*

Let us compare the defendant in *Osborne* to a contemporary possessor. Clyde Osborne was convicted of violating an Ohio statute that barred the possession of child pornography after police found four photographs of child pornography in a desk drawer in the bedroom of his house. Appellant testified he had been given the pictures in his home by a friend.¹¹⁴ It appears Osborne was charged only with the possession offense. Contrast Osborne with the defendant in *United States v. Davenport*, where government agents found hundreds of images and videos of child pornography on defendant's computer.¹¹⁵ The defendant was indicted on one count of receiving child pornography and one count of possessing child pornography. He pled guilty and was sentenced to 78 months in prison for each count, to run concurrently.

On appeal of the district court's denial of his motion to withdraw his guilty plea, defendant argued the sentence on both possession and receipt violated his Fifth Amendment Double Jeopardy right because the two statutory provisions proscribe the same conduct.¹¹⁶ As defendant claimed, "[i]t is impossible to 'receive' something without, at least at the very instant of 'receipt,' also 'possessing' it."¹¹⁷ The Ninth Circuit conducted a *Blockburger* analysis¹¹⁸ test and found that the receipt provision did not require proof of any

¹¹⁴ *Osborne v. Ohio*, 495 U.S. 103, (Brenna, J.,dissenting)

¹¹⁵ *United States v. Davenport*, 519 F.3d 940 (9th Cir. 2008).

¹¹⁶ *Id* at 942. The Fifth Amendment's Double Jeopardy Clause guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V

¹¹⁷ 519 F.3d at 943.

¹¹⁸ *Blockburger v. United States*, 284 U.S. 299 (1932). The *Blockburger* Court stated that if "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. In determining whether two statutory provisions are punishing the same conduct, the courts first look to Congressional intent. Absent clear intent to punish the defendant under two provisions, it is presumed that the legislature does not intend to impose two punishments for the same offense .*See* *Rutledge v. United States*, 517 U.S. 292 (1996). Nevertheless, the presumption against allowing

additional elements beyond those required by the possession provision, and therefore the Government could not charge defendant with both offenses.¹¹⁹ The court acknowledged that prior to 1998 when Congress changed the requisite number of images for a possession charge from three or more images to any number of images, prosecution for violating both provisions was permissible because the variance in the number of images needed for prosecution of receipt versus possession.¹²⁰ It reasoned that the older statutory language would allow for multiple convictions, but the amended language made the possession crime fall in as a lesser-included crime of the receipt of child pornography.¹²¹

Other courts have agreed with *Davenport's* reasoning that the prohibition against Double Jeopardy bars multiplicitous charges of receipt and possession when a person downloads child pornography from the Internet.¹²² The remedy is to dismiss the lesser

multiple punishments for the same crime may be overcome if there is a clear indication of legislative intent to allow courts to impose them. *Missouri v. Hunter*, 459 U.S. 359, 366-68 (1983); *Albernaz v. United States*, 450 U.S. 333 (1981); *United States v. Bobb*, 577 F.3d 1366 (11th Cir. 2009)

¹¹⁹ Compare 18 U.S.C. § 2252A(a)(2) with 18 U.S.C. § 2252A(a)(5)(B). The receipt statute requires that pornographic material be “shipped or transported in interstate ... commerce by any means, including by computer,” while the possession law states the pornography need only be “produced using materials that have been ... shipped or transported in interstate ... commerce.” The *Davenport* court found that because possession's nexus requirement can be met in one of two ways and receipt's nexus requirement is one of those two ways, possession is a lesser included offense of receipt. 519 F.3d at 944.

¹²⁰ *Davenport*, 519 F. 3d at 946-47; See notes and accompanying text *supra* In a change that was meant to demonstrate a “zero tolerance” policy toward child pornographers, in 1998 Congress amended the possession offense to ban possession of even one image, whereas previous legislation limited the offense to three or more images. See 18 U.S.C.A. § 2252A(a)(5)(B). Instead it gave defendants an affirmative defense if they possessed fewer than 3 images. 18 U.S.C.A. §2252A (d).

¹²¹ *Davenport*, 519 F. 3d at 945. The court did recognize that an affirmative defense was only applicable to the possession provision, but stated affirmative defenses are not considered elements of the crime for *Blockburger* purposes. *Accord*, *United States v. Miller*, 527 F.3 54 (3d Cir. 2008)

¹²² See, e.g., *United States v. Brobst*, 558 F.3d 982, 1000 (9th Cir.2009); *United States v. Bobb*, 577 F.3d 1366 (11th Cir. 2009); *United States v. Miller*, 527 F.3d 54 (3d Cir.2008), *United States v. Giberson*, 527 F.3d 882, 891 (9th Cir.2008); *United States v. Morgan*, 435 F.3d 660, 662-63 (6th Cir.2006); *United States v. Schaff*, 2011 WL 1042635 (S.D.Ga.); *United States v. Pomarico*, 2010 WL 4608423 (E.D.N.Y.); *United States v. Cunningham*, 2010 WL 3809853 (W.D.Pa.). See also *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009)(dicta supporting *Davenport* reasoning)

offense¹²³, which still highlights a difficulty with the present statutory scheme—the receipt charge that remains has a mandatory five year minimum sentence. Nevertheless, many courts have distinguished the *Davenport* line of cases and have upheld convictions for both receipt and possession when the Government bases its charges are different image downloads. For example, in *United States v. Bobb*, defendant’s convictions and sentences were based on activities that occurred on two different dates.¹²⁴ The evidence at trial established defendant received child pornography by downloading files from a pornographic website, and that on another date he possessed over 6,000 additional images. Accordingly, the Eleventh Circuit, while agreeing with the *Davenport* line of reasoning, upheld defendant’s convictions, finding the Government introduced evidence sufficient to convict him of distinct offenses.¹²⁵

With defendants using computers to obtain quantities of images via the Internet, it appears quite easy for the Government to fashion a case in a manner to avoid Double Jeopardy violations by basing the receipt count on different images than the possession count.¹²⁶ Yet, it is questionable whether such action is appropriate when the statutes themselves no longer reflect clear divisions of activity. It is outmoded to find as, some courts have, that those who traffic in child pornography by receiving it “are more directly tied to the market for such products” and the abuse of children necessary for that market

¹²³ See, e.g., *United States v. Schaff*, 2011 WL 1042635 (S.D.Ga.); *United States v. Pomarico*, 2010 WL 4608423 (E.D.N.Y.); *United States v. Cunningham*, 680 F.Supp.2d 844(W.D.Pa. 2010).

¹²⁴ 577 F.3d 1366 (11th Cir. 2009)

¹²⁵ *Id.* When multiple images are found, the courts have held that they may not be the basis of multiple counts of the same offense. *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009), *but see* *United States v. Flyer*, 2006 WL 2590459 (D. Ariz. 2006). Therefore, the 6,000 images resulted in one count of possession. The number of images, however, is a sentencing enhancement. See notes 54-56 and accompanying text *supra*.

¹²⁶ See, e.g., *United States v. Burgess*, 2010 WL 2219335 (W.D.N.C.); *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009) *cf.* *United States v. Irving*, 554 F.3d 64 (2d Cir. 2009)(court rejects double jeopardy issue *sua sponte*)

than are possessors.¹²⁷ When the person engages in one act¹²⁸ and thereby commits two crimes, the stated rationale for highly divergent punishments is dubious.

If we look at these cases in the context of the development of the child pornography laws, we can see the genesis of the original distinctions since possession was not initially covered and receipt was initially thought of as part of the commercial trade; these variables have disappeared. The Commission recognized this as early as 1990 when it tried to join the receiving and possessing offense Guidelines, a move roundly rejected by Congress.¹²⁹ Additionally, in its 1996 Report to Congress, the Commission detailed that some courts were sentencing receipt cases as possession cases because there were little difference in the perceived seriousness of the offenses.¹³⁰ The offense Guidelines were eventually combined, but this created a new problem—certain enhancements previously limited to the trafficking offenses now applies to simple possession cases.¹³¹

The overlap in offenses is even more obvious now. When receiver and possessor are one and the same, and the actions he takes to obtain the images are also identical, this division is no longer appropriate. A child is harmed because the image is circulated, but

¹²⁷ 355 F.3d 1040, 1043 (7th Cir. 2004). *Accord*, United States v. Grosenheider, 200 F.3d 321, 332-33 (5th Cir.2000); United States v. Davenport, United States v. Davenport, 519 F.3d 940 , 950 (9th Cir. 2008) (Graber, J., dissenting)(“the statutory provisions are directed toward different harms”) .

¹²⁸ It is, of course possible to inadvertently receive child pornography, and then consciously choose to keep them. In that instance, the person would be guilty only of possession. *See* United States v. Watzman, 486 F.3d 1004 (7th Cir. 2007) .

¹²⁹When possession was federally outlawed in 1991, Congress directed the Commission to establish sentencing Guidelines for the new possession offense. Comm’n Report, *supra* note 3 at 19. Initially, the Commission amended the Guidelines by moving the receipt offense to the new possession guideline because it determined that “receipt is a logical predicate to possession.” *Id.* It distinguished possession and simple receipt from receipt with intent to traffic. *Id.* This change lasted less than one month because of strong Congressional objection to the reduced penalty for receiving child pornography. *Id.* at 20-22 Thus, separate Guidelines existed for trafficking offenses and possession offenses until 2004 when the Commission consolidated them. *Id.* at 42.

¹³⁰ Comm’n Report, *supra* note 3 at 29.

¹³¹ *Id.* at 49. *See* notes 43-44 and accompanying text *supra*.

the offender who uses technology to both receive and possess the image cannot be said to be more entrenched in the market by his receipt than by his possession of the image.

b. *Distributing v. Possessing*

The conflation of offenses is further complicated because distribution is both an offense and a sentencing enhancement to receipt and possession charges.

i. Distribution as an Offense

Peer-to-peer file sharing, only popularized in the last few years has dramatically altered the collecting of child pornography. It has also led to defendants being charged and convicted of both distributing and possessing child pornography. For example, in *United States v. Schaffer*¹³², a defendant downloaded images and videos from a peer-to-peer network and stored them in a shared folder on his computer, which was accessible to others. Arguing that he merely left open his shared file, defendant sought to have his conviction for distribution set aside. The Tenth Circuit rejected his contention, noting that he freely allowed access to his computerized stash of images and videos, knowing that others could download his stash. It made an analogy to a self-serve gas station reasoning that the gas station owner who advertises his product need not actively pump gas to be in the business of distributing it. Similarly, it reasoned that the knowing passive distribution of child pornography from a shared network is sufficient to sustain the conviction.¹³³

¹³² 472 F.3d 1219 (10th Cir. 2007)

¹³³ *Id.* at 1223-24 ; *See* United States v. Darway, 255 Fed.Appx. 68, 72 (6th Cir.2007); United States v. Mathenia, 409 F.3d 1289, 1290 (11th Cir.2005); United States v. Collins, 2011 WL 2462948 (8th Cir.); United States v. Abraham, 2006 WL 3052702 (W.D.Pa.). *See also* United States v. Layton, 564 F.3d 330, 335 (4th Cir.2009); United States v. Carani, 492 F.3d 867, 875-76 (7th Cir.2007); United States v. Griffin, 482 F.3d 1008, 1010-12 (8th Cir.2007); United States v. Geiner, 498 F.3d 1104, 1109-10 (10th Cir.2007); United States v. Rogers, 666 F.Supp.2d 148, 151 (D.Me. Oct 07, 2009)(distribution enhancement for possession sentence applicable when peer-to-peer network used)

Recently, some courts have recognized the overlap between offenses caused by technology. The Third Circuit in *United States v. Grober*, affirmed a sentence that substantially deviated from the Guidelines in a case where the defendant traded via the Internet a number of images of child pornography.¹³⁴ Charged with transporting, receiving, and possessing child pornography, defendant pled guilty. The district court ruled this was a “typical downloading” case, and sentenced him to 60 months (the mandatory minimum sentence) imprisonment, rather than the Guideline amount of 235-293 months.¹³⁵ Rejecting the Government’s appeal of the sentence, the Third Circuit found that the deviation was appropriate because it agreed that the case “centered on personal possession of illicit images obtained on line, and involving no production or distribution other than noncommercial bartering,” notwithstanding the defendant’s guilty plea on the transporting and receiving counts.¹³⁶

ii. Distribution as Sentencing Factor

The category collapse among the child pornography offenses is striking when we look at the courts’ struggle with the meaning of the enhancement variables, particularly when images are distributed through file sharing programs. From the outset, the Guidelines included an increase to the base level applicable to trafficking offenses if an image was distributed.¹³⁷ It later distinguished between distributing in exchange for money or other “things of value,” and distributing without any gain.¹³⁸ Courts have

¹³⁴ *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010).

¹³⁵ *Id.* at 598.

¹³⁶ *Id.* at n.1

¹³⁷ Comm’n Report, *supra* note 3 at 10.

¹³⁸ *Id.* at 33. *See* U.S.S.G. § 2G2.2 (b) (3) Distribution for pecuniary gain and for “receipt, or expectation of receipt, of a thing of value, but not for pecuniary gain,” merits a five-level increase, and distribution for

interpreted the phrase “thing of value” to mean pornographic images a person actively trades over a peer-to-peer network.¹³⁹ Even if the person only downloads images, he can meet the “thing of value” distribution enhancement if he knows others have access to his images through the shared network.¹⁴⁰ Merely getting faster download speeds, a crucial design function of peer-to-peer network also constitutes a “thing of value.”¹⁴¹ Thus, a number of courts held that using a peer-to-peer network warrants a *per se* five-level distribution enhancement.¹⁴² Other courts apply only a lesser two-level enhancement when a defendant uses a peer-to-peer network.¹⁴³ One court acknowledged either enhancement could apply—a troubling overlap because there appears to be no rhyme or reason to the choice.¹⁴⁴

To rectify the problem, some courts have cut back on a *per se* approach and have ruled the issue should be decided on a case-by-case basis.¹⁴⁵ This solution has created its own issues because courts have allowed the enhancement with little direct proof of knowing distribution. Some courts have inferred knowledge based on the level of sophistication of the computer user.¹⁴⁶

Most troubling is judicial use of a “willful blindness” standard to impose the distribution enhancement. For example, in 2010, the Eight Circuit upheld a finding that

other reasons merits a two-level increase. The Guidelines also called for a five level increase if the distribution was to a minor, and a seven level increase if it was to a minor with the intent to have the minor engage in prohibited sexual activity. *Id.*

¹³⁹ *See, e.g.*, United States v. Griffin, 482 F.3d 1008, 1013 (8th Cir.2007); United States v. McVey, 476 F.Supp.2d 560, 563 (E.D.Va.2007)

¹⁴⁰ *See* United States v. Durham, 618 F.3d 921 (8th Cir.2010)

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See, e.g.*, United States v. Estey, 595 F.3d 836, 843 (8th Cir.2010); United States v. Dodd, 598 F.3d 449 (8th Cir. 2010)

¹⁴⁴ *See* United States v. Estey, 595 F.3d 836, 843 (8th Cir.2010)

¹⁴⁵ *See* cases cited in note 143 *supra*.

¹⁴⁶ *See, e.g.*, United States v. Bastian, 603 F.3d 460 (8th Cir.2010)

defendant's conduct warranted a distribution enhancement when he downloaded images onto Limewire, a peer-to-peer program.¹⁴⁷ The court rejected defendant's contention he did not know his computer was equipped to distribute. It reasoned that "the purpose of a file sharing program is to share, in other words, to distribute. Absent concrete *evidence* of ignorance-evidence that is needed because ignorance is entirely counterintuitive- a fact-finder may reasonably infer that the defendant knowingly employed a file sharing program for its intended purpose."¹⁴⁸ The implications of this court's reasoning cannot be understated. A willfulness blindness standard could drastically increase a person's punishment and in today's age may impact every user of a peer-to-peer program. Furthermore, as new sharing platforms are created, more and more individuals will be sharing information, whether they are aware or not.¹⁴⁹ Criminality of such conduct must depend on more than a legal tool such as willful blindness.

Finally, courts are holding defendants who use file sharing programs are ineligible for any decrease in the base level offense originally passed by the Commission for simple receipt offenses with no proof of distribution.¹⁵⁰ For example, in 2011 the Seventh Circuit noted it would be frivolous for a defendant who used a file sharing program to argue for a two-level decrease.¹⁵¹ As the use of peer- to-peer networks continues to grow, it will cause a *de facto* elimination of this decrease.

¹⁴⁷ United States v. Dodd, 598 F.3d 449 (8th Cir. 2010). As there was no evidence that defendant received anything of value, to warrant the five-level enhancement, the government sought a two-level.

¹⁴⁸ *Id.* at 452 (emphasis in original). *Accord*, United States v. DuFran, 2011 WL 2419481 (11th Cir.); United States v. Durham, 618 F.3d 921 (8th Cir.2010) (Defendant established actual ignorance of uploading capabilities); United States v. Layton, 564 F.3d 330 (4th Cir. 2009).

¹⁴⁹ See notes 187-188 and accompanying text *infra*.

¹⁵⁰ See note 43 *supra*.

¹⁵¹ United States v. Armes, 415 F.3d 729 (7th Cir. 2011).

As courts increasingly differ on what actions qualify for upward and downward sentence adjustments when a person uses a peer-to-peer network to obtain child pornography, their actions are in danger of appearing arbitrary. For example, when calculating the sentence for a person convicted of possession, receipt and distribution of child pornography via a peer-to-peer network, the sentencing court would have to use different base levels for each offense, and, in addition to other enhancement calculations, decide the applicability of the distribution sentencing factor, with the following possibilities: decrease by two, increase by two, or increase by five. Such discretion is arbitrary when it is not based on a reasoned calculation of the harm a defendant has inflicted, but rather on outmoded categories of offenses.

c. Transporting v. possessing

Peer-to-peer file sharing has also resulted in defendants being charged with transporting child pornography when they leave their network open. In a case virtually indistinguishable from *Schaefer*, prosecutors chose to charge defendant with transporting child pornography rather than distributing it.¹⁵² The same use of a peer-to-peer network now exposes a defendant to charges of transporting, distributing, receiving, and possessing child pornography.

As technology evolves, so too should the law. We should not have *de facto* and unintentional changes in offenses and sentences. For example, when the Commission combined the trafficking and possessing Guidelines, it exposed possessors to distribution enhancements because of sharing networks. In addition, the same network use has essentially eliminated the two-level receiving decrease. As Commission moves forward

¹⁵² United States v. Schade, 318 Fed.Appx. 91, (3d Cir.2009)

with its review, it must assess whether these changes were intentional and whether they result in appropriate sentences.

PART FOUR: RECOMMENDATIONS

Political implications for members of Congress should they appear to be soft on child pornographers means statutory changes may be difficult to enact; nevertheless, the recommendations are made with a view of at least helping to shape a discussion of these issues. Employing a harm principle gives a starting point for addressing current offenses and sentencing controversies. As the landmark child pornography cases had stated repeatedly, users of child pornography cause the depicted child to be shamed and humiliated by the knowledge people are looking at the images of them being abused.¹⁵³

This humiliation is exacerbated by the Internet. As one court described, “The child victims suffer not only from the initial physical sexual abuse of their tormentors, but also from the knowledge that their degradation will be repeatedly viewed electronically into near perpetuity by a large audience.”¹⁵⁴

When adult abuse survivors become aware that the images of them as children are circulating on the Internet they become even more mistrustful of people, and have more of a sense of helplessness and hopelessness.¹⁵⁵ As one psychologist explained, “In childhood, they knew that they were physically invaded and they couldn't stop it. As

¹⁵³ See notes 15-18, 28 and accompanying text *supra*. Other harms are that it contributes to the market for child pornography that could lead to abuse of additional children, and that child can be “groomed” into permitting acts of abuse against them if they see images and perceive that the behavior is acceptable. See generally, Rogers, *supra* note 12 at 328.

¹⁵⁴ E.D. v. C.R., 792 F.Supp.2d 343 (E.D.N.Y. 2011).(E.D.N.Y.) See also Ferber, Ashcroft

¹⁵⁵ ED v. C.R. 792 F.Supp.2d 343 (E.D.N.Y. 2011). at 36.

adults, they know they're visually invaded and they can't stop it. . . So, knowing that [the images] are out there just deepens the pathology that they're already suffering from.”¹⁵⁶

Beyond psychological injury, a more fundamental harm is suffered. Even if the child was unaware the image was circulated, those who trade in and view child pornography harm the child’s inherent right not to be viewed in this fashion. There is harm each and every time an image is circulated. From where does this human dignity right derive? This right goes beyond tort theories on invasion of privacy.¹⁵⁷ We can look to more analogous situations for answers.

a. The Fundamental Harm in Images

Images are so powerful that in diverse settings, special rules apply to them. For example, the Geneva Convention requires prisoners of war be treated humanely, and this includes banning photographs of them that subject them to humiliation or public curiosity.¹⁵⁸ Some courts have construed the term “public curiosity” to ban photographs that are released for the purpose of humiliating those depicted. Under Articles 13 and 14 of the 1949 Geneva Conventions III Relative to the Treatment of Prisoners of War, POWs are also “are entitled in all circumstances to respect for their persons and their

¹⁵⁶ *Id.*

¹⁵⁷ The issue of restitution to victims from pornographers under 18 U.S.C.A. § 2259(b)(1) has been the subject of recent court decisions, which has split circuit courts. Some have held that possessors are too remote to be the proximate of a victim’s injury and therefore no damages are recoverable. See e.g., *United States v. Aumais*, 656 F.3d 147 (2d Cir. 2011). Others have held that the restitution statute has only a limited proximity requirement. See, e.g., *In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011). The impact of these cases to the current issue is doubtful as they deal with remuneration; criminal culpability dependent on outmoded statutory classifications raise wholly separate issues. While on the surface one might argue that if a possessor is not liable in damages, he should not be criminally liable, the Supreme Court has long laid to rest the constitutionality of punishing possessors. See *Osborne v. Ohio*, 495 U.S. 103 (1990). In fact, even in *Aumais*, the court upheld the possessor’s sentence of 121 months. *Aumais*, 656 F.3d at 156-57.

¹⁵⁸ Article 13 of the Third Geneva Convention in relation to the Treatment of Prisoners of War 1949 and Article 27 of the Fourth Geneva Convention in relation to the Protection of Civilian Persons in Time of War 1949. See generally Noel Whitty, *Soldier Photography Of Detainee Abuse In Iraq: Digital Technology, Human Rights And The Death Of Baha Mousa*, 10 Hum. Rts. L. Rev. 689 (2010); Robert Cryer, *The Fine Art Of Friendship: Jus In Bello In Afghanistan* 7 J. Conflict & Security L. 37, 73-76 (2002.)

honor." ¹⁵⁹ Even non-POWs, or so-called enemy combatants are entitled to protection against "outrages on personal dignity, in particular humiliating and degrading treatment."¹⁶⁰ One need only think of the disgrace over the Abu Ghraib incident to see the impact of photographs. It was not just the humiliating treatment itself, it was the taking and dissemination of photographs of the humiliation that was contemptible.¹⁶¹ The same criticism was made following the release of photographs of Saddam Hussein after his capture.¹⁶²

Death scene and autopsy photographs are also subject to dissemination restrictions. In *National Archives and Records Admin. v. Favish*, the Supreme Court ruled there is a "familial right of privacy over the death-scene images of a loved one."¹⁶³ The case involved death-scene photographs of Vincent Foster, Jr., deputy counsel to President Clinton, and respondent's Freedom of Information Act (FOIA) request for the photos. In denying the FOIA request, the Court noted FOIA Exemption 7(C) excuses from disclosure information compiled by law enforcement if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁶⁴ Foster's sister explained her opposition to the release of the photos.: ["I] was "horrified and devastated by [a] photograph [already] leaked to the press. . . .[E]very time I see it . . . "I have nightmares and heart-pounding insomnia as I visualize how he must have spent

¹⁵⁹ Articles 13 and 14 of the Third Geneva Convention in relation to the Treatment of Prisoners of War 1949.

¹⁶⁰ Additional Protocol I, art. 75(2)(b). *See generally*, Cryer, *supra* note 158.

¹⁶¹ *See* Cryer, *supra* note 158, n. 200 ("the reference is, strictly speaking to the customary concomitant of art. 75, as the US is not bound by the Protocol, having signed, but not ratified it."); [http://www.upi.com/Business_News/Security-Industry/2003/03/23/Geneva-Convention-prohibits-filming-POWs/UPI-80261048460384/](http://www.upi.com/Business_News/Security-Industry/2003/03/23/Geneva-Convention-prohibits-filming-POWs/UPI-80261048460384/http://www.upi.com/Business_News/Security-Industry/2003/03/23/Geneva-Convention-prohibits-filming-POWs/UPI-80261048460384/)

¹⁶² <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/20/AR2005052000197.html>

¹⁶³ *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004).

¹⁶⁴ *Id.* at 160 .

his last few minutes and seconds of his life.” She opposed the disclosure of the disputed pictures because “ [u]ndoubtedly, the photographs would be placed on the Internet for world consumption,” and would renew media interest in her brother’s death.¹⁶⁵

The court agreed FOIA exemption 7c extended beyond the person depicted to his family members and banned release of the images, unless the person requesting the information establishes a significant public interest in the information sufficient to override the family’s privacy interest in the images.¹⁶⁶ It found the respondent failed to meet this burden.¹⁶⁷ Tort law also limits dissemination of non-newsworthy death and autopsy images.¹⁶⁸ They are deemed to be inherently humiliating and distressful for the family and can subject the releasers to damages.¹⁶⁹

Other courts ban the release of private information even if identities are protected. In *Northwestern Memorial Hospital v. Ashcroft*,¹⁷⁰ the government sought medical records of patients who received late-term abortions to aid the government’s constitutional challenge to the Partial-Birth Abortion Act of 2003.¹⁷¹ In rejecting the government’s demand, the Seventh Circuit court ruled it was an invasion of privacy, even if there were no possibility a patient’s identity might be learned from a redacted medical record.¹⁷² In doing so, the court made the following apt analogy:

Imagine if nude photos of a woman, uploaded to the Internet without her consent though without identifying her by name, were downloaded in a foreign country by people who will never meet her.

¹⁶⁵ *Id.* at 167.

¹⁶⁶ *Id.* at 172.

¹⁶⁷ *Id.* See generally, Clay Calvert, *Salvaging Privacy & Tranquility From The Wreckage: Images Of Death, Emotions Of Distress & Remedies Of Tort In The Age Of The Internet*, 2010 Mich. St. L. Rev. 311

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., *Catsouras v. Dep’t of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 357 (Cal. Ct. App. 2010).

¹⁷⁰ 362 F.3d 923 (7th Cir. 2004)

¹⁷¹ 18 U.S.C. § 1531

¹⁷² 362 F.3d at 929.

She would still feel that her privacy had been invaded. The revelation of the intimate details contained in the record of a late-term abortion may inflict a similar wound.”¹⁷³

The common thread in the above cases is that dissemination of images for no worthy purpose inflicts harm on the depicted person. The absolute lack of any worthy reason to trade in child pornography establishes the inherent harm to the dignity of the child depicted. The person inflicting the abuse captured in a pornographic image is obviously deserving of substantial punishment as a child molester. The producer of the image is guilty of documenting the infliction of sexual abuse. The harm others further down the chain inflict lacks physicality, but they too inflict distinct, actual harm on the child whose image is disseminated and collected.

b. Statutory Changes

Under current federal law, producers are punished separately and most severely¹⁷⁴; others in the pornography network are differentiated by activity¹⁷⁵; attempts to commit prohibited offense related to child pornography are treated equally to the completed offense.¹⁷⁶ As explained in Part III, however, when a person uses file sharing technology the categories of prohibited activities involving child pornography no longer reflect crisply defined actions. Thus, transporters, distributors, and possessors often are one and the same engaging in identical activity. We can define them as “traders.”

In place of the current statutory scheme, a more valid delineation would be among producers, traders, and seekers of child pornography. Since it is the producer who usually

¹⁷³ *Id.*

¹⁷⁴ 18 U.S.C.A. § 2251 (minimum 15 year, maximum 30 year sentence)

¹⁷⁵ 18 U.S.C.A. § 2252A

¹⁷⁶ 18 U.S.C.A. § 2251 (e); 18 U.S.C.A. § 2252A (b)(1)(2)

inflicts the most harm, he should have the most severe sentence; traders also harm the child, but typically to a lesser degree because they are not involved in any direct sexual abuse of a child. One possibility is that all activities involving the trading of child pornography have the same statutory base sentence. This is in keeping with fundamental harm theory because the depicted children are damaged by any and all proliferation of their images. Starting at the same base level, the Commission could then establish enhancements or departures to distinguish among the traders and their individual culpability. For example, one suggestion is that the first person to upload images be punished more severely than later downloaders.¹⁷⁷ Similarly, one who runs a chat room or bulletin board is more culpable than those who visit those sites.

A caveat to placing all traders in the same base category is that it should not automatically increase sentences for possessors, (which would occur if the current divisions between distributors, receivers and possessors are made into one). Instead, Congress needs to reexamine the current mandatory sentence structure against the backdrop of the blurring of offenses that exists with current technology.¹⁷⁸

Those who have not yet obtained images should be punished lesser still since they have not yet inflicted harm.¹⁷⁹ This suggestion is in keeping with the basic tenet of attempt laws that do not punish attempts as severely as completed crimes.¹⁸⁰ Thus, the statutes which now contain the same punishment for those attempting to commit child pornography could be parsed so the attempt is punished at a lower level. The attempts are

¹⁷⁷ Exum, *supra* note at 49 at*45 .

¹⁷⁸ Even the Justice Department agrees. See June 28, 2010 Letter to Sentencing Commission, *available at* http://sentencing.typepad.com/files/annual_letter_final_062810.pdf.

¹⁷⁹ See generally, Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. Rich. L. Rev. 477, 479-483 (2004)

¹⁸⁰ See generally George Fletcher, *Rethinking Criminal Law* § 6.6 (Little, Brown 1978); Wayne R. LaFave, *Criminal Law* §11.5 (c) at 646-47 (West 5th ed. 2010).

more comparable to the child pornography crimes of pandering and belong more appropriately grouped together.¹⁸¹

c. Sentencing Guideline Changes

As previously discussed in Part III, many scholars and judges have criticized the guideline enhancement for number of images possessed.¹⁸² Troy Stabenow has argued that punishing a defendant based on the number of images he or she has accumulated is akin to punishing a habitual marijuana smoker for every marijuana cigarette he or she has consumed over the past several years.¹⁸³ This analogy is wrong in that it does not acknowledge the offender has violated each child's right not to be viewed in a pornographic image. The collection continues to exist, unlike the dissipated marijuana, and the defendant who knowingly accesses large amounts of child pornography is harming large numbers of children. Nonetheless, Congress and the Commission should consider the ease of collecting images via computer technology to see if the size of a collection is a fair indication of a person's culpability. A more nuanced approach that allows a court to examine the number of times the user seeks out and obtains images, rather than merely counting the images may be more appropriate. In contrast to this enhancement, the use-of-computer enhancement does not adequately relate to the harm suffered by the child depicted. Particularly, in the Internet age, the rationale for a special skill enhancement is no longer valid, and should be eliminated.

¹⁸¹ 18 U.S.C.A. § 2252A (a)(3)(b). In keep with the thesis of this Article, since the pandering offense is inchoate crime, Congress should reexamined its sentence, which is currently a mandatory five-year minimum. *Id.* at (b)(1).

¹⁸² See notes 54-56 and accompanying text *supra*.

¹⁸³ Jesse P. Basbaum, *Unnequitable Sentencing For Possession Of Child Pornography: A Failure To Distinguish Voyeurs From Pederasts Misses Harm Point*, 61 HSTLJ 1281, n. 163 (Telephone Interview with Troy Stabenow, Assistant Fed. Pub. Defender (Jan. 13, 2010)).

The need to reform the laws becomes more urgent as technology continues its unabated growth. For example, cloud computing is becoming more and more popular.¹⁸⁴ Shared file functions are available that may make cloud computing analogous to peer-to-peer networking, but on a much larger platform. Given this technology, a person who collects child pornography by storing it on a cloud server, may also be a distributor of the image by virtue of the sharing function of his cloud files.¹⁸⁵ Yet, since the images are stored on a remote server, some have questioned whether and who possesses it.¹⁸⁶

Similarly, as wireless routers are now increasingly used to access the Internet, a person who fails to lock his router with a password could be potentially charged if his router is used by someone to transmit child pornography.¹⁸⁷ The analogy would be to peer-to-peer file sharers who fail to opt out of the sharing function. Taken to its logical extreme, the same willful blindness standard the courts have used in the file sharing cases could apply to owners of unprotected routers.¹⁸⁸ Of course, there is a difference in that a third person is hacking into an unprotected wireless network, as opposed to being part of a file-sharing network, but one who knows fails to protect his router from unauthorized access is leaving himself open to charges.

¹⁸⁴ See notes 106-108 and accompanying text *supra*.

¹⁸⁵ See Mark Blitz, *Stanley In Cyberspace: Why The Privacy Protection Of The First Amendment Should Be More Like That Of The Fourth*, 62 *Hastings L. J.* 357 (2010).

¹⁸⁶ *Id.* at 364.

¹⁸⁷ See FBI Child Porn Raid a Strong Argument for Locking Down WiFi Networks, *available at* <http://www.information-systems-research.com/blog/2011/06/02/fbi-child-porn-raid-a-strong-argument-for-locking-down-wifi-networks>. No charges were brought against the unwitting host. *Id.*

¹⁸⁸ Cf. *Global-Tech Appliances, Inc. v. SEB S.A.*, 1121 S.Ct. 2016 (2011) (Willful blindness standard applied in patent infringement case). There is a difference in that a person is hacking into an unprotected wireless network, as opposed to being part of a file-sharing network, but whether this is legally significant is untested as yet.

CONCLUSION

Fears that the Internet would be a boon to child pornographers have been realized as the number of images permanently circulating in cyberspace has ballooned into the millions. Yet, to be effective in punishing this flood, the law must accurately delineate the culpable conduct. The divisions among traders of child pornography are no longer accurate and, therefore, the differentials in punishment have lost their underpinnings. The current sentencing controversy surrounding child pornographers is merely the tip of the iceberg of the larger need to revamp the offenses themselves.

Optimally, Congress should revise the child pornography statutes to reflect technology; however, most likely this is politically unfeasible. Nevertheless, failure to act will allow the current debate to harden positions with negative consequences. Harsh sentences, such as life imprisonment for possession of child pornography as one court imposed recently, is counterproductive to the ostensible rationale for punishment.¹⁸⁹ Rather than deterring the prohibited activity, it causes some to question the validity of the offense itself or minimize its gravity. At the other extreme, to equate the harm inflicted by sexual predators in producing pornographic images of children with that of downstream traders is equally ineffective. The proposed framework at the very least may allow judges to properly tailor punishments, and give the Commission guidance in revamping its Guidelines.

¹⁸⁹ Erica Goode, *Life Sentence for Possession of Child Pornography Spurs Debate Over Severity*, available at <http://www.nytimes.com/2011/11/05/us/life-sentence-for-possession-of-child-pornography-spurs-debate.html>