CHILD PORNOGRAPHY AND CRIMINAL JUSTICE REFORM

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Drug offenses lie at the heart of the movement for criminal justice reform, and for good reason. Drug policy is defined by severe and disproportionate penalties owing to a retributive, factually flawed, and hurried congressional process. These central characteristics apply to the child pornography context as well. Though drug sentencing is problematic enough, child pornography sentencing is arguably worse. The U.S. Sentencing Commission has disavowed the child pornography sentencing guidelines and invited judges to vary from them. Judges have done just that, varying in sixty-three percent of all cases, more than any other offense type.

In this Article, we identify the common issues with drug and child pornography sentencing and outline the doctrinal implications of this shared foundation, especially as to district court discretion which varies under Kimbrough v. United States*. We also suggest how improvement to the uniquely distressed area of child pornography policy can inform criminal justice reform more generally, especially as to substantive reasonableness review under* Gall v. United States*, mandatory minimum sentences, and sunset provisions for penalty levels.*

Following the confirmation hearing of Justice Ketanji Brown Jackson, child pornography law became part of the national conversation at policy and public levels. We aim to seize on this newfound interest and ensure that both this area of law and criminal justice reform more generally are enriched and enhanced.

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INTRODUCTION

The movement for criminal justice reform has spanned almost the entire spectrum of criminal law and policy. It has covered policing (e.g., no-knock warrants,[1] discriminatory conduct,[2] and qualified immunity[3]); prosecutorial discretion;[4] minimal mens rea requirements;[5] court innovations (e.g., problem-solving courts[6] and juveniles tried and held as adults[7]); sentencing for specific offense types (e.g., drug offenses[8] and violent offenses[9]); sentencing mandates (e.g., mandatory minimums[10] and recidivist enhancements[11]); modes and nature of punishment (e.g., solitary confinement,[12] capital

1 *See, e.g.*, Lindsey Van Ness, *Breonna Taylor Killing Spurs Action Against No-Knock Warrants*, PEW CHARITABLE TRS. (Oct. 27, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/10/27/breonna-taylor-killing-spurs-action-against-no-knock-warrants [https://perma.cc/A9KS-VTMY].

2 *See, e.g.*, PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

3 *See, e.g.*, Kyle Hawkins, Fred Smith, Jr., Clark Neily & Jay Schweikert, *Qualified Immunity: A Shield Too Big?*, 104 JUDICATURE 65 (2020).

4 *See, e.g.*, Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 (2020).

5 *See, e.g.*, Chuck Grassley & Orrin Hatch, *Mens Rea Reform and the Criminal Justice Reform Constellation*, WASH. EXAM'R (July 19, 2018, 12:00 AM), https://www.washingtonexaminer.com/opinion/sens-chuck-grassley-and-orrin-hatch-mens-rea-reform-and-the-criminal-justice-reform-constellation [https://perma.cc/WN2C-ERME].

6 *See, e.g.*, U.S. SENT'G COMM'N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS (2017).

7 *See, e.g.*, Press Release, Wendy Sawyer, Rsch. Dir., Prison Pol'y Initiative, Youth Confinement: The Whole Pie 2019 (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html [https://perma.cc/5VYT-ZWBA].

8 *See, e.g.*, Jonah E. Bromwich, *This Election, a Divided America Stands United on One Topic*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/2020/11/05/style/marijuana-legalization-usa.html [https://perma.cc/TGX2-2F7K; Virginia Schlueter, *The Crack Sentencing Disparity and the Road to 1:1*, *in* IN HOT PURSUIT FED. CRIM JUST. 5 (2009).

9 *See, e.g.*, Eli Hager, *When "Violent Offenders" Commit Nonviolent Crimes*, MARSHALL PROJECT (Apr. 3, 2019, 6:00 AM), https://www.themarshallproject.org/2019/04/03/when-violent-offenders-commit-nonviolent-crimes [https://perma.cc/3Z6W-4UBJ].

10 *See, e.g.*, Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200 (2019).

11 *See, e.g.*, Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES (May 21, 2010), https://www.nytimes.com/2010/05/23/magazine/23strikes-t.html [https://perma.cc/WEH6-QHRM].

12 *See, e.g.*, Douglas A. Berman, *"The Case Against Solitary Confinement,"* SENT'G L. & POL'Y (Apr. 22, 2019, 10:26 AM), https://sentencing.typepad.com/sentencing_law_and_policy/2019/04/the-case-against-solitary-confinement.html [https://perma.cc/L25J-SZKE].

punishment,[13] and conditions of confinement[14]); and the pardon power.[15]

A primary focus of criminal justice reform is the "War on Drugs," during which a nation drunk on retributive impulses and dismissive social attitudes destroyed individuals and communities, primarily people of color, by way of draconian policies and penalties.[16] Consider the story of Tony Gregg, highlighted by former Fourth Circuit Judge Andre M. Davis. As Judge Davis recounts, Mr. Gregg was a drug user and FBI informant who, "[t]o support his drug use . . . resorted to selling crack cocaine—not kilos, but several grams at a time."[17] For having three convictions of felony drug offenses, Mr. Gregg was sentenced to life in prison.[18] The sentence was statutorily mandated, meaning there was nothing that either the district court or the federal appeals court (upon which Judge Davis served) could do to impose a more responsible and measured sentence.[19]

Mr. Gregg's case is representative of the deep flaws in drug sentencing. For starters, defendants convicted of drug offenses are categorically marginalized and dehumanized.[20] This "othering" facilitates an indifference to the defendants' futures, and fuels

13 *See, e.g.*, Liliana Segura & Jordan Smith, *Counting the Condemned: By Any Measure, Capital Punishment Is a Failed Policy*, INTERCEPT (Dec. 3, 2019, 8:31 AM), https://theintercept.com/2019/12/03/death-penalty-capital-punishment-data [https://perma.cc/U7AW-JZNF].

14 *See, e.g.*, Press Release, Gregory Hooks & Wendy Sawyer, Prison Pol'y Initiative, Mass Incarceration, COVID-19, and Community Spread (Dec. 2020), https://www.prisonpolicy.org/reports/covidspread.html [https://perma.cc/Y2KW-CDCF].

15 *See, e.g.*, Shon Hopwood, *How Joe Biden Can Fix the Broken Clemency Process*, APPEAL (Jan. 11, 2021), https://theappeal.org/the-lab/research/how-joe-biden-can-fix-the-broken-clemency-process [https://perma.cc/7L98-QM6S].

16 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6, 102 (2012) (connecting drug-related laws and policies to mass incarceration); Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 13–17 (2011) [hereinafter Alexander, OHIO ST.] (same); *see also Inmate Statistics: Offenses*, FED. BUREAU PRISONS (June 18, 2022), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp [https://perma.cc/E9UG-VF28] (juxtaposing that 45.3% of all federally incarcerated individuals were convicted of a drug offense, which is more than double the incarceration rate of the next most common offense type).

17 *Public Hearing on Federal Sentencing Options After* Booker *Before the U.S. Sent'g Comm'n* 1 (2012) (statement of Andre M. Davis, J. for the U.S. Court of Appeals, 4th Circuit), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120216/Testimony_16_Davis.pdf [https://perma.cc/5VQV-XUPB] (discussing United States v. Gregg, 435 F. App'x 209 (4th Cir. 2011)).

18 *See id.*

19 *See id.*

20 *See infra* notes 21–23 and accompanying text.

retributive punishments.[21] The punishments themselves are excessive, thereby contributing to mass incarceration; are mandatory, obliterating sentencing discretion and blocking individualized sentencing determinations; are disproportionate, failing to calibrate sentences according to different levels of culpability; and are durable, persisting despite widespread understanding that the penalty levels are irrational and severe.[22] Nonetheless, the punishments are justified, at least in part, due to an assumed or presumed link between drugs and violence.[23] And the harsh penalties for drug offenses were enacted through a rushed, atypical process in Congress.[24] It is because of these problems, and their impact on individuals and communities, that drug crimes lie at the heart of the movement for criminal justice reform.[25]

The need for reform in the drug context is clear. Less obvious, however, is the fact that the defining attributes of prevailing drug policy—severe, disproportionate, and long-lasting penalties owing to a retributive, factually flawed, and hurried congressional process—apply to the child pornography context as well. Despite these commonalities, child pornography is avoided in conversations on criminal justice reform. This indifference may be due to the disturbing nature of the

21 *See* Justin D. Levinson, Robert J. Smith & Koichi Hioki, *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839, 869 (2019) (describing that psychologically, "dehumanization is an important prerequisite to retributive excess because '[p]eople are more likely to commit violence against a group they do not view as fully human, and are more likely to view such violence as acceptable because its target, as not fully human, is not deserving of the moral concern that humans owe each other'" (quoting Rebecca C. Hetey & Jennifer L. Eberhardt, *Cops and Criminals: The Interplay of Mechanistic and Animalistic Dehumanization in the Criminal Justice System*, *in* HUMANNESS AND DEHUMANIZATION 147, 148 (Paul G. Bain, Jeroen Vaes & Jacques-Philippe Leyens eds., 2013))).

22 *See* Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1065–66 (2016) ("Congress passed harsh sentencing laws that drastically increased the penalties for a number of drug offenses. These laws included mandatory minimum terms with no possibility of release before the minimum term is completed. Judges are required to sentence any person convicted of one of these crimes to at least the mandatory term, regardless of the particular circumstances of the crime or the defendant's criminal history. Consequently, first-time offenders and individuals who played a minor role in the commission of the offense have been and continue to be sentenced to long prison terms.") (footnotes omitted).

23 *See* Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 472–73 (2017) ("[During the 1980s and 1990s], the public ranked crime as the number one issue in America. The hysteria centered on the perception that drugs and violence were deeply interconnected.") (footnote omitted); *see also* Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 227–28 (2015) ("[A] causal connection between drugs and violence is unsupported by historical arrest data, current research, or independent empirical evidence.").

24 *See infra* note 198 and accompanying text.

25 *See* Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017) (discussing the need for reform, "especially [for] nonviolent drug offenders").

offenses and the general public hostility toward those who commit these offenses.[26]

But walking away from these defendants and this area of criminal justice would be a mistake. It is precisely because these offenses give rise to strong emotions that they represent the truest test of our commitment to the values that are the principled source of broader criminal justice reform. Moreover, solutions to the structural and substantive problems with child pornography offenses may apply to criminal justice reform generally. Criminal justice, therefore, will not be complete or correct unless it extends to and draws from the child pornography context.

In this Article, we identify the common issues with drug and child pornography sentencing and sketch the doctrinal implications of this shared foundation. The substantive similarities between drug and child pornography offenses are sufficient, we argue, such that there is a sound basis for criminal justice reform to extend from drug crimes to child pornography crimes.[27]

The child pornography sentencing context is even more broken than the drug sentencing context. The U.S. Sentencing Commission has disavowed the child pornography sentencing guidelines and invited courts to vary in their approaches.[28] District courts had done just that in 2018, deviating from these guidelines in nearly sixty-three percent of all child pornography cases, well above any other offense type.[29] For

26 *See* Gabriel J.X. Dance, *Fighting the Good Fight Against Online Child Sexual Abuse*, N.Y. TIMES (Dec. 23, 2019), https://www.nytimes.com/interactive/2019/12/22/us/child-sex-abuse-websites-shut-down.html [https://perma.cc/N85Q-3B2J] (noting that visitors of websites created to provide easily accessible child pornography represent "the most hated people on earth"); Lauren M. Ouziel, *Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236, 2307–08 (2014) (suggesting reasons why, despite the substantive similarities, child pornography penalties have not produced as much public concern as crack cocaine penalties). Even among incarcerated individuals, those who commit child sexual offenses occupy the lowest rung in prison. *See* SHON HOPWOOD WITH DENNIS BURKE, LAW MAN: MY STORY OF ROBBING BANKS, WINNING SUPREME COURT CASES, AND FINDING REDEMPTION 20 (2012) (noting that those who molest children "are the lepers of prison").

27 We acknowledge that drug and child pornography offenses are not perfectly parallel in all material respects. For example, drug offenses ensnare more defendants and disproportionately impact poor people of color compared to child pornography offenses. *Compare* U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT, at 26 (2017) (finding that "Black male drug offenders received sentences that were 17.7 percent longer than White male drug offenders"), *with id.* at 40 n.52 (finding that "Child pornography offenders are overwhelmingly White male offenders").

28 *See* United States v. Jenkins, 854 F.3d 181, 189–90 (2d Cir. 2017) (citing U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES, at xxi (2012) [hereinafter COMMISSION REPORT TO CONGRESS]).

29 *See* U.S. SENT'G COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2018: SIXTH CIRCUIT 16 tbl.10 (2019).

their part, circuit courts are mired in splits regarding the discretion that district courts possess in child pornography sentencing and how subsequent substantive reasonableness review should be performed.[30] In 2020, the Sixth Circuit held that a noncustodial sentence for a child pornography offense is per se unreasonable, effectively and remarkably introducing a judicial mandatory minimum in child pornography cases.[31] Whereas retributive attitudes toward drug offenses have softened, the same cannot be said for child pornography offenses. As the Second Circuit recently noted, child pornography sentencing has become "barbaric without being all that unusual."[32] Accordingly, the child pornography context warrants attention not just because of problems that also exist within the drug context, but also because of additional and alarming problems that are unique to child pornography cases.[33] Thus, we also suggest how improvements to this uniquely distressed area of law can inform criminal justice reform more generally.

This Article unfolds as follows. Part I defines child pornography, capturing the range of federal child pornography crimes[34]—which span from sex trafficking to the exchange of nude images via text messaging—and tracing the development of child pornography sentencing in the federal system.

Part II addresses the common non-empirical origins of drug and child pornography sentencing. The Supreme Court, in *Kimbrough v. United States*, determined that, because the drug guidelines are the

30 *See infra* notes 166–69, 251–68 and accompanying text. The conflicts discussed therein are not exhaustive as other conflicts pertaining to these guidelines exist. *See, e.g.*, United States v. Dominguez, 997 F.3d 1121, 1123–26 (11th Cir. 2021) (acknowledging the split between the Fourth and Eleventh Circuits' conclusion and the Seventh Circuit's conclusion as to the meaning of "activity" for purposes of U.S.S.G. § 2G2.2(b)(5)).

31 *See infra* notes 280–85 and accompanying text.

32 United States v. Sawyer, 907 F.3d 121, 126 (2d Cir. 2018); *see also* United States v. D.M., 942 F. Supp. 2d 327, 347–48 (E.D.N.Y. 2013) (collecting cases making similar observations to the Second Circuit's).

33 *See Regional Hearings on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984 Before the U.S. Sent'g Comm'n* 221–22 (2009) [hereinafter *Hearings on the Twenty-Fifth Anniversary*] (statement of Edith Jones, then–Chief Judge for the U.S. Court of Appeals, 5th Circuit), https://www.ussc.gov/sites/default/files/Austin_Transcript.pdf [https://perma.cc/A7WP-LHQ2] (admitting that there is "something seriously wrong" as to child pornography sentencing guidelines).

34 We focus on child pornography in the federal system for several reasons: our experience in federal child pornography litigation, the number and significance of issues within just the federal child pornography context, and the rise of child pornography cases at the federal level. *See* Jacob Sullum, *The Number of Men in Federal Prison for Viewing or Sharing Child Pornography Has Nearly Septupled Since 2004*, REASON (Jan. 2, 2019, 2:45 PM), https://reason.com/2019/01/02/the-number-of-men-in-federal-prison-for [https://perma.cc/T4RG-A73V] ("The number of child pornography offenders in federal prison has nearly septupled since 2004 . . . .").

product of congressional judgment and not the Commission's independent expertise, district court judges may vary from the drug guidelines for policy reasons without inviting "closer review" on appeal.[35] Six federal appeals courts are evenly split as to whether *Kimbrough* applies to the child pornography guidelines. We argue that, as with the drug guidelines, the child pornography guidelines owe their existence to congressional whim, and not Commission expertise, and thus district courts should have full discretion to vary from them under *Kimbrough*.

While Part II discusses the congressional source of drug and child pornography sentences, Part III focuses on the structure and severity of those sentences. As with drug offenses, child pornography sentences are dictated by mandatory minimums and statutory directives. These statutory commands skew child pornography sentencing decisions by limiting judicial discretion, lumping together offenders with different levels of culpability, and establishing excessively high baselines for penalty determinations. The impact of these commands on child pornography sentencing reinforces and provides further support for calls that all mandatory minimums, regardless of offense type, are eliminated.

Part IV relates to time. Senseless drug laws remain on the books, including the 18:1 crack-cocaine disparity, notwithstanding the broad consensus that the law lacks any principled basis. Similarly, for almost a decade now, Congress has not responded to the Commission's repeated attempts to moderate child pornography sentencing or address the unprecedented variance rates. As such, the issues with child pornography sentencing persist. We posit that this situation—congressional imposition of severe sentences followed by a long-term withdrawal from the area—supports the imposition of sunset provisions on statutory penalty commands, which would force Congress to revisit and recalibrate penalty levels after a certain time period.

Part V then addresses appellate review. It probes a deep circuit split on whether, under the substantive reasonableness review authorized by *Gall v. United States*,[36] an appeals court may reweigh a district court's 18 U.S.C. § 3553(a) analysis, an issue that has arisen in drug, child pornography, and other criminal cases. We contend that reweighing amounts to impermissible de novo review. This Part then points out a remarkable and regressive development: the imposition of mandatory minimums by courts—not Congress. The Sixth Circuit has rejected

35 552 U.S. 85, 109–10 (2007).

36 552 U.S. 38, 51 (2007).

noncustodial sentences in child pornography cases as per se unreasonable,[37] effectively introducing a *judicial* mandatory minimum. Such categorical rules produce the same harms as mandatory minimums generally.[38]

I. AN OVERVIEW OF CHILD PORNOGRAPHY SENTENCING

This Part addresses the basics of sentencing in the child pornography context. First, it defines the different types of child pornography offenses and provides examples of each. Second, it summarizes the penalty structure that applies to these offenses, tracing the development of that structure over time. That history consists of Congress adding additional crimes as it learns about child pornography and increasing penalties. Indeed, Congress has stiffened penalties numerous times, despite protests from sentencing experts that heightening penalties are not proportionate or principled.

A. *Defining Child Pornography Offenses*

Congress, in 18 U.S.C. §§ 2251, 2252, and 2252A, prohibited the knowing receipt, possession, distribution, solicitation, and production of child pornography.[39] This Section breaks down the mens rea, conduct, content, and jurisdictional aspects of these crimes.

As to scienter, the Supreme Court has clarified that the knowledge requirement of § 2552 applies to the nature of the content—specifically, "knowing[]" that the material contains child pornography—and not the verbs—such as knowingly distributing.[40] Accordingly, an individual who mails pornographic videos to another person without knowledge

37 *See* United States v. Demma, 948 F.3d 722, 729, 733 (6th Cir. 2020).

38 Nothing in this Article should be construed as our condoning the actions of anyone convicted of a child pornography offense, or as our view that anyone who is convicted of such offenses should escape criminal responsibility. *Cf.* Paroline v. United States, 572 U.S. 434, 439–41 (2014) (describing the harms of child pornography crimes). Our focus is on the fact that the system governing the imposition of that responsibility is, in material respects, broken. Accordingly, we are not questioning whether such offenders deserve punishment; rather, we are seeking to ensure that such punishment is meted out in a principled and sound fashion.

39 *See infra* notes 67–73 and accompanying text (defining child pornography).

40 United States v. X-Citement Video, Inc., 513 U.S. 64, 68, 78 (1994). For a discussion of the Court's analysis of the mens rea requirement, see Gerard E. Lynch & Madison Lecture, *Complexity, Judgment, and Restraint*, 95 N.Y.U. L. REV. 621, 632–37 (2020). For a critique of the knowledge requirement, see Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1583 (2018).

that the videos depict minors has not knowingly distributed child pornography.[41]

Because the level of scienter is knowledge and not intent, an individual need not desire to commit the act *because* the material depicts an underage individual; the individual need only know that the material depicts an underage person. This information is particularly important in the context of minors taking and transmitting sexually explicit materials of themselves to other minors, a common practice[42] that some may consider benign and outside of what should be criminalized.[43] But such conduct nonetheless falls within the definition of child pornography, because the individual will know that they are underage and that the material is of a sexual nature.[44] Indeed, an underage individual who has explicit images *of themselves* on their own cell phone technically may be charged with possession of child pornography.[45] To provide another example of how possession is

41 In *X-Citement Video*, 513 U.S. at 66, the defendant knew that videos he mailed through interstate commerce depicted an underage individual.

42 *See* Eli Rosenberg, *One in Four Teens Are Sexting, a New Study Shows. Relax, Researchers Say, It's Mostly Normal.*, WASH. POST (Feb. 27, 2018, 9:40 PM), https://www.washingtonpost.com/news/the-switch/wp/2018/02/27/a-new-study-shows-one-in-four-teens-are-sexting-relax-experts-say-its-mostly-normal [https://perma.cc/KRC8-ST53].

43 *See* Amy Roe, *Teens Who Engage in "Sexting" Should Not Be Prosecuted as Sex Offenders*, ACLU (Apr. 19, 2017, 2:00 PM), https://www.aclu.org/blog/privacy-technology/teens-who-engage-sexting-should-not-be-prosecuted-sex-offenders [https://perma.cc/9GZL-DSVQ] ("This much should be obvious: Selfies taken by minors are not child pornography. No crime is being committed when a teen photographs himself of his own volition.").

44 *See* A.H. v. State, 949 So. 2d 234, 238 (Fla. Dist. Ct. App. 2007) ("The [child pornography] statute is not limited to protecting children only from sexual exploitation by adults, nor is it intended to protect minors from engaging in sexual intercourse. The state's purpose in this statute is to protect minors from exploitation by anyone who induces them to appear in a sexual performance and shows that performance to other people."); *see also* Mary Graw Leary, *Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation*, 15 VA. J. SOC. POL'Y & L. 1, 19 (2008) ("'[Many teenagers] are using the Internet in groups . . . . When they are with friends, maybe they are egging each other on to do something they wouldn't normally do.' Yet, when doing so they are producing, distributing, and possessing child pornography which is a violation of state and local laws . . . .") (second alteration in original) (footnote omitted). Whether Kellyanne Conway's posting of a topless photograph of her minor daughter constitutes a child pornography offense would boil down to whether she knew that her daughter was topless in the photograph and whether the photograph would be considered sexually explicit. If so, the posting would be considered distribution of child pornography and any continued maintenance of the photograph on an electronic device would be considered possession of child pornography. *See generally* Victoria Bekiempis, *What Happens Next with Kellyanne and Claudia Conway's Leaked Photo?*, VULTURE (Jan. 29, 2021), https://www.vulture.com/article/kellyanne-claudia-conway-leaked-photo-explained.html (last visited June 27, 2022).

45 *See* Amy E. Feldman, *For Teens, Sexting Can Be a Crime*, WALL ST. J. (Nov. 19, 2020, 11:02 AM), https://www.wsj.com/articles/for-teens-sexting-can-be-a-crime-11605801722

strictly construed, consider an attorney who represents an individual charged with a child pornography offense and who seeks to review the relevant evidence, including the images or videos in question. Typically, the defendant's attorney and experts in these circumstances need to view the digital contraband in a secure government office on a secure laptop. This process is followed because if an attorney or expert were sent the evidence and subsequently viewed it, they too technically would have received and possessed child pornography in violation of federal law.[46]

As to the substantive offenses, questions have arisen as to the differences between the offenses. On the surface, receipt and possession of child pornography may seem to capture the same conduct. Judge Easterbrook recounted a district court's determination that "persons who possess something must have received it, and those who receive something necessarily possess it."[47] But, as he noted, receipt and possession are distinct offenses. For example, "a person who seeks out only adult pornography, but without his knowledge is sent a mix of adult and child pornography," has not received child pornography within the meaning of the statute.[48] If the person then continues to retain the material, however, the individual will have knowingly possessed child pornography.[49] With respect to what constitutes possession, control and access are the essential qualities.[50] An easy, if not traditional, example of possession is storage of physical magazines or videotapes depicting child pornography.[51]

The Internet and mobile technology have transformed the amount of child pornography available—Kate Klonick reports that there are

[https://perma.cc/3DKC-M97Y] (describing how a teenager may be found guilty of possession of child pornography "if they take or send naked photos of themselves").

46 *See* Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. § 3509(m) (requiring that any child pornography remain within the "care, custody, and control" of the government and that the evidence be "reasonably available to the defendant," and prohibiting the defense from copying the evidence); *see, e.g.*, United States v. Shrake, 515 F.3d 743, 745 (7th Cir. 2008) (noting that § 3509(m) "required [the defendant's] expert to visit a governmental office to analyze the contents of the hard disk").

47 United States v. Malik, 385 F.3d 758, 759 (7th Cir. 2004) (reviewing a district court's determination that "because persons who possess something must have received it, and those who receive something necessarily possess it," the offenses are coterminous); *see also* United States v. Richardson, 238 F.3d 837, 839 (7th Cir. 2001) ("[P]ossessors, unless they fabricate their own pornography, are also receivers.").

48 United States v. Myers, 355 F.3d 1040, 1042 (7th Cir. 2004).

49 *See id.*

50 *See* United States v. Kuchinski, 469 F.3d 853, 863 (9th Cir. 2006).

51 *See, e.g.*, United States v. Layne, 43 F.3d 127, 130–31 (5th Cir. 1995) (upholding conviction of possession of child pornography where the defendant possessed two magazines containing "European pornography," a euphemism for child pornography).

720,000 known child pornography images online[52]—and how child pornography offenses are committed.[53] An individual who saves child pornography on their hard drive, or knows that such material is automatically copied to a folder over which the individual has control, has possessed child pornography.[54] If the individual views child pornography and the images are automatically copied to an unknown space within the computer over which the individual cannot access or control, the individual may not have possessed child pornography.[55] While receipt and possession are distinct offenses, "possession is generally [considered] a lesser-included offense of receipt" because receipt necessarily entails current possession.[56]

52 *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1636 (2018).

53 *See* Paroline v. United States, 572 U.S. 434, 440 (2014) ("[C]hild pornography is now traded with ease on the Internet . . . ."); Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, 24 FED. SENT'G REP. 108, 122 (2011) (reporting that over ninety-six percent of child pornography offenders used a computer in the commission of the offense). In the universe of child pornography crimes, almost all offenses involve a computer; at the same time, in the universe of computer crimes, most are child pornography offenses. *See* Orin S. Kerr, *Decryption Originalism: The Lessons of* Burr, 134 HARV. L. REV. 905, 957 (2021). For an overview of how computers are used to commit and detect child pornography offenses, see Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1028–31 (2001); Orin S. Kerr, *Cybercrime's Scope: Interpreting "Access" and "Authorization" in Computer Misuse Statutes*, 78 N.Y.U. L. REV. 1596, 1603 (2003). For more information on how users take advantage of technology to mask their identities, enter private or encrypted networks, and otherwise evade detection, see U.S. DEP'T OF JUST., THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION 23–24 (2010). For information on governmental enforcement responses to the challenges posed by technology, see *id.* at 58–60; COMMISSION REPORT TO CONGRESS, *supra* note 28, at 65–69. Promisingly, technology may also be useful in removing child pornography. *See* Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2429–30, 2430 n.31 (2020) (discussing artificial intelligence that screens and blocks content against a database of illegal content); *see also* Jennifer Daskal, *Speech Across Borders*, 105 VA. L. REV. 1605, 1631 (2019) (noting that Google actively seeks to delist child pornography websites); Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001 (2019) (discussing the systems used by Facebook, Twitter, and others to take down child pornography); Jonathan Mayer, *Government Hacking*, 127 YALE L.J. 570, 624–25 (2018) (describing the use of malware by the government to detect visits to child pornography websites).

54 *See, e.g.*, United States v. Romm, 455 F.3d 990, 1000 (9th Cir. 2006) ("[T]o possess the images in the cache, the defendant must, at a minimum, know that the unlawful images are stored on a disk or other tangible material in his possession."); *see also id.* at 993 n.1 (noting that once images are viewed in a web browser, those images are automatically and temporarily stored in a folder on the hard drive called an "Internet cache").

55 *See, e.g.*, United States v. Flyer, 633 F.3d 911, 918–20 (9th Cir. 2011) (reversing convictions for possession where images were automatically saved to "unallocated space" and the user had no control or access to this space).

56 United States v. Burman, 666 F.3d 1113, 1117 (8th Cir. 2012); *see* United States v. Teague, 722 F.3d 1187, 1190 (9th Cir. 2013); United States v. Dudeck, 657 F.3d 424, 426, 428–30 (6th Cir. 2011); United States v. Miller, 527 F.3d 54, 71 (3d Cir. 2008); *see also* United States v. Malik, 385

Distribution covers the transmission or exchange of child pornography. It includes physical distribution—such as sending magazines or videotapes by mail[57]—as well as electronic forms of transmission—such as sending images or video files by email or posting such material to a website.[58] Perhaps less obvious is that distribution may occur through the use of peer-to-peer networks (P2P), which enable users to access and download materials from each other's computers.[59] Therefore, if a user downloads child pornography from another user by way of this network, that initial user also has made that material available for others to download from their own folder.[60] As Chief Judge Beryl Howell explained, these "file sharing programs make distribution a passive act, but no less subject to criminal liability."[61] "Many users of P2P programs do not fully realize that the simple act of selecting files or folders to share on [a P2P program] makes them a

F.3d 758, 759 (7th Cir. 2004) (noting skepticism of the argument that possession can occur without receipt, such as if an individual stumbles upon an image in the trash and decides to retain possession of it).

57 United States v. Tillotson, No. 2:08-CR-33, 2008 WL 5140773, at *4 (E.D. Tenn. Dec. 2, 2008).

58 *See* United States v. Pappas, 592 F.3d 799, 802 (7th Cir. 2010) (email); United States v. Vosburgh, 602 F.3d 512, 516–17 (3d Cir. 2010) (message board).

59 Peer-to-peer networks are attractive to offenders for several reasons. *See* Maggie Muething, Note, *Inactive Distribution: How the Federal Sentencing Guidelines for Distribution of Child Pornography Fail to Effectively Account for Peer-to-Peer Networks*, 73 OHIO ST. L.J. 1485, 1488 (2012) (noting that unlike the use of email or chat messaging, peer-to-peer networks do not require that the provider and receiver have any personalized contact); *id.* ("One of the pertinent characteristics that makes peer-to-peer networks ideal for child pornography offenders is the lack of a centralized server. In other words, the peer-to-peer program acts simply as the medium for file distribution. The program does not monitor the content or have ownership rights to the files shared . . . .") (footnotes omitted).

60 *See* United States v. Stitz, 877 F.3d 533, 538 (4th Cir. 2017) (adopting the view of sister circuits, holding that "where files have been downloaded from a defendant's shared folder, use of a peer-to-peer file-sharing program constitutes 'distribution' pursuant to 18 U.S.C. § 2252A"); United States v. Richardson, 713 F.3d 232, 236 (5th Cir. 2013) (affirming a child pornography distribution conviction where a law enforcement agent downloaded a pornographic video stored in the defendant's shared folder); United States v. Budziak, 697 F.3d 1105, 1109 (9th Cir. 2012) (holding "that the evidence is sufficient to support a conviction for distribution . . . when it shows that the defendant maintained child pornography in a shared folder, knew that doing so would allow others to download it, and another person actually downloaded it"); United States v. Chiaradio, 684 F.3d 265, 282 (1st Cir. 2012) ("When an individual consciously makes files available for others to take and those files are in fact taken, distribution has occurred."); United States v. Shaffer, 472 F.3d 1219, 1223 (10th Cir. 2007) ("We have little difficulty in concluding that [defendant] distributed child pornography in the sense of having 'delivered,' 'transferred,' 'dispersed,' or 'dispensed' it to others. He may not have actively pushed pornography on [] users, but he freely allowed them access to his computerized stash of images and videos and openly invited them to take, or download, those items.").

61 Beryl A. Howell, *Real World Problems of Virtual Crime*, 7 YALE J.L. & TECH. 103, 115 (2005).

distributor of all those files," she added.[62] As this example of distribution makes plain, there need not be any commercial element to the transmission for the act to qualify as distribution within the meaning of federal law.

Distribution of child pornography requires the transmission of the offensive material to a third party. The Eleventh Circuit, for example, has ruled that an individual sending pornographic images from his own cellphone to his own email account and subsequently downloading those images onto his own computer does not constitute distribution of child pornography.[63] By contrast, as in general criminal law, the solicitation of child pornography is a solitary crime that does not require the involvement of any third party. For example, an individual who sends a text message to a minor, asking the minor to take and send a nude picture of themselves, has solicited child pornography even if the minor does not comply or does not even read the message.[64] The offense is complete once the individual has sought the qualifying material.

The production of child pornography entails the creation of qualifying material, defined as the "producing, directing, manufacturing, issuing, publishing, or advertising" of child pornography.[65] For example, various circuit courts have upheld convictions for the production of child pornography when the defendant intentionally positioned cameras in bathrooms to expose a minor's pubic area.[66]

With the mens rea and actions covered, the question becomes what constitutes child pornography. Under federal law, "child pornography" is the "visual depiction" (e.g., image or video) of "sexually explicit conduct" involving a minor.[67] "[S]exually explicit conduct" includes, among other acts, "graphic sexual intercourse," "masturbation," or the "lascivious exhibition of the anus, genitals, or pubic area."[68] Amy Adler

62 *Id.*

63 United States v. Grzybowicz, 747 F.3d 1296, 1307 (11th Cir. 2014) ("[T]here is no evidence that [defendant] sent the images of child pornography to anyone other than himself. As [defendant] argues, the government offered no proof that he transferred the images to, or even made them available to, another person.").

64 *See* United States v. Streett, 363 F. Supp. 3d 1212, 1230–31, 1322 (D.N.M. 2018) (finding probable cause for a search warrant where an adult requested nude images from a minor and the minor did not appear to send any such images as requested).

65 18 U.S.C. § 2256(3).

66 *See, e.g.*, United States v. Spoor, 904 F.3d 141, 149 (2d Cir. 2018); United States v. Holmes, 814 F.3d 1246, 1252 (11th Cir. 2016); United States v. Wells, 843 F.3d 1251, 1256–57 (10th Cir. 2016).

67 § 2256(8).

68 § 2256(2)(B). Whether the film *Cuties* would qualify as child pornography would depend, in a federal prosecution, on whether the depictions of minors would be considered sexually explicit. *See* Eugene Volokh, *Indictment of Netflix Under Texas Child Pornography Law Probably*

observes that, increasingly, what counts as sexually explicit conduct is determined not necessarily by what happened to the minor, but by what a viewer might find arousing.[69] Accordingly, the minor need not be nude for the content to be considered sexually explicit.[70] In 2002, the Supreme Court held that child pornography does not include completely generated images of individuals appearing to be minors, explaining that these images constitute protected speech and do not "implicate the interests of real children."[71] Following this decision, circuit courts have held that images of a minor and an adult that are doctored to appear to be a single person—such as the head of a minor on the body of an adult—fall outside of the Supreme Court's purely generated exception to child pornography and are subject to criminal liability.[72] It is also important to note that unlike obscenity, child pornography laws do not provide an exception for material that may have some artistic value.[73]

Finally, these offenses share a jurisdictional requirement that the offense involve interstate commerce, foreign commerce, or the mail.[74] As noted above, almost all child pornography offenses take place over the Internet.[75] As such, virtually all who commit the underlying

Won't Go Anywhere, REASON: VOLOKH CONSPIRACY (Oct. 6, 2020, 5:58 PM), https://reason.com/volokh/2020/10/06/indictment-netflix-under-texas-child-pornography-law-probably-wont-go-anywhere [https://perma.cc/DTH9-BGMM].

69 Amy Adler, *The Shifting Law of Sexual Speech: Rethinking Robert Mapplethorpe*, 2020 U. CHI. LEGAL F. 1, 34 (2020). For a framing of child pornography in terms of protecting children from such exploitation and commodification, see Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1250–51 (2020).

70 *See* United States v. Knox, 32 F.3d 733, 737 (3d Cir. 1994).

71 Ashcroft v. Free Speech Coal., 535 U.S. 234, 242, 250 (2002).

72 *See* Doe v. Boland, 698 F.3d 877, 883–84 (6th Cir. 2012); United States v. Hotaling, 634 F.3d 725, 729–30 (2d Cir. 2011). For scholarship on whether such "morphed" materials fall within the definition of child pornography, see, for example, Stacey Steinberg, *Changing Faces: Morphed Child Pornography Images and the First Amendment*, 68 EMORY L.J. 909 (2019). Technology even exists to doctor videos by superimposing the face of a minor on the face of the actual adult actor in the video. *See* Anne Pechenik Gieseke, Note, *"The New Weapon of Choice": Law's Current Inability to Properly Address Deepfake Pornography*, 73 VAND. L. REV. 1479, 1487–88 (2020); Rebecca A. Delfino, *Pornographic Deepfakes: The Case for Federal Criminalization of Revenge Porn's Next Tragic Act*, 88 FORDHAM L. REV. 887, 893–94 (2019).

73 *See* United States v. Williams, 553 U.S. 285, 297–98 (2008) (holding that child pornography is categorically illegal and not protected by the First Amendment); *see also* Adler, *supra* note 69, at 32; *cf.* Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 419 (2016) (describing "a widespread and overlooked pattern of harshly punishing individuals for exploring their sexual fantasies on the Internet," and arguing "that judges and juries have repeatedly conflated sexual fantasy with harmful criminal conduct").

74 *See* 18 U.S.C. § 2252A(a); *see also* Marin K. Levy & Tejas N. Narechania, *Interbranch Information Sharing: Examining the Statutory Opinion Transmission Project*, 108 CALIF. L. REV. 917, 931–34 (2020) (surveying the legislative history of this interstate requirement).

75 *See supra* notes 52–53 and accompanying text.

substantive actions will also have satisfied the jurisdictional element and thus have committed a federal child pornography offense. The jurisdictional component is also important to point out for constitutional purposes. This requirement supports the determination that federal criminalization of child pornography is a valid exercise of Congress's authority under the Commerce Clause.[76]

With the stringent nature of child pornography offenses, the question may become why an individual would engage in such behavior. The most apparent motivations are sexual in nature. Both a sexual interest in minors and sexual gratification as a result of that interest are common explanations for child pornography behavior.[77] Despite societal beliefs and stereotypes, there are also nonsexual motivations for engaging in child pornography behavior. Apparently, some offenders collect child pornography because of compulsive collecting behavior,[78] while others collect merely to belong to an online community.[79]

B. *Punishing Child Pornography Offenses*

1. Initial Congressional Action

Prior to 1977, child pornography was largely unregulated in the criminal context. Child pornography was prohibited indirectly, primarily through laws prohibiting obscenity.[80] A Senate Report observed that these laws "deal[t] only with the sale, distribution and importation of obscene materials."[81] "No federal law," it continued, "deals directly with the abuse of children that is inherent in the production of such materials."[82] As Amy Adler notes, 1977 marked a

76 *See* United States v. MacEwan, 445 F.3d 237 (3d Cir. 2006).

77 *See* Michael C. Seto, James M. Cantor & Ray Blanchard, *Child Pornography Offenses Are a Valid Diagnostic Indicator of Pedophilia*, 115 J. ABNORMAL PSYCH. 610, 613 (2006) ("[P]eople are likely to choose the kind of pornography that corresponds to their sexual interests, so relatively few nonpedophilic men would choose illegal child pornography . . . .").

78 *Public Hearing on Federal Child Pornography Crimes Before the U.S. Sent'g Comm'n* 110–11 (2012) (statement of Jennifer A. McCarthy, Assistant Director & Coordinator, Sex Offender Treatment Program at the New York Center for Neuropsychology and Forensic Behavioral Science), https://www.ussc.gov/sites/default/files/Transcript_4.pdf [https://perma.cc/53KE-VJBT].

79 *Id.*

80 *See* S. REP. NO. 95-438, at 9 (1977).

81 *Id.* at 10.

82 *Id.*

"turning point" in the legislative consideration of child pornography.[83] Media coverage of child sex abuse and child pornography propelled Congress to act.[84]

The Protection of Children Against Sexual Exploitation Act of 1977 served as Congress's response.[85] The Act prohibited the knowing transportation or shipping, in interstate or foreign commerce, for purposes of sale or distribution for sale, any obscene visual or print medium, if "the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct," or the knowing receipt of such material.[86] The Act further set the penalties at a maximum sentence of ten years imprisonment for first-time trafficking offenders and a range of two to fifteen years for repeat offenders.[87] In specifying that the knowing transportation or shipping had to be done for sale or distribution for sale, the Act limited punishment to traffickers who committed such offenses for commercial purposes. The Act succeeded in curbing commercial child pornography activity.[88] But noncommercial child pornography, left unregulated, continued to be consumed and traded.[89]

Under the Child Protection Act of 1984, Congress broadened the scope of the federal child pornography prohibition in several ways: it eliminated the requirement that the child pornography offense be committed for sale or distribution for sale, raised the qualifying age of a depicted minor from sixteen to eighteen years of age, and deleted the requirement that the material be obscene.[90] In 1982, the Supreme Court paved the way for Congress to reach nonobscene material, upholding a state prohibition on the private possession of nonobscene child pornography.[91] In the Child Abuse Victims' Rights Act of 1986,

83 Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 230 (2001).

84 *Id.*

85 Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251–2253, 2423).

86 § 2252(a)(1)(A) (1978).

87 § 2252(b).

88 *See* U.S. DEP'T OF JUST., NCJ NO. 102046, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 607 (1986).

89 *See* Susan G. Caughlan, Note, *Private Possession of Child Pornography: The Tensions Between* Stanley v. Georgia *and* New York v. Ferber, 29 WM. & MARY L. REV. 187, 199 (1987) ("[T]raffic in child pornography went underground, and noncommercial distribution flourished in the absence of federal sanctions."); *see also* H.R. REP. NO. 99-910, at 4 (1986) ("[E]xperience revealed that much if not most child pornography material is distributed through an underground network of pedophiles who exchange the material on a non-commercial basis, and thus no sale is involved.").

90 Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251–2255, 2516; 28 U.S.C. § 522).

91 New York v. Ferber, 458 U.S. 747, 756–58 (1982).

Congress, following the Department of Justice's (DOJ) calls for more stringent enforcement of child pornography offenses, increased mandatory minimum penalties for repeat offenders from two to five years.[92]

2. Initial Federal Sentencing Guidelines

In 1984, Congress, concerned about disparities in sentencing decisions, established the U.S. Sentencing Commission and charged this new judicial agency with the responsibility to develop federal sentencing guidelines.[93] These guidelines would give each federal judge the same baseline, or a national norm, from which to begin the sentencing decision-making process.

While the Commission was set up as an independent agency, Congress, to a meaningful degree, retained control over the Commission. First, the statute establishing the Commission and corresponding legislative history detailed to the Commission how the guidelines were to be crafted.[94] As the first chairman of the Commission observed, "[W]e were told to develop this new system of justice, yet the statute told us how to do it."[95] Second, the Senate has the power to confirm nominees to the Commission.[96] In the past, the Senate has refused to confirm nominees to the Commission, thus "paralyzing" the Commission, as then-Chief Justice William H. Rehnquist observed.[97] Third, the guidelines manual and any amendments thereto are not self-executing. Rather, Congress must approve the manual or any proposed amendments to it, thereby holding a veto power over the Commission's work on the guidelines.[98] This administrative and structural relationship is important to understand not only for historical purposes, but also for setting the stage for the back and forth between Congress

92 Child Abuse Victims' Rights Act of 1986, Pub. L. No. 99-500, § 704, 100 Stat. 1783-74, 1783-75 (1986) (codified as amended at 18 U.S.C. §§ 2251–2252, 2255–2256).

93 Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217, 98 Stat. 1987, 2017–18 (1984) (codified as amended at 28 U.S.C. §§ 991–998).

94 Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1210 (2017). Commissioner George MacKinnon, who had been a member of Congress, a U.S. Attorney, and a federal judge, recalled that after "follow[ing] legislation for over 60 years," the Sentencing Reform Act "was the most complete set of legislative directives that [he] ha[d] ever seen in a statute." *Id.*

95 *Id.* at 1210–11.

96 28 U.S.C. § 991(a).

97 *See* William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary*, 11 FED. SENT'G REP. 134, 134 (1998).

98 *See* 28 U.S.C. § 994(p).

and the Commission in the context of child pornography sentencing and establishing the power differential between Congress and the Commission: the latter is not absolutely independent, and in fact is dependent upon and subordinate to Congress.

The Commission fulfilled its charge and promulgated the first ever federal sentencing guidelines, the United States Sentencing Guidelines (USSG), in 1987.[99] The USSG establishes baseline levels for a conviction, has additional penalty levels for aggravating and mitigating circumstances, and also contains categories to capture a defendant's criminal history. The USSG contains several guidelines for child pornography offenses: USSG Section 2G2.1 applies to the production of child pornography, as codified at 8 U.S.C. § 1328 and 18 U.S.C. § 2251, and USSG Section 2G2.2 applies to the transportation, distribution, and receipt of child pornography, as codified at 18 U.S.C. § 2252.[100] Under Section 2G2.1, the Commission set the base offense level at 25 (yielding a sentencing range of 57 to 71 months in prison, assuming that the defendant falls within the lowest criminal history category)[101] and provided for a 2-level increase "[i]f the minor was under the age of twelve years" (raising the offense level to 27, or a range of 70 to 87 months).[102] Under Section 2G2.2, the Commission set the base offense level at 13 (yielding a sentencing range of 12 to 18 months),[103] provided for a 2-level increase "[i]f the material involved a minor under the age of twelve years" (raising the offense level to 15, or a range of 18 to 24 months),[104] and at least a 5-level increase "[i]f the offense involved distribution" with a corresponding retail value (raising the offense level to no less than 18, or a range of at least 27 to 33 months).[105]

The Commission stressed that the initial guidelines were "evolutionary" in nature and would be revised over time.[106] The child pornography guidelines themselves have been substantively amended nine times. Just one year after publishing the original guidelines, the Commission, in 1988, replaced "minor under the age of twelve years"

99 *See* U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A.2 (U.S. SENT'G COMM'N 1987) ("The law requires the Commission to send its initial guidelines to Congress by April 13, 1987, and under the present statute they take effect automatically on November 1, 1987.").

100 *Id.* §§ 2G2.1–2.

101 *Id.* § 2G2.1(a). The identified ranges correspond with the offense levels in the current Guidelines Manual. *See* U.S. SENT'G GUIDELINES MANUAL ch. 5, pt. A (U.S. SENT'G COMM'N 2021).

102 U.S. SENT'G GUIDELINES MANUAL § 2G2.1(b)(1), ch. 5, pt. A (U.S. SENT'G COMM'N 1987).

103 *Id.* § 2G2.2(a), ch. 5, pt. A.

104 *Id.* § 2G2.2(b)(1), ch. 5, pt. A.

105 *Id.* § 2G2.2(b)(2), ch. 5, pt. A.

106 *Id.* ch. 1, pt. A.2–3.

with "prepubescent minor."[107] The Commission reasoned that the amendment would "provide an alternative measure to be used in determining whether the material involved an extremely young minor for cases in which the actual age of the minor is unknown."[108]

3. Subsequent Congressional Action and Commission Responses

The same year, Congress, through the Child Protection and Obscenity Enforcement Act of 1988, specified that the use of a computer satisfied the "interstate or foreign commerce" requirement of existing child pornography prohibitions.[109] In 1990, the Commission amended Section 2G2.1 by providing distinctions based on the victim's age, raising the enhancement "[i]f the offense involved a minor under the age of twelve years" from a 2- to a 4-level increase, and adding a 2-level increase "if the offense involved a minor under the age of sixteen years."[110] Section 2G2.1 also created a 2-level enhancement for defendants who abused a position of trust,[111] and added a special instruction to clarify calculations for multiple victims.[112] That same year, the Commission reviewed sentencing data and proposed an increase in the base offense level under Section 2G2.2 for repeat offenders.[113] The Commission proposed retaining a base offense level of 13 for simple receipt offenses.[114] In addition, the Commission proposed a number of sentencing enhancements: a 4-level increase for offenses that depicted "sadistic or masochistic conduct or other depictions of violence,"[115] a minimum base offense level of 21 "[i]f the defendant sexually abused a minor at any time prior to the commission of the

107 *Compare id.* § 2G2.2(b)(1), *with* U.S. SENT'G GUIDELINES MANUAL, § 2G2.2(b)(1) (U.S. SENT'G COMM'N 1988).

108 Notice of Submission of Regular Amendments, 53 Fed. Reg. 15530, 15533 (Apr. 29, 1988).

109 Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, §§ 7501, 7511–13, 7521, 102 Stat. 4485, 4485–89 (1988).

110 U.S. SENT'G GUIDELINES MANUAL § 2G2.1(b)(1) (U.S. SENT'G COMM'N 1990) [hereinafter USSG 1990].

111 *See id.* § 2G2.1(b)(2) ("If the defendant was a parent, relative, or legal guardian of the minor involved in the offense, or if the minor was otherwise in the custody, care, or supervisory control of the defendant, increase by 2 levels.").

112 *See id.* § 2G2.1(c)(1) ("If the offense involved the exploitation of more than one minor, Chapter Three, Part D (Multiple Counts) shall be applied as if the exploitation of each minor had been contained in a separate count of conviction.").

113 Notice of Proposed Amendments and Additions to Sentencing Guidelines, 55 Fed. Reg. 5718, 5729–30 (Feb. 16, 1990).

114 *Id.*

115 *Id.* at 5730.

offense,"[116] a 4-level increase for offenses involving "a minor under the age of twelve years,"[117] and a 2-level increase for offenses involving "a minor under the age of 16 years."[118] After receiving comments from both proponents and opponents of the amendments, the Commission only promulgated a 4-level increase "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence."[119]

Whereas Congress criminalized the commercial and noncommercial trafficking of child pornography, Congress, in 1990, greatly expanded the universe of child pornography crimes by prohibiting the mere possession of child pornography.[120] In 1991, the Commission created a new guideline, Section 2G2.4, with a base offense level of 10 that specifically addressed the possession of child pornography.[121] In addition, the Commission deleted the offense of receipt of child pornography from Section 2G2.2 and moved it to Section 2G2.4.[122] In so doing, the Commission explicitly distinguished the receipt of child pornography from the trafficking of child pornography, and equated receipt with possession, noting that "receipt is a logical predicate to possession."[123]

Less than a month later, Congress voiced concern with Section 2G2.4, particularly as it related to penalties for the possession of child pornography.[124] Senator Jesse Helms proposed to amend all child pornography guidelines to increase base offense levels and make Section 2G2.4 applicable "only to offense conduct that involves the simple possession" of child pornography, thus returning the offense of receipt back to its original guideline, Section 2G2.2.[125] The Commission pushed back, pointing out that returning receipt to Section 2G2.2 would "negate the Commission's carefully structured efforts to treat similar conduct similarly" and "would require the Commission to rewrite the guidelines for these offenses in a manner that will reintroduce sentencing disparity among similar defendants . . . ."[126]

116 *Id.*

117 *Id.*

118 *Id.*

119 USSG 1990 § 2G2.2(b)(3).

120 Crime Control Act of 1990, Pub. L. No. 101-647, § 323(b), 104 Stat. 4789, 4818–19 (1990).

121 U.S. SENT'G GUIDELINES MANUAL § 2G2.4 (U.S. SENT'G COMM'N 1991).

122 *Compare id.*, *with* USSG 1990 § 2G2.2(b).

123 137 CONG. REC. 23719, 23733 (1991).

124 137 CONG. REC. 18882, 18898 (1991).

125 *Id.*

126 137 CONG. REC. 23719, 23733 (1991).

Despite the Commission's protestations, Congress enacted directives requiring the Commission to increase base offense levels and amend "[g]uideline 2G2.4 to provide that such guideline shall apply only to offense conduct that involves the simple possession of materials . . . and guideline 2G2.2 to provide that such guideline shall apply to offense conduct that involves receipt or trafficking."[127] These directives reflected Congress's belief that child pornography receipt cases should be treated similarly to the more serious trafficking cases and distinguished from the less serious possession cases.

In 1992, the Commission implemented Congress's directives, returning receipt offenses to Section 2G2.2 and raising the base offense level of Section 2G2.2 from 13 to 15.[128] A specific offense characteristic was also added to Section 2G2.2, providing for a 5-level increase "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor."[129] USSG Section 2G2.4 was limited to possession offenses, but the Commission raised the associated base offense level from 10 to 13 (yielding a sentencing range of 12 to 18 months).[130] The Commission also added a 2-level increase for offenses that "involved possessing ten or more books, magazines, periodicals, films, video tapes, or other items, containing a visual depiction involving the sexual exploitation of a minor."[131]

Four years later, the Commission yet again acceded to congressional directives to further increase the penalties of child pornography offenses. In 1996, the Commission proposed amending USSG Sections 2G2.2 and 2G2.4 to provide alternative base offense levels that would increase penalties for child pornography offenses by a level of 2, 3, or 4.[132] The Commission also proposed a 2- to 4-level increase for offenders who used computers in the commission of their crime.[133] Ultimately, the base offense level of Section 2G2.2 went from 15 to 17,[134] and the base offense level of Section 2G2.4 went from 13 to 15 (yielding a sentencing range of 18 to 24 months).[135] Both guidelines added a new 2-level enhancement for the use of a computer.[136] The

127 Treasury, Postal Service and General Government Appropriations Act, 1992, Pub. L. No. 102-141, § 632, 105 Stat. 834, 876 (1991).

128 U.S. SENT'G GUIDELINES MANUAL § 2G2.2(a) (U.S. SENT'G COMM'N 1992).

129 *Id.* § 2G2.2(b)(4).

130 *Id.* § 2G2.4(a), ch. 5, pt. A.

131 *Id.* § 2G2.4(b)(2).

132 Notice of Proposed Amendments to Sentencing Guidelines and Commentary, 61 Fed. Reg. 7037, 7038 (Feb. 23, 1996).

133 *Id.*

134 U.S. SENT'G GUIDELINES MANUAL § 2G2.2(a) (U.S. SENT'G COMM'N 1997).

135 *Id.* § 2G2.4(a), ch. 5, pt. A.

136 *Id.* §§ 2G2.2(b)(5), 2G2.4(b)(3).

Commission also informed Congress that it was considering consolidating Section 2G2.2 and Section 2G2.4 to once again unite the offenses of receipt and possession.[137]

In 2000, the Commission responded to Congress's directive to amend the guidelines by implementing amendments to Section 2G2.2 that created varying enhancements for distribution offenses. The specific offense characteristics advised sentencing courts to "[a]pply the [g]reatest" increase level, ranging from a general 2-level increase for distribution to a 7-level increase for "[d]istribution to a minor that was intended to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct."[138]

In 2003, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), which, among other things, increased mandatory minimum sentences for child pornography offenses and directly amended Sections 2G2.2 and 2G2.4 by adding a specific offense characteristic relating to the quantity of images.[139] The Commission responded by providing, in both Sections, a 2-level increase "[i]f the offense involved . . . at least 10 images, but fewer than 150," a 3-level increase "[i]f the offense involved . . . at least 150 images, but fewer than 300," a 4-level increase "[i]f the offense involved . . . at least 300 images, but fewer than 600," and a 5-level increase "[i]f the offense involved . . . 600 or more images."[140] The amendment also provided for a 4-level increase under Section 2G2.4 "[i]f the offense involved material that portrays sadistic or masochistic conduct or other depictions of violence."[141]

In 2004, the Commission amended the guidelines to comply with the remaining PROTECT Act directives. The Commission again proposed consolidating Sections 2G2.2 and 2G2.4 and received support from the DOJ in favor of this proposal.[142] After carefully studying

137 U.S. SENT'G COMM'N, SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES 41 (1996).

138 U.S. SENT'G GUIDELINES MANUAL § 2G2.2(b)(2) (U.S. SENT'G COMM'N 2000).

139 Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, 117 Stat. 650 (2003).

140 U.S. SENT'G GUIDELINES MANUAL §§ 2G2.2(b)(6), 2G2.4(b)(5) (U.S. SENT'G COMM'N 2003).

141 *Id.* § 2G2.4(b)(4).

142 *See, e.g.*, Letter from Cathy A. Battistelli, 1st Cir. Chair, Prob. Officers Advisory Grp., to the U.S. Sent'g Comm'n 1 (Mar. 5, 2004) (stating that "the current cross references create a tremendous amount of confusion and disparity in application, often resulting in lengthy sentencing hearings"); Letter from U.S. Dep't of Just., Crim. Div., to the U.S. Sent'g Comm'n 2 (Mar. 1, 2004) ("The existing scheme . . . has created a great deal of confusion and, we believe, has been applied inconsistently.").

sentencing data, the Commission created two separate base offense levels under Section 2G2.2: for possession offenses, the base offense level started at 18,[143] and for trafficking and distribution offenses, the base offense level started at 22 (yielding a sentencing range of 41 to 51 months).[144] Section 2G2.2 was officially consolidated with Section 2G2.4.[145]

In 2008, Congress created a new child pornography offense, codified at 18 U.S.C. § 2252A(a)(7), which made it a federal crime to "knowingly produce[] with intent to distribute, or distribute[], by any means, including a computer, in or affecting interstate or foreign commerce, child pornography that is an adapted or modified depiction of an identifiable minor."[146] The Commission concluded that this new offense best fit within the distribution guideline at Section 2G2.2. In so doing, the Commission enumerated that offenders convicted under this statute would have a base offense level of 18 (yielding a sentencing range of 27 to 33 months).[147]

This Part offered a factual overview of child pornography sentencing, beginning with definitions and proceeding to a summary of the relevant statutes and guideline provisions applicable to child pornography offenses, sketching how these congressional directives and guidelines have evolved over time.

II. RESTORING THE FULL DISCRETION OF DISTRICT COURTS TO VARY UNDER *KIMBROUGH*

This Part argues that a common feature of drug and child pornography guidelines—the fact that Congress has dictated both through the passage of numerous directives—can resolve a deep circuit split as to whether *Kimbrough v. United States*, which authorizes district court judges to vary from the drug sentencing guidelines, applies to child pornography sentencing as well.[148] In particular, it suggests that, as judges may vary from the drug guidelines without inviting heightened review because these guidelines are the product of

143 U.S. SENT'G GUIDELINES MANUAL § 2G2.2(a)(1) (U.S. SENT'G COMM'N 2004).

144 *Id.* § 2G2.2(a)(2), ch. 5, pt. A.

145 *Id.* § 2G2.2(a)(2), *amended by id.* app. C (U.S. SENTENCING COMM'N 2008).

146 Pub. L. No. 110-401, § 304, 122 Stat. 4229, 4243 (2008). These adapted images are commonly called "morphed images." *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 242 (2002) (describing that with morphed images, "[r]ather than creating original images, pornographers can alter innocent pictures of real children so that the children appear to be engaged in sexual activity").

147 U.S. SENT'G GUIDELINES MANUAL § 2G2.2(a)(1) (U.S. SENT'G COMM'N 2008).

148 552 U.S. 85 (2007).

congressional action and not Commission expertise, judges similarly may vary from the child pornography guidelines.

A. *Congress Is Responsible for the Drug and Child Pornography Guidelines*

As noted above, in 1984, Congress sought to introduce greater uniformity into federal sentencing by establishing the Commission and charging this agency with developing national norms for federal sentencing decisions throughout the country.[149] The original Commission encountered many difficult questions in formulating the initial guidelines manual, including how to set penalty levels. After drafts based on "just deserts" and "crime control" philosophies failed, the Commission adopted an empirical approach to quantifying the guidelines.[150] In particular, the Commission studied approximately 10,000 sentences and effectively used past practice as the touchstone for identifying and quantifying penalty levels, enhancements, and reductions.[151]

There were several exceptions to the Commission's empirical approach. The Commission based penalty levels for drug offenses, significant white-collar offenses, and violent offenses on mandatory minimums and congressional directives.[152] In short, the guideline ranges for these three categories of offenses followed Congress—not the data.

The same conclusion—that relevant guidelines are a product of Congress and not the Commission's independent expertise—is true of the child pornography guidelines. The Commission admitted as much in an exhaustive analysis of these very guidelines. The agency noted, "Congress has specifically expressed an intent to raise penalties associated with certain child pornography offenses several times through directives to the Commission and statutory changes aimed at increasing the guideline penalties and reducing the incidence of downward departures for such offenses."[153] The Commission added that it acceded to these congressional orders: "The Commission has

149 *See* 18 U.S.C. §§ 3551–3586 (describing sentencing procedures and options for sentencing in the federal system); 28 U.S.C. §§ 991–998 (outlining the purposes and duties of the Sentencing Commission); *see also supra* notes 93–98 and accompanying text.

150 *See* U.S. SENT'G GUIDELINES MANUAL, ch. 1, pt. A.3 (U.S. SENT'G COMM'N 1987).

151 *See id.* ch. 1, pt. A.5.

152 *See* Newton & Sidhu, *supra* note 94, at 1272–74.

153 U.S. SENT'G COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 6 (2009) [hereinafter HISTORY REPORT].

sought to implement congressional intent in the area of child pornography offenses in a manner consistent with the SRA and subsequent legislation."[154] This is not to say that the Commission did not, in discharging this responsibility, study the matter in crafting the responsive guidelines. It is to say that the penalty levels were effectively dictated by Congress irrespective of any research from the Commission.[155]

B. *Circuit Split:* Kimbrough *Applies to the Drug and Child Pornography Guidelines*

In *Kimbrough*, the Supreme Court acknowledged that the Commission plays a unique role in the development of sentencing policy because the Commission, unlike Congress, "has the capacity . . . to 'base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.'"[156] Accordingly, the Court suggested that, in general, a district court's policy disagreement with whether particular guidelines reflect the 18 U.S.C. § 3553(a) considerations may invite "closer review."[157]

But the Court has also emphasized that such "closer review" would not be appropriate where the guidelines in question are not predicated on the Commission's independent expertise,[158] or where the Commission offers a "wholly unconvincing" policy for the relevant guideline.[159] As the drug-trafficking guideline was a response to Congress, specifically the Anti-Drug Abuse Act of 1986, the Court in *Kimbrough* held that a variance due to a disagreement with the drug-

154 *Id.* at 7.

155 *See* United States v. Perez-Frias, 636 F.3d 39, 43 (2d Cir. 2011) ("[T]he absence of empirical support is not the relevant flaw [in these guidelines] . . . . [It is that] Congress ignored the Commission and directly amended the Guideline . . . ."). To be sure, the Commission's empirical work in this context has been challenged as flawed, most notably in the work of public defense attorney Troy Stabenow. Troy Stabenow, Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines (Jan. 1, 2009) (unpublished manuscript), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/report_stabenow.pdf [https://perma.cc/S54C-CXFY].

156 Kimbrough v. United States, 552 U.S. 85, 109 (2007) (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

157 *Id.*

158 *Id.*

159 Pepper v. United States, 562 U.S. 476, 501 (2011).

trafficking guideline did not warrant "closer review."[160] An open question—one that has evenly divided six appellate courts—is whether *Kimbrough* applies to the child pornography guidelines. This conflict is widely recognized across the legal landscape, including by federal appellate and district courts,[161] federal appellate and district judges,[162] the Commission,[163] the DOJ (in its own manual),[164] and legal scholars.[165]

The Second, Third, and Ninth Circuits hold that the child pornography guidelines did not stem from the Commission's independent expertise, and therefore, as in *Kimbrough*, a variance based on a policy disagreement with those guidelines does not merit "closer review."[166] By contrast, the Sixth Circuit contends that USSG Section 2G2.2 is the product of the Commission's considered judgment, and therefore that any variance based on a disagreement with these

160 *Kimbrough*, 552 U.S. at 109–10; *see also* Spears v. United States, 555 U.S. 261, 265–66 (2009) ("[D]istrict courts are entitled to reject and vary categorically from [USSG § 2D1.1] based on a policy disagreement with those Guidelines.").

161 *See, e.g.*, United States v. Miller, 665 F.3d 114, 120–21 (5th Cir. 2011); United States v. Pelloski, 31 F. Supp. 3d 952, 956–57 (S.D. Ohio 2014).

162 *See, e.g.*, James L. Graham, *The Sixth Circuit Broke New Ground in Post-*Booker *Guideline Sentencing with a Pair of Important Decisions*, 26 FED. SENT'G REP. 102, 103 (2013); Thomas M. Hardiman & Richard L. Heppner Jr., *Policy Disagreements with the United States Sentencing Guidelines: A Welcome Expansion of Judicial Discretion or the Beginning of the End of the Sentencing Guidelines?*, 50 DUQ. L. REV. 5, 30–32 (2012).

163 *See, e.g.*, COMMISSION REPORT TO CONGRESS, *supra* note 28, at 14 n.73, 239–40 (noting that "appellate courts have taken inconsistent approaches in child pornography cases" and contrasting the Second, Third, and Ninth Circuits' position with that of the Fifth, Sixth, and Eleventh Circuits).

164 *See* U.S. Dep't of Just., U.S. Sentencing Commission Primer, cmt. 9-27.710G (2020).

165 *See, e.g.*, Carol S. Steiker, *Lessons from Two Failures: Sentencing for Cocaine and Child Pornography Under the Federal Sentencing Guidelines in the United States*, 76 L. & CONTEMP. PROBS. 27, 42–44 (2013).

166 *See* United States v. Dorvee, 616 F.3d 174, 188 (2d Cir. 2010) (holding that the Court's conclusion in *Kimbrough*—that the crack cocaine guidelines "do not exemplify the Commission's exercise of its characteristic institutional role"—"applies with full force to § 2G2.2" (quoting Kimbrough v. United States, 552 U.S. 85, 109 (2007))); United States v. Grober, 624 F.3d 592, 601 (3d Cir. 2010) ("[T]he Commission did not do what 'an exercise of its characteristic institutional role' required—develop § 2G2.2 based on research and study rather than reacting to changes adopted or directed by Congress." (quoting *Kimbrough*, 552 U.S. at 109)); United States v. Henderson, 649 F.3d 955, 960, 962 (9th Cir. 2011) ("[T]he child pornography Guidelines were not developed in a manner 'exemplify[ing] the [Sentencing] Commission's exercise of its characteristic institutional role.' [S]o district judges must enjoy the same liberty to depart from them based on reasonable policy disagreement as they do from the crack-cocaine Guidelines discussed in *Kimbrough*." (second and third alterations in original) (citation omitted) (quoting *Kimbrough*, 552 U.S. at 109)); *see also* United States v. Wireman, 849 F.3d 956, 962 (10th Cir. 2017) (noting that the arguments in *Dorvee* and *Grober* as to whether *Kimbrough* applies to the child pornography context are "quite forceful").

guidelines must be subject to heightened scrutiny.[167] Likewise, the Eleventh Circuit en banc has held that a variance to the guidelines for the production of child pornography necessitates the "closer review" contemplated in *Kimbrough*.[168] For its part, the Fifth Circuit completely foreclosed a district court from varying due to a policy disagreement.[169]

This deep split matters in real terms: These opposing views as to the applicability of *Kimbrough* to child pornography sentencing guidelines produce sentencing disparities.[170] Such disparities exist even as to noncustodial sentences.[171] More generally, an orderly system of justice cannot exist in a state of uncertainty. Justice Sotomayor, when she was on the Second Circuit, acknowledged that the "contours" of closer review under *Kimbrough* "remain imprecise."[172]

For several reasons, the Second, Third, and Ninth Circuits are on the right side of the debate. First, the plain language of *Kimbrough* expressly ties deference to the Commission by the agency's exercise of its "characteristic institutional role."[173] The Court, in *Spears v. United States*, recognized the corresponding authority for district courts to vary on a categorical basis[174]—an authority that reflects the advisory nature of the guidelines.[175] In addition, congressional amendments directed toward the Commission bind only the Commission, and not

167 United States v. Demma, 948 F.3d 722, 728 (6th Cir. 2020); United States v. Bistline, 720 F.3d 631, 633 (6th Cir. 2013); United States v. Bistline, 665 F.3d 758, 764 (6th Cir. 2012).

168 United States v. Irey, 612 F.3d 1160, 1203 (11th Cir. 2010) (en banc).

169 United States v. Miller, 665 F.3d 114, 121 (5th Cir. 2011) ("[W]e will not reject a Guidelines provision . . . simply because it is not based on empirical data and even if it leads to some disparities in sentencing."). The Fifth Circuit expressly disagreed with the Second Circuit, confirming the existence of a circuit split. *See id.* at 120–21. The Fifth Circuit recently stood by its position. *See* United States v. Naidoo, 995 F.3d 367, 383 (5th Cir. 2021).

170 *See* Steiker, *supra* note 165, at 44 ("This profound disagreement among the federal appellate courts guarantees that there will be an increase—probably a substantial one—in sentencing disparities among child pornography offenders . . . .").

171 *See* COMMISSION REPORT TO CONGRESS, *supra* note 28, at 241–42 (observing that circuit courts "have taken seemingly inconsistent positions in reviewing" sentences of probation or very short sentences).

172 United States v. Cavera, 550 F.3d 180, 217 (2d Cir. 2008) (en banc) (Sotomayor, J., concurring in part and dissenting in part); *see also* Carissa Byrne Hessick, *Child Pornography Sentencing in the Sixth Circuit*, 41 U. DAYTON L. REV. 381, 389 (2016) ("[T]he Supreme Court has not said what that closer review will look like. Nor has it said that closer review should, in fact, occur.").

173 Kimbrough v. United States, 552 U.S. 85, 109 (2007).

174 555 U.S. 261, 264 (2009).

175 *See* United States v. Booker, 543 U.S. 220, 259–60 (2005). Put differently, it is the advisory character of the guidelines that renders the guidelines' regime constitutional. If the congressional directives were binding on district courts, and district courts were unable to fully vary, the guidelines system would enter mandatory, unconstitutional territory in violation of *Booker*.

the courts.[176] Moreover, as noted above, Congress effectively has dictated the contents of the child pornography guidelines, rejecting the Commission's repeated efforts to set lower and more precise penalty levels, and substantively revising these guidelines nine times.[177] Due to the relationship between Congress and the Commission, and between Congress and these specific guidelines, district courts should have complete authority, under *Kimbrough*, to vary from the child pornography sentencing guidelines for policy reasons without giving rise to "closer review" on appeal.[178]

III. FIXING SEVERE, DISPROPORTIONATE, AND MANDATORY PENALTY LEVELS

As Congress is effectively the author of child pornography sentencing policy, this Part discusses the content of Congress's work, specifically highlighting the impact of the numerous mandatory minimums and statutory directives on fair and responsible sentencing: they have distorted the sentencing structure to the detriment of judicial discretion, individualized sentencing processes, and proportionate sentencing outcomes. As with the drug context, the solution should be to eliminate mandatory minimums and restore district court discretion to impose measured, individualized punishment consistent with the defendant's actual role.

A. *Severity*

Congress entered the child pornography field relatively recently and, in rapid succession, introduced increasingly severe penalty schemes and attached them to an increasingly wide set of conduct.[179] As Carol Steiker puts it, "The child pornography Guidelines have been controversial because of the steep escalation of applicable penalties over

176 *See* United States v. Sanchez, 517 F.3d 651, 663–65 (2d Cir. 2008); *see also* Brief for the United States, Vasquez v. United States, 558 U.S. 1144 (2010) (No. 09-5370), 2009 WL 5423020, at *9–11 (rejecting the "premise that congressional directives to the Sentencing Commission are equally binding on sentencing courts").

177 *See supra* Section I.B.3.

178 Arguing that *Kimbrough* applies with full force to child pornography guidelines will not open the door to every offense nor spell the end of the Guidelines as a whole. For example, there is a limited universe of guidelines that were grounded in congressional directives and not empirical information. *See* Newton & Sidhu, *supra* note 94, at 1272–74, 1303 n.933 (describing original guidelines that were adjusted from past practice due to statutes).

179 *See supra* Section I.B.3.

a relatively brief period of time through direct intervention by Congress."[180] Lauren Ouziel similarly notes, "For more than three decades, Congress has steadily increased maximum penalties, added mandatory minimum penalties, and repeatedly directed the Sentencing Commission to impose harsher sentencing Guidelines penalties for child pornography offenses."[181]

A measure of the severity of the child pornography sentences is their relationship to penalty levels for other "serious" crimes. Punishments for child pornography are more severe than for crimes that some may deem to be more serious. For example, the average sentencing for an individual convicted of possession of child pornography is greater than an individual convicted of manslaughter,[182] which some may believe to carry greater harm and moral blameworthiness. The Second Circuit has taken notice of the comparative severity of the child pornography guidelines, observing that, if a child pornography defendant had "actually engaged in sexual conduct with a minor, his applicable Guidelines range could have been considerably lower" than for mere possession of child pornography.[183]

Consider the case of Andrew Demma, a former combat medic who served multiple tours of duty in Iraq, was exposed to pornography during his deployments, and witnessed an Iraqi child explode in front of him.[184] He developed post-traumatic stress disorder (PTSD) and each psychologist who interviewed him testified that viewing child pornography upon returning home was caused, or at least exacerbated, by his PTSD.[185] For possessing over six hundred images of child pornography, Mr. Demma was looking at six to over eight years in prison.[186] Mr. Demma faced a higher sentencing exposure than would an individual who raped a minor,[187] committed armed robbery of a

180 Steiker, *supra* note 165, at 27.

181 Ouziel, *supra* note 26, at 2307.

182 *See* Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1686 (2012).

183 United States v. Dorvee, 616 F.3d 174, 187 (2d Cir. 2010).

184 *See* Petition for a Writ of Certiorari, Demma v. United States, 141 S. Ct. 620 (2020) (No. 19-1260), 2020 WL 2095044, at *2–4. The authors filed this petition on behalf of Mr. Demma.

185 *See id.* at *4.

186 *See* United States v. Demma, 948 F.3d 722, 725 (6th Cir. 2020).

187 *See* U.S. SENT'G GUIDELINES MANUAL § 2A3.2(a) (U.S. SENT'G COMM'N 2021) (setting the base offense level at 18 compared to 28 for Mr. Demma).

bank,[188] committed a violent offense with a weapon,[189] or committed a violent offense that resulted in permanent bodily injury.[190]

The path to stiff sentences for child pornography crimes is the same as that for drug offenses. As with individuals who are convicted of drug offenses,[191] those who commit child pornography offenses are categorically marginalized, reduced, and relegated to the lowest rung of society.[192] This "othering" facilitates an indifference toward the offenders and fuels a retributive response to these offenders[193]—just as it does in the drug context.[194] Michelle Alexander writes that individuals convicted of drug offenses are "put in a cage, labeled a felon, and then subjected to a lifetime of discrimination, scorn and social exclusion."[195] The same may be said of individuals convicted of child pornography offenses. Part of the justification for the heightened penalty scheme is the assumption that anyone who possesses child pornography is inclined to act on their sexual interests, triggering concerns about future dangerousness and therefore legitimizing longer sentences.[196] A similar

188 *See id.* § 2B3.1(b)(2)(E) (setting the base offense level at 23 compared to 28 for Mr. Demma).

189 *See id.* § 2A2.2(b)(2)(A) (setting the base offense level at 19 compared to 28 for Mr. Demma).

190 *See id.* § 2A2.2(b)(3)(C) (setting the base offense level at 21 compared to 28 for Mr. Demma).

191 *See* Alexander, OHIO ST., *supra* note 16, at 13–17 (discussing the stereotyping of drug users and efforts to create this underclass). *But cf.* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 36–44 (2012) (challenging whether race explains this strategy and its targets).

192 *See supra* notes 21–23 and accompanying text.

193 *See* Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1561–62 (2014) (discussing the process, in the context of sex offenders, including those convicted of child pornography offenses, in which individuals are scapegoated, subjected to draconian punishments, and effectively banished). *See generally* Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 854 (1995) (reviewing GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995)) (characterizing our current criminal justice system as an "emotion-driven blame game of remorseless punishment for unmitigated evil").

194 *See* Alexander, OHIO ST., *supra* note 16, at 16–17 (observing that, once the perception of the unsavory drug user was created and publicized, "a wave of punitiveness took over"). *See generally* Jody Armour, *N**** Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 55 (2014) ("[T]he more we view wrongdoers as wickedly depraved, the more they stir the retributive urge for vengeance and retribution, the easier it is for us to conclude that their voluntary wrongdoing breaks the causal chain between earlier factors and their crime, shifts responsibility for crime entirely to them, and absolves us as a nation of accountability for the abundantly foreseeable results of our own social forces and currents.") (title altered).

195 Alexander, OHIO ST., *supra* note 16, at 24.

196 *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 250 (2002) ("While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect.") (citation omitted); *see id.* at 253–54 ("The Government has shown no more than a

assumed connection exists as to drug offenders—those involved in the drug trade are assumed to be violent and thus deserving of a higher sentence.[197] As with the development of the drug guidelines, Congress employed a hurried process to enact its directives, allowing for its decision-making to be governed by subjective determinations and not empirical information.[198] The same punishment psychology, social attitudes, and empirical assumptions help explain both the "War on Drugs" and the sentencing of child pornography offenders.[199]

More broadly, a consequence of the retributive-based excessive sentences is that both drug penalties[200] and child pornography penalties contribute to mass incarceration. James Forman, for example, writes that child pornography defendants are also targets of mass incarceration in light of the four-hundred percent increase in prosecutions and the severity of sentences.[201] The severity of child pornography sentences is thus alarming in its own right, but also because of the role of child pornography sentences in the crisis of mass incarceration.

B. *Disproportionality*

The child pornography sentencing guidelines mandated by Congress fail to properly distinguish between offenses in this area,

remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without a significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct."); *see also* Jennifer M. Kinsley, *Therapeutic Expression*, 68 EMORY L.J. 939, 971 (2019) (observing that viewing child pornography may reduce the prospects for child sexual abuse); Jeannie Suk Gersen, *Sex Lex Machina: Intimacy and Artificial Intelligence*, 119 COLUM. L. REV. 1793, 1805 n.68 (2019) (exploring whether conduct as to child sex robots may reduce or reinforce the likelihood of contact offenses with human children); *cf.* MICHAEL C. SETO, PEDOPHILIA AND SEXUAL OFFENDING AGAINST CHILDREN: THEORY, ASSESSMENT, AND INTERVENTION 5 (2008) (rejecting the assumption that all sex offenders who offend against children are also pedophiles).

197 *See* David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 26 (1994) (noting the perceived connection between drugs and violence); *id.* at 25 n.132, 26 n.133 (collecting cases). *See generally* Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015) (criticizing the empirical basis for this connection, and outlining the harms caused by this association).

198 *See, e.g.*, HISTORY REPORT, *supra* note 153, at 23 (describing "just months" between the directives and the Commission's response); Newton & Sidhu, *supra* note 94, at 1275 (noting that the statute was enacted only three months after the introduction of the original bill).

199 *See supra* note 194.

200 A former U.S. district judge catalogues the contributions of the "War on Drugs" to mass incarceration. *See* Mark W. Bennett, *A Slow Motion Lynching? The War on Drugs, Mass Incarceration, Doing* Kimbrough *Justice, and a Response to Two Third Circuit Judges*, 66 RUTGERS L. REV. 873, 880–92 (2014).

201 Forman, *supra* note 191, at 59–60.

despite the Commission's attempts to develop proportionate guidelines. The Commission itself made this point: "[S]entencing enhancements that originally were intended to provide additional proportional punishment for aggravating conduct now[, because of congressional intervention,] routinely apply to the vast majority of offenders."[202] The Commission continues:

> [T]here is a growing belief . . . that the existing sentencing scheme in non-production cases no longer distinguishes adequately among offenders based on their degrees of culpability and dangerousness. . . .
>
> The Commission believes that the current non-production guideline warrants revision in view of its outdated and disproportionate enhancements related to offenders' collecting behavior . . . .[203]

The guidelines do not distinguish between defendants of different levels of culpability and dangerousness. For example, a defendant who commits a noncontact offense has higher sentencing exposure under the guidelines compared to a defendant who commits a contact offense,[204] despite the fact that someone who engages in a contact offense undoubtedly has committed a more serious offense.[205] To provide another example, the child pornography sentencing guidelines call for a sentencing enhancement if the defendant uses a computer.[206] However, there is no correlation between sophisticated use of technology and dangerousness,[207] and virtually every such crime will involve a computer.[208] As one judge explained, "[E]nhancing for use of a computer is a little like penalizing speeding, but increasing that if you're using a car."[209] Yet another example: the mandatory minimum sentences for receipt offenses is five years and there is no mandatory

202 COMMISSION REPORT TO CONGRESS, *supra* note 28, at xi.

203 *Id.* at xxi.

204 *See id.* at 13 n.69.

205 *See id.* at 170 n.6. *See generally* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853 (2011).

206 U.S. SENT'G GUIDELINES MANUAL § 2G2.2(b)(6) (U.S. SENT'G COMM'N 2021).

207 COMMISSION REPORT TO CONGRESS, *supra* note 28, at 94.

208 *Id.* at 313; Stabenow, *supra* note 53, at 122.

209 *Hearings on the Twenty-Fifth Anniversary*, *supra* note 33, at 14–15 (statement of Robin Cauthron, former Chief Judge for the U.S. District Court, Western District of Oklahoma).

minimum for possession,[210] even though possession and receipt generally occur together.[211]

Congress has vetoed the Commission's attempts to set more measured and refined penalty levels for child pornography offenses. The Commission reported that members of Congress expressly rebuked the agency for establishing penalty levels that they believed were insufficiently severe; Congress reacted by negating the Commission's amendments with superseding legislation.[212] But it has been the Commission's repeated, expert-based position that lower penalty levels are needed to satisfy the parsimony principle of 18 U.S.C. § 3553(a).[213]

An absence of proportionality is a fundamental problem with drug penalties. Significant drug penalties meant for those with greater roles are instead imposed on low-level distributors or couriers.[214] In her excellent overview of the problems with the criminal justice system, Rachel Barkow highlights the overinclusiveness of major drug penalties, the mismatch between the intended target of the penalties and the recipients of those harsh sentences, and the reliance on quantity as a proxy for culpability. She notes that while the purpose of the drug guidelines was to target "kingpins—the masterminds who are really running these [drug] operations," only about 10%–11% of federal drug defendants are high-level operators, with 40% being street-level dealers or couriers.[215] The same is true of child pornography; penalties for child pornography offenses fail to measure culpability, with low-level defendants still receiving significant sentences.[216] Moreover, as with

210 *See* U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 6 (2019) [hereinafter MANDATORY MINIMUM PENALTIES REPORT].

211 *See supra* note 47; *see also* United States v. Richardson, 238 F.3d 837, 839–40 (7th Cir. 2001) (calling the distinction a "puzzle" and "tenuous").

212 *See, e.g.*, MANDATORY MINIMUM PENALTIES REPORT, *supra* note 210, at 19–23 (examining mandatory minimum penalties for child pornography offenses and noting that in 2016, "[t]he majority of sexual abuse offenders convicted of an offense carrying a mandatory minimum penalty faced a mandatory minimum penalty of 15 years").

213 *See* United States v. Stone, 575 F.3d 83, 97 (1st Cir. 2009) ("[T]he sentencing guidelines at issue [USSG § 2G2.2] are in our judgment harsher than necessary.").

214 *See* Juan R. Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 YALE J. ON REGUL. 235, 256 (1997) (observing "how often the penalties for drug trafficking are imposed on individuals other than those most culpable").

215 RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 22–23 (2019); *see also* Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 HARV. L. REV. 200, 217 n.138 (2019) (reporting that only fourteen percent of federal drug offenders are high-level operatives). This modest percentage has stayed relatively constant over time. *See* Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 71 n.129 (1998) (reporting an 11% figure from 1996).

216 *See infra* notes 218–22 and accompanying text.

low-level drug users, those who are most often prosecuted are those who possess, rather than produce, child pornography.[217]

C. *Mandatory Minimum Sentences*

Congressional action in this area has impeded individualized, responsible sentencing for child pornography offenses. As with mandatory minimums generally, the mandatory minimums enacted by Congress here unduly limit the opportunity for district judges to deliver individualized sentences,[218] establish an artificially high baseline for sentencing decisions,[219] and frustrate orderly guideline development.[220] The Judicial Conference of the United States observed that the guidelines "often" call for disproportionate sentences, which in turn give rise to the "concern that the goals of fair administration of justice and respect for the law are not being met" in these cases, "undermine[] judicial confidence in the child pornography guidelines," and "leave[] judges . . . frustrated by the inconsistency inherent in giving respectful consideration and weight to these guidelines calculations while also considering other pertinent factors [in] section 3553(a)."[221] Indeed, as head of the Judicial Conference, then–Chief Justice Rehnquist informed the Senate Judiciary Committee that the congressional directives governing these guidelines distort the structure of federal sentencing; congressional amendments to these guidelines, he warned, "would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences."[222]

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217 *See* Lauren M. Ouziel, *Steering White-Collar Enforcement*, 97 TEX. L. REV. ONLINE 44, 47 (2019).

218 *See, e.g.*, Melissa Hamilton, *Sentencing Adjudication: Lessons from Child Pornography Policy Nullification*, 30 GA. ST. U. L. REV. 375, 396 (2014) ("[R]ecognizing that the guideline skews toward the most heinous offenders, a judge complained it fails to provide appropriate guidance for achieving § 3553(a)'s statutory-based objectives in typical cases involving noncontact offenders.").

219 *See, e.g.*, Michael J. Pelgro, *Child Pornography: The New Crack Cocaine?*, 56 BOS. BAR J. 24, 26 (2012) ("Courts have recognized that the Congressionally-manipulated guideline has resulted in unusually severe sentences in many child pornography cases.").

220 *See id.* at 25 ("The Commission's usual empirical approach was not followed . . . in the development of the child pornography guidelines . . . . The Commission was not allowed to play its traditional institutional role in fashioning recommended imprisonment ranges for such offenses. Rather, Congress took over the process . . . .").

221 *Public Hearing on Federal Child Pornography Offenses Before the U.S. Sent'g Comm'n* 4, 33 (2012) (statement of M. Casey Rodgers, Chief Judge for the U.S. District Court, Northern District of Florida), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215/Testimony_15_Rodgers.pdf [https://perma.cc/5LRN-GDEG].

222 149 CONG. REC. 9094 (2003).

As with mandatory minimums generally, the solution is to scrap mandatory minimum sentences in the child pornography context. Doing so would permit the Commission to craft measured guidelines in accordance with their expert judgment and without the anchoring effect of statutes, and would allow district court judges to have access to the full range of sentencing options (including little to no prison time) when devising an individualized sentence. More generally, doing so would restore proportionality to such sentencing determinations and reduce unwarranted disparities.[223]

As this Part suggests, child pornography sentencing is characterized by its severity, a failure to distinguish between different levels of culpability and conduct, and the absence of meaningful judicial discretion to impose an individualized, measured sentence. The way to fix these problems is for Congress to respect and adopt the guidelines changes proposed by the Commission and to rescind the applicable mandatory minimums.

IV. FORCING CONGRESS TO CORRECT FLAWED SENTENCING SYSTEMS

This Part addresses the fact that child pornography sentences are known to be flawed, and yet Congress has refused to go back to the drawing board and revise the penalty scheme. This problem—of Congress creating an unsound system and then fleeing the scene—exists in the drug context as well. We suggest that a proposal that has been floated in that context—that sunset provisions attach to criminal penalties, forcing Congress to return to the table—should apply to the child pornography setting as well.

As noted above, Congress has dictated the contents of the child pornography guidelines.[224] The system that it has created is less than ideal, to put it charitably. Despite setting this system into motion and unleashing these harms on individual sentencing determinations and the structure of sentencing in the child pornography context, Congress has all but withdrawn from child pornography sentencing. As a former Sentencing Commission senior official notes, since 2012, "Congress has not given any indication that it intends either to amend the penal statutes governing child-pornography offenses or to give the

223 *Compare* Hamilton, *supra* note 218, at 396 (describing the group of federal judges who remain faithful to the guidelines because they take the position that "Congress's will can and should prevail"), *with id.* (describing the group of federal judges who are comfortable departing from the guidelines because "deference is unjustified since the child pornography guideline is a political construction of Congress forced upon an unwitting Commission and transcends the latter's otherwise independent role").

224 *See supra* Section II.A.

Commission authority to amend the provisions" of the child pornography guidelines.[225] It is the legal equivalent of setting a house ablaze and walking away.[226]

Yet, it is Congress that is in the best position to respond. For starters, the directives and mandatory minimums established by Congress can only be amended or rescinded by Congress.[227] For its part, the Commission lacks the authority to change the congressional directives that supply the contents of the child pornography guidelines.[228] Its authority is limited to developing guidelines within the detailed legislative lines drawn by Congress,[229] and even then, the Commission can only propose guideline amendments that Congress can approve or reject.[230] To the limited extent that the Commission could amend the guidelines, it has not been in a position to propose amendments because it has lacked a quorum since 2018 to pass and submit any amendments to Congress.[231] Moreover, the Supreme Court repeatedly has declined to take up clear circuit splits involving the guidelines,[232] seemingly deferring to its preference for the Commission to resolve any such conflicts.[233]

This situation—congressional imposition of severe sentences followed by a decade-plus withdrawal from the area—supports the imposition of sunset provisions on statutory penalty commands, which

225 Brent E. Newton, *A Partial Fix of a Broken Guideline: A Proposed Amendment to Section 2G2.2 of the United States Sentencing Guidelines*, 70 CASE W. RSRV. L. REV. 53, 62–63 (2019) (suggesting that Congress may be avoiding the child pornography context because there is no "political capital" to be gained from reforming this area of criminal law).

226 *See generally* Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1240 (2004) ("[S]tatutes linger on the books long after they should be revised or removed.").

227 *See* 28 U.S.C. § 994(p), (q).

228 *See supra* notes 94–98 and accompanying text.

229 *See* Mistretta v. United States, 488 U.S. 361, 412 (1989) (recognizing that Congress provided "significant statutory direction" to the Commission).

230 *See id.* at 393–94 ("[T]he Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit . . . ."); *see also* 28 U.S.C. § 994(p) (specifying the amendments process).

231 *See* Press Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission Publishes for Comment Proposed Amendments to the Federal Sentencing Guidelines (Dec. 13, 2018), https://www.ussc.gov/about/news/press-releases/december-13-2018 [http://perma.cc/3ED5-3WMU] (noting that the Commission has only two voting members, where four are required for a quorum).

232 *See* Dawinder S. Sidhu, Sentencing Guidelines Abstention (Nov. 1, 2021) (unpublished manuscript) (available on SSRN) (surveying and challenging the Court's longstanding refusal to review clear splits involving the guidelines); *see also* Carissa Byrne Hessick, *The Sixth Amendment Sentencing Right and Its Remedy*, 99 N.C. L. REV. 1195, 1219 n.153 (2021) (recognizing that "the Court recently denied certiorari in a case that squarely presented two appellate review circuit splits").

233 *See* Braxton v. United States, 500 U.S. 344, 348 (1991).

would force Congress to revisit and recalibrate penalty levels after a certain time period. These provisions would compel Congress to periodically justify current statutes or to amend existing statutes as appropriate. This process would ensure that the statutory regime is predicated on recent policy decisions and empirical information, in lieu of keeping severe sentences on cruise control. In practice, sunset provisions would mean, at a minimum, courts giving less deference to laws whose factual foundation has eroded,[234] and legislators providing a temporal limitation on the criminal code.[235]

Scholars have explored and endorsed sunset provisions in federal statutes.[236] Allison Orr Larsen writes that such temporal provisions are beneficial in that they compel "legislative reevaluation of policies," "factual findings," and "adjust[ments] to changing conditions."[237] She suggests that "Congress can and perhaps ought to be more attentive to the issue of staleness,"[238] offering crack/cocaine disparities as an example of when Congress should have returned to the drawing board.[239] While Congress has revisited this disparity, reducing it through the Fair Sentencing Act,[240] for example, Congress is conspicuously quiet in the context of child pornography.[241]

V. GIVING UNIFORM AND APPROPRIATE MEANING TO SUBSTANTIVE REASONABLENESS REVIEW UNDER *GALL*

This Part addresses appellate review in two respects. First, the circuit courts are deeply divided as to how to perform substantive reasonableness review under *Gall v. United States*.[242] Second, the Sixth Circuit, in conducting such review for substantive reasonableness, took the remarkable step of declaring noncustodial sentences in child

234 *See* Allison Orr Larsen, *Do Laws Have a Constitutional Shelf Life?*, 94 TEX. L. REV. 59, 83–85 (2015) (providing *Kimbrough* as an example of such reverse legislative deference).

235 *See* Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1381 (2008) ("Penal code drafters could design rolling sunset provisions to require a phased second look at the substantive laws. Legislation creating regulatory schemes could mandate sunsets or reexamination periods for the regulations thereby designed.").

236 *See, e.g.*, Myers, *supra* note 235; Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (2007).

237 Larsen, *supra* note 234, at 107.

238 *Id.* at 108.

239 *Id.* at 82–83, 104–05.

240 Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010).

241 *See* Newton, *supra* note 225, at 62–63 (observing that Congress has not signaled any interest in returning to the subject of child pornography).

242 552 U.S. 38 (2007).

pornography cases per se unreasonable, thus effectively establishing a judicial mandatory minimum.[243]

A. *Circuit Split: Reweighing the 18 U.S.C. § 3553(a) Factors Under* Gall

In *United States v. Booker*,[244] the Supreme Court issued one of the most significant and consequential decisions in modern criminal justice.[245] The Court specifically changed the status of guidelines, which were designed to be binding, from mandatory to advisory.[246] In doing so, the Court noted that the role of the federal appeals courts in federal sentencing is to check the "reasonableness" of sentences imposed.[247] Two years later, in *Gall*, the Court explained that, in conducting this reasonableness review, the appellate court "must first ensure that the district court committed no significant procedural error" in determining the sentence, and "should then consider the substantive reasonableness of the sentence imposed."[248] The Court recently clarified that substantive reasonable review boils down to ensuring that, under an abuse of discretion standard, district courts impose a sentence that complies with the parsimony principle of 18 U.S.C. § 3553(a).[249]

The problem, however, is that there is little understanding as to what substantive reasonableness means. Judge Jeffrey Sutton admitted frankly that he is unsure how substantive reasonableness review is to be performed: "I must say I'm being close to a loss . . . in what I as a court of appeals judge should be doing when it comes to reviewing sentences for substantive reasonableness."[250] Indeed, reflecting this confusion, the circuit courts do not agree on how to deploy the abuse of discretion

243 United States v. Demma, 948 F.3d 722 (6th Cir. 2020). An emerging, related issue in the circuits is whether probable cause is needed for border searches of electronic devices. *See, e.g.*, Alasaad v. Mayorkas, 988 F.3d 8 (1st Cir. 2021). The primary contraband uncovered during these searches is child pornography. *See* Recent Case, United States v. Cano, *934 F.3d 1002 (9th Cir. 2019)*, 133 HARV. L. REV. 2635, 2638 n.39 (2020).

244 543 U.S. 220 (2005).

245 *See* Dillon v. United States, 560 U.S. 817, 835 (2010) (Stevens, J., dissenting) (describing *Booker* as a "fundamental sea change"); Douglas A. Berman, *Perspectives and Principles for the Post-*Booker *World*, 17 FED. SENT'G REP. 231, 231 (2005) (characterizing *Booker* as "dramatic," "remarkable," and "stunning").

246 *Booker*, 543 U.S. at 261–63.

247 *Id.*

248 Gall v. United States, 552 U.S. 38, 51 (2007).

249 Holguin-Hernandez v. United States, 140 S. Ct. 762, 766–67 (2020).

250 *Public Hearing Before the U.S. Sent'g Comm'n* 207 (2009) (statement of Jeffrey S. Sutton, then-Judge for the Court of Appeals, 6th Circuit), https://www.ussc.gov/sites/default/files/Public_Hearing_Transcript.pdf [https://perma.cc/K6PJ-6W92].

standard when conducting a substantive reasonableness review. As explained below, the Sixth and Eleventh Circuits recalibrate the weight by a district court to each § 3553(a) factor and effectively set aside a sentence as unreasonable on that basis. In contrast, the First, Second, and Tenth Circuits conclude that such factor-by-factor reweighing is forbidden, asking, instead, whether the sentence is reasonable overall.

The Sixth and Eleventh Circuits occupy one side of the split. In 2020, the Sixth Circuit reviewed the substantive reasonableness of a sentence of time served for possession of child pornography.[251] The court defined a sentence as "substantively unreasonable . . . [if] the 'sentence is too long . . . or too short.'"[252] "This inquiry," the Sixth Circuit continued, "requires us to determine whether 'the court placed too much weight on some of the § 3553(a) factors and too little on others.'"[253] The court relied on *Gall* for the proposition that it "may 'consider the extent of the deviation' in deciding whether the district court abused its discretion."[254] Applying this understanding of substantive reasonableness review, the Sixth Circuit faulted the district court for giving "an unreasonable amount of weight" to several factors, including the defendant's mental health.[255] At the same time, the Sixth Circuit claimed that the district court gave too little weight to other factors, including the seriousness of the offense.[256] This factor-by-factor analysis doubled as the abuse of discretion analysis, as the court admitted: "Our overall conclusion is that, based on the totality of the circumstances, the district court weighed some factors under § 3553(a) too heavily and gave insufficient weight to others in determining [the defendant's] sentence."[257]

The en banc Eleventh Circuit endorsed this factor-by-factor approach to substantive reasonableness review.[258] In doing so, the full court responded to and rejected a dissenting colleague's argument that such a deconstructive process was inconsistent with *Gall*.[259] In determining that an evaluation of the weight assigned to each § 3553(a) factor follows—rather than flouts—*Gall*, the Eleventh Circuit interpreted *Gall* as deciding the reasonableness question "only after

251 United States v. Demma, 948 F.3d 722 (6th Cir. 2020).

252 *Id.* at 727 (second omission in original) (quoting United States v. Parrish, 915 F.3d 1043, 1047 (6th Cir. 2019)).

253 *Id.* (quoting United States v. Rayyan, 885 F.3d 436, 442 (6th Cir. 2018)).

254 *Id.* (quoting Gall v. United States, 552 U.S. 38, 51 (2007)).

255 *Id.* at 729–30.

256 *Id.* at 730–32.

257 *Id.* at 733.

258 *See* United States v. Irey, 612 F.3d 1160 (11th Cir. 2010) (en banc).

259 *Id.* at 1192.

reviewing the weight the district court had assigned to various factors as well as its decision that the § 3553(a) factors, as a whole, justified the sentence."[260] The court referenced language from *Gall* in which the Supreme Court mentioned the "great weight" given to the defendant's voluntary withdrawal from the conspiracy to distribute drugs and the "great weight" given to the defendant's desire for rehabilitation.[261] The Eleventh Circuit, not unlike the Sixth Circuit, concluded that the sentence imposed "discounted the value of general deterrence" and did not adequately promote retributive purposes.[262]

By contrast, the First, Second, and Tenth Circuits disagree with the Sixth and Eleventh Circuits' interpretation of *Gall* and their resulting atomistic approach to substantive reasonableness review.[263] For starters, the First Circuit has made clear that the weighing of the § 3553(a) factors rests with the sound discretion of the trial court, and that it is not within the purview of the appellate court to revisit or revise that

260 *Id.* (citing Gall v. United States, 552 U.S. 38, 56–60 (2007)).

261 *Gall*, 552 U.S. at 57, 59.

262 *Irey*, 612 F.3d at 1222. It should be noted that the Fourth Circuit also reversed a sentence for relying "extensively" on a § 3553(a) factor, though the court based its authority to reweigh those factors on three circuit decisions that predated *Gall*. United States v. Howard, 773 F.3d 519, 531 (4th Cir. 2014). This decision also seems to conflict with a prior Fourth Circuit ruling, issued shortly after *Gall*, in which the Fourth Circuit conceded that "to the extent that [a previous circuit decision] suggests that a court cannot reasonably accord significant weight to a single sentencing factor in fashioning its sentence, *Gall* and *Kimbrough* hold otherwise." United States v. Pauley, 511 F.3d 468, 476 (4th Cir. 2007).

263 Unlike the Sixth Circuit, the First, Second, and Tenth Circuits focus ultimately and properly on the big picture. *See, e.g.*, United States v. Colón-Rodríguez, 696 F.3d 102, 108 (1st Cir. 2012) (asking whether the district court has stated a "plausible" rationale for the sentence and imposed a "sensible" sentence); United States v. Rigas, 583 F.3d 108, 123 (2d Cir. 2009) (likening substantive reasonableness to a "manifest-injustice" or "shocks-the-conscience" standard); United States v. Sells, 541 F.3d 1227, 1239 (10th Cir. 2008) ("[A]s long as the balance struck by the district court among the factors set out in § 3553(a) is not arbitrary, capricious, or manifestly unreasonable, we must defer to that decision even if we would not have struck the same balance in the first instance."); United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008) (asking whether the sentence is "defensible").

weighing.[264] The Second Circuit shares the same view.[265] In addition, the Tenth Circuit has disclaimed any authority under *Gall* to "examine the weight a district court assigns to various § 3553(a) factors, and its ultimate assessment of the balance between them, as a legal conclusion to be reviewed de novo."[266] An appellate court's disagreement with that weighing, the court added, "is simply not enough to support a holding that the district court abused its discretion."[267] Instead, the appellate court must "defer not only to a district court's factual findings but also to its determinations of the weight to be afforded to such findings."[268]

The Sixth and Eleventh Circuits' deconstructed form of the abuse of discretion standard is incorrect for at least two independent reasons. First, it is predicated on a misreading of *Gall*. Consider that, in *Gall*, the appellate court reversed the district court's sentence, in relevant part, because the district court assigned "too much weight to [Mr.] Gall's withdrawal from the conspiracy."[269] However, the Supreme Court surmised that the appellate court had "clearly disagreed with the District Judge's conclusion that consideration of the § 3553(a) factors justified a sentence of probation," and the Court nonetheless precluded the appellate court from conducting de novo review of the district court's balancing of the § 3553(a) factors.[270] A reassessment of the weighing of the § 3553(a) factors is tantamount to the sort of de novo

264 *See, e.g.*, United States v. Rivera-Clemente, 813 F.3d 43, 53 (1st Cir. 2016) (affirming the sentence where the district court placed "less weight" on certain factors and "more weight" on others, highlighting that "such a choice of emphasis . . . is not a basis for a founded claim of sentencing error" (internal quotation marks omitted) (quoting United States v. Ramos, 763 F.3d 45, 58 (1st Cir. 2014))); United States v. Clogston, 662 F.3d 588, 593 (1st Cir. 2011) ("That the sentencing court chose not to attach to certain of the mitigating factors the significance that the appellant thinks they deserved does not make the sentence unreasonable."); United States v. Madera-Ortiz, 637 F.3d 26, 32 (1st Cir. 2011) (affirming the sentence, stating that the district court's weighing of § 3553(a) factors "represented a judgment call" and that "[w]ithin wide margins, . . . such judgment calls are for the sentencing court, not for this court"); United States v. Anonymous Defendant, 629 F.3d 68, 78 (1st Cir. 2010) (affirming the sentence against objection that the district court "misweighed" the § 3553(a) factors, explaining that the district court "holds the scales in gauging the extent of discretionary departure decisions").

265 *See, e.g.*, United States v. Broxmeyer, 699 F.3d 265, 289 (2d Cir. 2012) ("The particular weight to be afforded aggravating and mitigating factors 'is a matter firmly committed to the discretion of the sentencing judge . . . .'" (quoting United States v. Fernandez, 443 F.3d 19, 32 (2d Cir. 2006))); United States v. Nektalov, 461 F.3d 309, 319 (2d Cir. 2006) (affirming the sentence and explaining that "we do not review the relative weight given to the competing factors").

266 United States v. Smart, 518 F.3d 800, 808 (10th Cir. 2008).

267 *Id.*

268 *Id.*

269 United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006).

270 Gall v. United States, 552 U.S. 38, 59 (2007).

review that *Gall* forbids.[271] Indeed, whereas *Gall* instructs appellate courts to keep the district court's weights fixed and assess whether the factor "can bear the weight assigned to it,"[272] the Sixth and Eleventh Circuits compare the district court's values against the values it would have given.

With respect to the language from *Gall* regarding the "great weight" given to certain factors, the broader text reveals that the Court in *Gall* was describing the weight that the district court—not the appellate court—had allocated.[273] In short, the Court in *Gall* seemed to be making a descriptive, rather than evaluative, reference to this weight. Accordingly, this language should not be used as a license to second-guess the relative weight assigned to the sentencing factors by the district court.[274]

Second, and relatedly, the Sixth and Eleventh Circuits have adopted a divide-and-conquer approach that is meaningfully different than one considering whether, on the whole, the district court abused its discretion. As the First Circuit explained: "[S]entencing decisions represent instances in which the whole sometimes can be greater than the sum of the constituent parts. So here: it is the complex of factors—their presence in combination—that verges on the unique. The factors themselves, if viewed in isolation, present a distorted picture."[275]

With this perspective in mind, the Sixth and Eleventh Circuits' approach necessarily will lead to different qualitative outcomes compared to one that truly considers whether, in view of the totality of the circumstances, the trial court abused its discretion. In sum, neither a proper interpretation of *Gall* nor practical considerations support the Sixth and Eleventh Circuits' position.

The challenge is how to ensure that the substantive reasonableness review is deferential and yet still has some teeth. Then-Judge Brett Kavanaugh commented on the deferential nature of this review, stating

271 *See* United States v. Irey, 612 F.3d 1160, 1260–62 (11th Cir. 2010) (Tjoflat, J., concurring in part and dissenting in part) (likening an appellate court's objective reweighing of the § 3553(a) factors to de novo review).

272 United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008) (en banc).

273 *See Gall*, 552 U.S. at 57, 59.

274 There are material similarities between *Gall* and the Sixth Circuit case. There, as in the Sixth Circuit case, the guidelines pointed to a custodial sentence; the district court imposed a noncustodial sentence; the district court emphasized the individual circumstances of the case, including the defendant's rehabilitation, in explaining the sentencing decision; and the appellate court reversed and vacated the sentence as substantively unreasonable on the ground that certain § 3553(a) factors were not given the right values. *Id.* at 43–45. Further, in *Gall*, the Supreme Court restored the district court's discretion to make a reasonable individualized sentencing determination, as all circuit courts should, too. *Id.* at 59–60.

275 United States v. Martin, 520 F.3d 87, 95 (1st Cir. 2008).

that "the appellate role with respect to substantive review of sentences is going to be very, very limited."[276] At the same time, some judges have expressed concern that substantive reasonableness is an empty concept. The Eighth Circuit noted in concurrence, for example, that such review is "usually an exercise in futility."[277] The approach taken by the First, Second, and Tenth Circuits strikes that proper balance, by deploying a familiar and meaningful standard, focusing on the totality of the district court's reasoning.[278] It is this approach that other circuit courts should embrace. If the Supreme Court decides to take up this split one day, it too should side with and nationalize that approach.

B. *Creating a Judicial Mandatory Minimum*

Remarkably, a circuit court itself has imposed a mandatory minimum in the child pornography context. In 2017, a district court imposed a noncustodial sentence in a possession of child pornography case.[279] Considering the individual circumstances of the case, the court "determine[d] that a custodial sentence as recommended by the guidelines 'would not accomplish anything.'"[280] The Sixth Circuit reversed, explaining in part that a noncustodial sentence would not be supported by deterrence considerations.[281]

The district court—of the view that the Sixth Circuit failed to defer to the particularized findings of the district court and substituted the individualized consideration of the § 3553(a) factors with its own independent weighing of these factors—reimposed a noncustodial sentence on remand.[282] The district court itself expressly stated during the resentencing hearing that the Sixth Circuit is not to "second-guess a district court judge's decision on sentencing," but "that's exactly what they did, is they second-guessed my decision on what the sentence

276 *See Public Hearing Before the U.S. Sent'g Comm'n* 35 (2009) (statement of Brett M. Kavanaugh, then-Judge for the U.S. Court of Appeals, District of Columbia Circuit).

277 United States v. Johnson, 916 F.3d 701, 705 (8th Cir. 2019) (Grasz, J., concurring); William H. Pryor, Jr., *Returning to Marvin Frankel's First Principles in Federal Sentencing*, 29 FED. SENT'G REP. 95, 99 (2017) ("Reasonableness review, which occurs in thousands of appeals annually, does almost nothing to promote the first principles of sentencing.") (footnote omitted).

278 *See supra* notes 263–68 and accompanying text.

279 United States v. Schrank, 768 F. App'x 512, 514 (6th Cir. 2019).

280 *See* Supplemental Brief for Petitioner at 4, Demma v. United States, 141 S. Ct. 620 (2020) (No. 19-1260), 2020 WL 5751253 (quoting Sentencing Hearing, United States v. Schrank, No. 2:17-cr-20129, at *27 (W.D. Tenn. Aug. 25, 2017)).

281 *Schrank*, 768 F. App'x at 515.

282 Resentencing Hearing, United States v. Schrank, No. 2:17-cr-20129, at *27–32 (W.D. Tenn. Aug. 7, 2019).

should be based on their *own evaluation* of the factors."[283] The district court acknowledged the Sixth Circuit's opinion that a custodial sentence would be supported by general deterrence, but the district court emphasized that it "does not make sense" to impose a custodial sentence to advance one isolated factor when "everything else about [the defendant] argues for something different."[284]

In 2020, the Sixth Circuit vacated the sentence, holding candidly that a child pornography offense automatically triggers a significant custodial sentence: "sentences are substantively unreasonable in child pornography cases when they require little or no jail time."[285] Put differently, the court held that a noncustodial sentence for the possession of child pornography is per se unreasonable, irrespective of any individualized determinations made by the district court.

This categorical rule amounts to the introduction of new mandatory minimum sentences through judicial opinion. Indeed, the opinion categorically restricts the discretion of district courts to identify an appropriate sentence within the actual statutory minimums and maximums set by Congress, eliminates noncustodial sentencing options altogether and even in outlier cases, and increases sentencing disparities as to noncustodial sentences.[286] This inflexible limit on judicial discretion also conflicts with *Gall*'s requirement that sentencing courts "make an individualized assessment based on the facts presented" and statutory factors,[287] with *Gall*'s direction that circuit courts are to give due deference to the individualized decisions of sentencing courts,[288] and with *Kimbrough*'s refusal to endorse a rule of

283 *Id.* at *5 (emphasis added).

284 *Id.* at *27; *see also id.* at *29 ("I again don't see any value in sending [the defendant] to prison.").

285 United States v. Schrank, 975 F.3d 534, 536 (6th Cir. 2020). The absence of any limiting language of this rule cuts against the argument made by the Government that the court "merely held that a noncustodial sentence was not appropriate given the facts of this case." Response of the United States in Opposition to Appellee's Petition for Rehearing En Banc, United States v. Schrank, No. 19-5903, at *6 (6th Cir. Oct. 27, 2020). The Government ignored the defendant's argument that the Sixth Circuit functionally imposed a mandatory minimum sentence for child pornography offenses, writing instead that the Sixth Circuit did not require district courts to impose a sentence within the guidelines. *See id.* at *10. There is a clear difference—in law and effect—between a mandatory minimum sentence (which is what the Sixth Circuit mandated) and a mandatory guidelines sentence (which is what the Government addressed).

286 *See* COMMISSION REPORT TO CONGRESS, *supra* note 28, at 241–42 (observing that circuit courts "have taken seemingly inconsistent positions in reviewing lenient sentences of probation or very short prison sentences").

287 Gall v. United States, 552 U.S. 38, 50 (2007).

288 *Id.* at 51–53.

per se unreasonableness in federal sentencing.[289] It is the exact opposite of deference to preemptively and absolutely shorten the range of sentences otherwise available to a district court.

Consider an instructive case from the drug context, in which the defendant was sentenced by a district court judge to probation for distributing roughly a quarter of crack cocaine, though the sentencing guidelines called for a sentence of sixty-three to seventy-eight months in prison.[290] The government appealed, arguing that the sentence was substantively unreasonable, and the Fourth Circuit agreed, holding that a noncustodial sentence was not per se unreasonable, but that the large variance in this particular case was not justified.[291] The Supreme Court subsequently decided *Gall*, vacated the Fourth Circuit opinion, and sent the case back to the circuit court for reconsideration in light of *Gall*.[292] On remand, the Fourth Circuit upheld the sentence of probation, explaining this time that the district court thoroughly discussed the § 3553(a) factors and was substantively reasonable under the deferential abuse of discretion standard dictated by *Gall*.[293] The contrast between the Fourth Circuit's pre-*Gall* ruling and the post-*Gall* ruling highlights the meaning of *Gall*. If the Fourth Circuit understood that noncustodial sentences in the drug context are not per se substantively unreasonable even before *Gall*, the Sixth Circuit's requirement of custodial sentences in child pornography sentences seems that much more of a departure from *Gall*.

In short, appellate courts should not, under the guise of substantive reasonableness review, introduce mandatory minimum sentences in child pornography offenses. Nor should district courts, with the exception of those bound by the Sixth Circuit's erroneous decision, feel compelled to impose a custodial sentence in these cases. If the Supreme Court were to revisit the meaning of substantive reasonableness review, it should clarify that the full scope of judicial discretion should be available to sentencing courts and that a categorical appellate restriction on sentencing discretion is inconsistent with the abuse of discretion standard and an individualized sentencing system.

289 Kimbrough v. United States, 552 U.S. 85, 91 (2007) (citation omitted) (answering the question presented—"whether . . . 'a sentence . . . outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses'"—in the negative (second omission in original) (quoting United States v. Kimbrough, 174 F. App'x 798, 799 (4th Cir. 2006))).

290 Brief of Appellant at 3, 7, United States v. Pyles, 482 F.3d 282 (4th Cir. 2007) (No. 06-4522), 2006 WL 2453787.

291 *Pyles*, 482 F.3d at 291–92.

292 Pyles v. United States, 552 U.S. 1089 (2008).

293 United States v. Pyles, 272 F. App'x 258, 262 (4th Cir. 2008).

CONCLUSION

This Article makes the case that the movement for criminal justice reform should include child pornography sentencing. The movement has extended to various areas of criminal law and to various actors within the criminal justice system. But child pornography warrants attention and reform too. Indeed, the systemic problems identified in this Article implicate the very values that supply the predicate for a just and orderly system of punishment. Moreover, some of the problems that have given rise to concerns with other areas of law, including severe and mandatory sentencing, exist in the child pornography space as well. The unsympathetic nature of child pornography defendants does not negate the existence of these shared issues.

Drug defendants were once viewed with revulsion, and that hostility remains as to defendants convicted of child pornography crimes. The draconian penalties applicable to child pornography crimes thus linger as well. As drug policy becomes more rational in principle and thus more measured in effect, so too should child pornography policies. Otherwise, the movement for criminal justice reform will be incomplete, limited by social attitudes and not fully commensurate with principle. We aim to ensure that policymakers, courts, and the public generally will not continue to make the same mistakes in the child pornography context that were committed and now condemned in the area of drug offenses.