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A Distinction Without A Difference: "receipt" And "possession" Of Child Pornography And The Double Jeopardy Problem

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A Distinction Without a Difference: “Receipt” and “Possession” of Child Pornography and the Double Jeopardy Problem

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I. INTRODUCTION

Federal prosecution of child pornography offenders has increased dramatically in recent years. In fact, “child pornography is one of the fastest growing areas of prosecution by the Justice Department.”¹ In 1996, just 156 defendants were convicted of child pornography related offenses in federal court.² As the Internet Age took hold in the decade that followed, the number of convictions skyrocketed to 1150 in 2006 as law enforcement officials ratcheted up efforts to patrol cyberspace and apprehend those who pollute it with grotesque images of innocent chil-

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1. United States v. Szymanski, No. 08-CR-417, 2009 WL 1212252, at *1 (N.D. Ohio Apr. 30, 2009).

2. MARK MOTIVANS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: FEDERAL PROSECUTION OF CHILD SEX EXPLOITATION OFFENDERS 6 (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fpcseo06.pdf>.

dren.³ The same ten-year period saw astronomical increases in the severity of child pornography sentences. Between 1996 and 2006, the median sentence imposed in child pornography cases jumped from fifteen months to sixty-three months.⁴ This radical increase was achieved through mandatory sentences imposed by Congress and more severe punishment recommended by the U.S. Sentencing Commission's Guidelines.⁵ But the current child pornography Guidelines have been widely criticized for imposing illogically harsh punishments and disparate sentences among similarly situated defendants.⁶

Numerous federal judges have recently joined the chorus of criticism by condemning the Guidelines and refusing to give them the deference they typically command.⁷ After the U.S. Supreme Court declared

3. *Id.* Child pornography prosecutions have increased an additional forty percent since 2006, with 2315 suspects indicted under federal law in 2009 alone. Paul Elias, *Child Porn Prosecutions Soaring*, S.F. CHRON., (Feb. 5, 2011, 11:05 PM), <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2011/02/05/state/n110526S97.DTL#ixzz1DCIvERnn>.

4. MOTIVANS, *supra* note 2, at 6.

5. See generally U.S. SENTENCING COMMISSION, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES (2009), http://www.ussc.gov/Research/Research_Projects/Sex_Offenses/20091030_History_Child_Pornography_Guidelines.pdf (last visited Jan. 28, 2011) [hereinafter HISTORY] (reporting the history of the child pornography Guidelines since their initial promulgation in 1987).

6. See Mark Hansen, *A Reluctant Rebellion*, A.B.A. J., June 2009, at 54. For an extensive critique of the federal child pornography sentencing Guidelines, see Troy Stabenow, *Deconstructing the Myth of Careful Study: A Primer on the Flawed Progression of the Child Pornography Guidelines*, http://www.fd.org/pdf_lib/child%20porn%20july%20revision.pdf (unpublished working paper, last updated Jan. 1, 2009). In this article, Federal Public Defender Troy Stabenow effectively "deconstructs" the Guidelines and reveals serious flaws in how defendants are being punished in child pornography cases. Defendants convicted of "receiving" or "possessing" child pornography in violation of 18 U.S.C. § 2252 are punished in accordance with U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2008). Section 2G2.2 establishes a base offense levels for defendants convicted of "possessing" child pornography (18) and "receiving" child pornography (22). *Id.* at § 2G2.2(a)(1), (2). "Receiving" child pornography carries a mandatory five-year prison sentence, but "possession" has no mandatory minimum punishment. 18 U.S.C. § 2252(b) (2008). U.S.S.G. § 2G2.2 provides for enhancements to the defendant's base offense level if they exhibit certain offense characteristics. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b) (2008). Stabenow criticizes § 2G2.2 because the offense characteristics found in subsection (b) apply in the majority of child pornography cases. Stabenow, *supra* at 26–27. As a result, a mechanical application of § 2G2.2 often yields a guideline recommendation close to the statutory maximum (twenty years) for typical first-time offenders who download images of child pornography. *Id.*

7. See, e.g., *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1104–05 (N.D. Iowa 2009); *United States v. Riley*, 655 F. Supp. 2d 1298, 1300 (S.D. Fla. 2009); *United States v. McElheney*, 630 F. Supp. 2d 886, 895 (E.D. Tenn. 2009); *United States v. Cruikshank*, 667 F. Supp. 2d 697, 702 (S.D. W. Va. 2009); *United States v. Grober*, 595 F. Supp. 2d 382, 412 (D. N.J. 2008); *United States v. Hanson*, 561 F. Supp. 2d 1008, 1011 (E.D. Wis. 2008); *United States v. Johnson*, 588 F. Supp. 2d 997, 1004 (S.D. Iowa 2008); *United States v. Baird*, 580 F. Supp. 2d 889, 895 (D. Neb. 2008). But see *United States v. Cunningham*, 680 F. Supp. 2d 844 (N.D. Ohio 2010), for a comprehensive defense of the child pornography Guidelines and a rebuttal to the arguments put forth in Stabenow, *supra* note 6.

the Guidelines advisory in *United States v. Booker*,⁸ federal judges across the country began to frequently impose below-Guideline sentences in child pornography cases.⁹ In 2007, 351 out of 1025 defendants sentenced for nonproduction-related offenses received downward departures from the recommended Guideline range.¹⁰ Today, over forty percent of defendants convicted of federal child pornography offenses receive sentences below the Guidelines.¹¹ At least for nonproduction related offenses, most judges feel that the Guidelines are too harsh.¹² Judge Gilbert Merritt of the Sixth Circuit complained that “[o]ur ‘social revolution’ against these ‘misfits’ downloading these images is perhaps somewhat more rational than the thousands of witchcraft trials and burnings conducted in Europe and here from the Thirteenth to the Eighteenth Centuries, but it borders on the same thing.”¹³ But not everyone sees it that way. Prosecutors and child advocacy groups believe that harsh punishment is necessary to protect children who are victimized during the production of images and subsequently re-victimized every single time the images are viewed.¹⁴ The proponents of strict sentencing also draw links between child pornography and contact offenses, arguing that those who possess and distribute images over the Internet are more likely to sexually assault children in the future.¹⁵

8. 543 U.S. 220, 264 (2005) (“[D]istrict courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”). Recent clarification of *Booker* by the Supreme Court has emboldened district court judges to stray from the Guidelines in child pornography cases. See Kimbrough v. United States, 552 U.S. 85, 101 (2007) (“[A]s a general matter, courts may vary [from Guideline ranges] based solely on policy considerations, including disagreements with the Guidelines.”) (internal quotations omitted). See also Jamie Satterfield, *Porn Sentencing Rules Puzzle*, KNOXNEWS.COM (Jan. 4, 2011, 9:51 PM), <http://www.knoxnews.com/news/2011/jan/04/porn-sentencing-rules-puzzle/>.

9. Hansen, *supra* note 6, at 56.

10. *Id.*

11. Amir Efrati, *Judges Trim Jail Time for Child Porn*, WALL ST. J., Jan. 20, 2010, at A2.

12. See U.S. SENTENCING COMMISSION, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 (June 2010), http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf (reporting that seventy percent of district court judges believe the Guidelines are inappropriate because they recommend sentences that are too high). See also Felisa Cardona, *Federal Judges Argue For Reduced Sentences For Child-Porn Convicts*, DENVER POST, Nov. 29, 2009, at A1; Brian Bowling, *Most Federal Judges Not Comfortable With Tough Guidelines*, PITT. TRIB. REV. (Nov. 30, 2010), http://www.pittsburghlive.com/x/pittsburghtrib/news/s_711466.html.

13. *United States v. Paull*, 551 F.3d 516, 533 (6th Cir. 2009) (Merritt, J., dissenting).

14. See generally Audrey Rodgers, *Child Pornography's Forgotten Victims*, 28 PACE L. R. 847, 853–54 (2008).

15. See Hansen, *supra* note 6, at 59. Interestingly, many judges justify below-guideline sentences specifically because they are not convinced that there is any real link between child pornography and contact offenses. See Efrati, *supra* note 10. Compare Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577961 (arguing, *inter alia*, that child sex abuse is improperly conflated with possession of child pornography), with

The goal of this Note is not to take sides in the heated debate over how severe child pornography offenders should be punished. Instead, this Note seeks to expose a serious problem with current federal child pornography law that warrants correction. The problem stems from a paradox found in 18 U.S.C. § 2252. In its current form, 18 U.S.C. § 2252 imposes a mandatory five-year minimum sentence for defendants convicted of “receiving” child pornography, but “possessing” child pornography carries no mandatory minimum sentence.¹⁶ There is simply no meaningful distinction between these two offenses or logical reason to punish “receiving” child pornography more severely than “possessing” it. Like all other types of contraband, it is by definition impossible to “receive” child pornography without “possessing” it, at least at the moment “receipt” occurs. Likewise, it is impossible to “possess” child pornography without “receiving” it, except for the rare instance when the possessor is the one who produced the pornography. So, as Judge Posner recognized, “the puzzle is why receiving . . . should be punished more severely than possessing, since possessors, unless they fabricate their own pornography, are also receivers.”¹⁷

This “puzzle” has significant ramifications for sentencing in the vast majority of federal child pornography cases. Most child pornography offenders are charged with “receiving” and/or “possessing” child pornography under § 2252.¹⁸ Of these offenders, almost all use computers to download and eventually store images.¹⁹ Therefore, the typical child pornography downloader may be charged with “receipt,” “possession,” or both at the discretion of the prosecutor. This discretion furnishes the prosecution with the power to determine the defendant’s ultimate sentencing fate simply because § 2252 punishes “receipt” more severely than “possession.” When a prosecutor elects to charge a defendant with “receipt” instead of, or in conjunction with, “possession,” he or she strips the judicial branch of its authority to fashion an appropriate sentence in light of the defendant’s conduct.²⁰ Federal prosecutors,

Julian Sher & Benedict Carey, *Federal Study Stirs Debate on Child Pornography’s Link to Molesting*, N.Y. TIMES, July 19, 2007, at A20 (discussing a study done by psychologists at the Federal Bureau of Prisons that found that eighty-five percent of inmates convicted of possessing or distributing child pornography had committed acts of sexual abuse against minors).

16. See 18 U.S.C. § 2252(b) (2008).

17. *United States v. Richardson*, 238 F.3d 837, 839 (7th Cir. 2001) (Posner, J.).

18. In 2007, only five percent of all child pornography defendants were charged with production. Hansen, *supra* note 6, at 57.

19. In fiscal year 2006, ninety-seven percent of convicted child pornography offenders used a computer. MOTIVANS & KYCKELHAHN, *supra* note 2, at 6.

20. *United States v. Norris*, 159 F.3d 926, 930 n.4 (5th Cir. 1998) (“A prosecutor can . . . manipulate the severity of a sentence by deciding whether to charge the defendant with receiving or possessing child pornography—a result at apparent odds with the policy goals of the sentencing guidelines.”).

aware of the recent judicial assault on the Guidelines, can always hedge the risk that a judge will depart downward by charging defendants with just “receipt.” This effectively ties the judge’s hands and ensures that the defendant will serve five years in prison if convicted, regardless of what he would have been sentenced to had he been convicted of “possession” alone. Allowing prosecutors to exercise arbitrary discretion of this nature subverts our constitutional structure and further exacerbates the problems associated with child pornography sentencing.

Not surprisingly, defendants affected by § 2252’s paradox have looked to avoid the five-year mandatory minimum sentence that accompanies “receipt” convictions. The close nexus between “receipt” and “possession” has subjected convictions under both provisions to scrutiny under the Fifth Amendment’s Double Jeopardy Clause, which prohibits multiple punishments imposed for the same offense.²¹ This Note focuses primarily on recent appellate court decisions examining whether the Double Jeopardy Clause prohibits convictions based on “receiving” and “possessing” child pornography. Those decisions are irreconcilable, leaving the scope of double jeopardy protection in this context unclear. This Note will analyze those decisions and flesh out their ramifications on sentencing. It will demonstrate that the Double Jeopardy Clause can, at times, protect child pornography offenders from the arbitrary difference in punishments for “receipt” and “possession” convictions. Ultimately, however, a consistent approach to analyzing these double jeopardy issues cannot remedy the adverse sentencing effects of § 2252’s paradox. As a result, Congress must redraft § 2252 for clarity and consistency so that simple “receipt” and “possession” of images (usually accomplished by downloading) are prohibited by the same statutory provision or punished equally by the Guidelines. Without congressional action, § 2252 will continue to adversely affect the integrity of child pornography sentencing.

Before analyzing the recent line of double jeopardy cases, it is necessary to understand the history § 2252. Therefore, Part II gives a brief historical overview of federal child pornography legislation, focusing specifically on how “receipt” came to be punished more severely than “possession.” The beginning of Part III examines the Supreme Court precedent used by the appellate courts to interpret the extent of double jeopardy protection in this context. The remainder of Part III critiques the line of cases interpreting the extent to which the Double Jeopardy Clause protects defendants convicted of “receiving” and “possessing” child pornography. In Part IV, I briefly conclude by urging Congress to resolve § 2252’s paradox.

21. U.S. CONST. amend. V.

II. A BRIEF HISTORY OF 18 U.S.C. § 2252

A. *The Early Amendments to § 2252(a)(2)*

In 1978, 18 U.S.C. § 2252 became law as part of the Protection of Children Against Sexual Exploitation Act of 1977.²² As enacted in 1978, § 2252 was much narrower in scope than it is today because Congress's original intent was to thwart the widespread commercialization of child pornography.²³ The earliest version of § 2252 punished those transporting, shipping, distributing, or receiving child pornography in interstate or foreign commerce *for the purpose of sale*.²⁴ However, it soon became apparent that the original legislation was too limited in scope because non-commercial trafficking of child pornography was also pervasive.²⁵ To rectify this problem, Congress passed the Child Protection Act of 1984²⁶ which amended § 2252 and made non-commercial trafficking a federal crime.²⁷

The changes made by the 1984 amendments to § 2252 are critical to understanding the ultimate confusion found in the statute today. The original version of 18 U.S.C. § 2252(a)(2) punished "[a]ny person who . . . knowingly receive[d] for the purpose of sale or distribution for sale, or knowingly s[old] or distribute[d] for sale, any" child pornography.²⁸ To effectuate the intended change in § 2252's scope, Congress made two simple changes to the language found in § 2252(a)(2). First, Congress eliminated the requirement that "receiving" child pornography be "for the purpose of sale or distribution for sale" from the statute altogether.²⁹ Congress also struck the language requiring "distribution" to be "for sale."³⁰ The resulting § 2252(a)(2) simply punishes "[a]ny person who . . . knowingly receives, or distributes" child pornography.³¹

The amendments to § 2252(a)(2) gave federal law enforcement officials more authority to frustrate the dissemination of child pornography that was being exchanged, not just sold. Perhaps more significantly however, the amendments created an entirely new class of offenders that received and subsequently possessed child pornography for personal

22. Pub. L. No. 95-225, § 2(a), 92 Stat. 7, 7-8 (1978).

23. See *United States v. Malik*, 282 F. Supp. 2d 833, 834 (N.D. Ill. 2003) ("As initially enacted in 1978, as part of the 'Protection of Children Against Sexual Exploitation Act of 1977,' the conduct prohibited by Section 2252 expressly targeted the commercialization of child pornography.").

24. § 2(a), 92 Stat. at 7-8 (1978).

25. H.R. REP. NO. 98-536, at 2-3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 492, 493-94.

26. Pub. L. No. 98-292, § 4, 98 Stat. 204, 204 (1984).

27. H.R. REP. NO. 98-536, at 2-3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 492, 493-94.

28. § 2(a), 92 Stat. at 7-8.

29. § 4(1), (2), 98 Stat. at 204.

30. *Id.*

31. 18 U.S.C. § 2252 (2008).

use, whether the images were bought or exchanged. The amended version of § 2252(a)(2) does not require proof that the defendant intends to distribute or profit from child pornography once it is received—it simply requires proof that the defendant knowingly received contraband images. The 1984 amendments to § 2252 did not directly criminalize private possession of child pornography. However, private possession was impossible to achieve without violating the amended version of § 2252(a)(2) because almost all possession stems from an instance of receipt.³²

The new class of personal-use receivers created by § 2252(a)(2) would become the focus of federal law enforcement officials looking to collapse the child pornography market by cutting end-user demand. In 1986, the federal government implemented “Operation Looking Glass,” a program arising out of the National Child Pornography Reverse Sting Project.³³ “Under this program, the U.S. Postal Inspection Service, in the guise of a pornography dealer, corresponded with persons initially identified as predisposed towards child pornography and sent a child pornography catalog and order form to those whose predisposition was confirmed by subsequent test correspondence.”³⁴ If an individual ordered child pornography from the catalogue, postal authorities would execute a search warrant after the material was delivered.³⁵ During the late 1980s, undercover operations like “Operation Looking Glass” resulted in numerous convictions under § 2252(a)(2).³⁶

Some personal-use receivers challenged their convictions under the new version of § 2252(a)(2), arguing that “the statute reache[d] only receipt of [child pornography] for the purpose of redistribution rather than personal use.”³⁷ However, the courts of appeals rejected this limited interpretation of § 2252(a)(2) as it was completely contrary to the plain

32. It is necessary to acknowledge that possessors are receivers in most, but not all instances. For example, an individual could possess child pornography without receiving it if they produced it. In that case, however, the individual would be subject to much harsher penalties for production. See U.S. SENTENCING GUIDELINES MANUAL § 2G2.1(b)(3) (2008).

33. See *United States v. Szymanski*, No. 88-5095, 1989 WL 5450, at *1 (4th Cir. Jan. 11, 1989).

34. *Id.*

35. *Id.*

36. See, e.g., *United States v. Kalinowski*, 890 F.2d 878 (7th Cir. 1989); *United States v. Musslyn*, 865 F.2d 945 (8th Cir. 1989); *United States v. Brown*, 862 F.2d 1033 (3d Cir. 1988); *United States v. Dornhofer*, 859 F.2d 1195 (4th Cir. 1988); *United States v. Flippen*, 861 F.2d 266 (4th Cir. 1988); *United States v. Goodwin*, 854 F.2d 33 (4th Cir. 1988); *United States v. Driscoll*, 852 F.2d 84 (3d Cir. 1988).

37. *United States v. Bevacqua*, 864 F.2d 19, 20 (3d Cir. 1988). Because “receipt” is punished as severely as “distribution” but more severely than “possession,” the argument put forth in *Bevacqua* has recently resurfaced. See, e.g., *United States v. Olander*, 572 F.3d 764 (9th Cir. 2009). The court in *Olander* found it “possible that the text of § 2252A(a)(2)(A), which penalizes mere receipt of child pornography as severely as distribution and attempted distribution, is the

text of the statute and the purpose of the 1984 amendments.³⁸ These cases made it abundantly clear that it was illegal to receive child pornography under § 2252(a)(2), even if the receiver intended only to possess the material for personal use.³⁹ By criminalizing personal-use "receipt" but not "possession," the amended version of § 2252(a)(2) fostered inconsistent prosecution of similarly situated offenders. Reverse sting operations like "Operation Looking Glass" were critical because they were able to garner sufficient evidence of "receipt." But those caught simply in "possession" of child pornography, with no evidence of "receipt," could avoid a conviction under § 2252(a)(2) simply because law enforcement intervened at a later time. This left a large class of personal-use possessors outside the scope of § 2252, even though they were just as culpable as the personal-use receivers punished under the statute.

As detailed in Part II.B, Congress would eventually rectify this by criminalizing "possession." However, that did not ultimately resolve the problem of inconsistently punishing receivers and possessors. In fact, by increasing § 2252's scope to include "possession," Congress inadvertently exacerbated that very problem by failing to reconcile the proscribed punishments for both offenses.

B. *Possession is Outlawed Under § 2252(a)(4)(B)*

In 1990, Congress passed the Child Protection Restoration and Penalties Enhancement Act,⁴⁰ making it illegal to knowingly possess child pornography under § 2252(a)(4)(B).⁴¹ Once "possession" was criminalized, the Sentencing Commission was tasked with restructuring the Guidelines in light of the 1990 amendments.⁴² The Commission responded by developing a sensible new Guideline section that would punish "receipt" and "possession" equally.⁴³ The Commission's proposal would punish "receiving," "possessing," and "transporting" child

result of a drafting mistake." *Id.* at 770. But, ultimately, the court felt it was "not in a position to rewrite § 2252A(a)(2)(A) so that it accords with what Congress might have intended." *Id.*

38. *See United States v. Andersson*, 803 F.2d 903, 906 (7th Cir. 1986); *United States v. Miller*, 776 F.2d 978, 979–80 (11th Cir. 1985).

39. *See, e.g., Andersson*, 803 F.2d at 906 ("The language of the statute is unambiguous. It extends to any mailing or receipt of pornographic literature involving children: commercial or non-commercial, public or private.").

40. Pub. L. No. 101-647, § 323(a), 104 Stat. 4816, 4818 (1990).

41. After the 1990 amendment, § 2252(a)(4)(B) punished "[a]ny person who . . . knowingly possesse[d] 3 or more" items of child pornography. 18 U.S.C. § 2252(a)(4)(B) (1990). Eventually, however, Congress adopted a "zero tolerance" policy towards child pornography and punished the possession of any child pornography, not just "three or more items." *See The Protection of Children from Sexual Predators Act of 1998*, Pub. L. No. 105-314, § 203(b)(1) (1998).

42. HISTORY, *supra* note 5, at 17.

43. *Id.* at 18–19.

pornography under § 2G2.4, which imposed no mandatory minimum sentence.⁴⁴ The new Guideline would continue to punish offenders intending to traffic child pornography under § 2G2.2, which carried a mandatory minimum five-year sentence.⁴⁵ Thus, the Commission's proposal logically sought to punish personal-use receivers and possessors equally, but less severely than those who distribute.

However, the Commission's rational new scheme was upended by an amendment included in an appropriations bill introduced by Senator Jesse Helms of North Carolina.⁴⁶ The amendment was never debated and it forced the Commission to punish "receipt" convictions under § 2G2.2.⁴⁷ Before the amendment passed, the Chairman of the Sentencing Commission wrote a letter to Congress that objected to the amendment and justified the rationale behind the proposed Guideline changes.⁴⁸ In the letter, Chairman Wilkens explained the purpose of § 2G2.4 as follows:

[I]n keeping with the overarching congressional mandate to ensure that defendants who commit similar offense conduct are treated similarly under the guidelines, the Commission determined that the new guideline should encompass other conduct of comparable seriousness to the new statutorily-created offense (simple possession of child pornography) that was formerly sentenced under § 2G2.2, including simple receipt. Recognizing that receipt is a logical predicate to possession, the Commission concluded that the guideline sentence in such cases should not turn on the timing or nature of law enforcement intervention, but rather on the gravity of the underlying conduct.⁴⁹

The Chairman went on to warn that Senator Helms's amendment would "reintroduce sentencing disparity among similar defendants and render the guidelines susceptible to plea bargaining manipulation."⁵⁰

After almost two decades, it is quite clear that the Chairman's fears have become a reality. The U.S. Sentencing Commission recently finished a full-scale review of the child pornography Guidelines that ended May 1, 2010.⁵¹ Despite its apparent focus on child pornography, the Commission failed to generate any proposed amendments to those Guidelines.⁵² But even if the Commission had re-proposed the Guideline change envisioned by Chairman Wilkens in the early 1990s, Congress

44. *Id.*

45. *Id.*

46. *See* 137 CONG. REC. S10356-01, S10363 (vote on Amendment 780).

47. *See* 137 CONG. REC. S10322-04, S10322-23.

48. 137 CONG. REC. H6736-02 (1991) (letter from Chairman Wilkens).

49. *Id.*

50. *Id.*

51. HISTORY, *supra* note 5, at 54.

52. PROPOSED AMENDMENTS TO SENTENCING GUIDELINES, 76 Fed. Reg. 3193-02 (Jan. 19,

would still need to repeal Senator Helms's amendment to authorize equal punishment for "receiving" and "possessing" child pornography. Indeed, without congressional action, the Commission cannot change the fact that "receipt" is punished under § 2G2.2—perhaps the Guidelines' most influential flaw.

Unfortunately, child pornography is a political hot potato and any proposed bill seen as "soft" on these offenders has almost no chance of passage. The controversy surrounding child pornography will very likely stall any efforts to reform a guideline structure that results in disparate sentencing—an outcome at odds with the very purpose of the Guidelines. As Chairman Wilkens noted in his letter, "[o]ne primary reason Congress created the Sentencing Commission was to devise guidelines that avoid these unwarranted variations in sentencing for similar conduct."⁵³ If Congress fails to act, these unwarranted variations will continue and the integrity of child pornography sentencing will suffer as a result.

III. "RECEIPT" AND "POSSESSION": THE DOUBLE JEOPARDY PROBLEM

A. *Blockburger and Ball: The Basis for Double Jeopardy Protection*

The Fifth Amendment's Double Jeopardy Clause protects defendants from being punished twice for the same criminal offense.⁵⁴ To determine whether two statutory provisions proscribe a single criminal offense, courts apply the same-elements test established by the Supreme Court in *Blockburger v. United States*.⁵⁵ Under the *Blockburger* test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."⁵⁶ Inherent in the *Blockburger* test is a presumption that the legislature does not ordinarily intend to impose two punishments when different statutory provisions prohibit the same offense.⁵⁷ But "[t]he *Blockburger* test is a 'rule of statutory construction,' and because it serves as a means of discerning congressional purpose the rule should not be controlling where, for example, there is a clear indication of contrary legislative intent."⁵⁸ In other words, the Double Jeopardy Clause does not prevent Congress from proscribing

2011), available at http://www.ussc.gov/Legal/Federal_Register_Notices/20110119_Notice_of_Proposed_Amendments.pdf.

53. 137 CONG. REC. H6736-02 (1991) (letter from Chairman Wilkens).

54. U.S. CONST. amend. V.

55. 284 U.S. 299 (1932).

56. *Id.* at 304.

57. *Id.*

58. *Albernaz v. United States*, 450 U.S. 333, 340 (1981).

multiple punishments for the same offense as long as it clearly intends to do so. Of course, the problem is, Congress does not always clearly express its intent.

Courts “have often concluded that two different statutes define the ‘same offense’ . . . because one is a lesser included offense of the other.”⁵⁹ This occurs when the elements required to prove one offense are subsumed in another distinct offense that requires proof of additional elements. Under the *Blockburger* rule, if a statutory provision proscribes an offense that is a lesser-included offense of another, then convictions under both offenses are presumed to violate the Double Jeopardy Clause. To overcome the *Blockburger* presumption, Congress must clearly intend to impose separate punishments for the greater offense and the lesser-included offense.

The U.S. Supreme Court has addressed the lesser-included offense issue in a variety of different contexts.⁶⁰ However, in *United States v. Ball*, the Court specifically addressed the application of *Blockburger* to statutory provisions prohibiting “receipt” and “possession.”⁶¹ In *Ball*, a felon was convicted of “receiving” a firearm in violation of 18 U.S.C. § 922(h) and “possessing” the same firearm in violation of 18 U.S.C. § 1202(a)(1).⁶² After applying *Blockburger*, the Court found it “clear that Congress did not intend to subject felons to two convictions” because “proof of illegal receipt of a firearm necessarily includes proof of illegal possession of that weapon.”⁶³ As a result, *Ball*’s convictions for “receipt” and “possession” violated the Double Jeopardy Clause and the Court remanded so that one of those convictions could be vacated.⁶⁴ The Court made it clear that the government could prosecute defendants for “receipt” and “possession,” but convictions on both counts could not be imposed.⁶⁵ This was true even though the defendant’s convictions were to run concurrently.⁶⁶

Ball is the only Supreme Court case addressing Double Jeopardy protection for defendants convicted of “receiving” and “possessing”

59. *Rutledge v. United States*, 517 U.S. 292, 297 (1996).

60. *See, e.g., id.* (conspiracy was a lesser included offense of conducting a continuing criminal enterprise); *Whalen v. United States*, 445 U.S. 684, 693–94 (1980) (rape was a lesser included offense of murder committed in the course of rape); *Brown v. Ohio*, 432 U.S. 161, 167 (1977) (joyriding was a lesser included offense of auto theft).

61. 470 U.S. 856 (1985).

62. *Id.* at 857.

63. *Id.* at 862.

64. *Id.* at 865.

65. *Id.* at 861 (“To say that a convicted felon may be prosecuted simultaneously for violation of [both offenses], however, is not to say that he may be convicted and punished for two offenses.”).

66. *Id.* at 865 (“The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored.”).

contraband. But the *Ball* decision left many questions unanswered and the scope of Double Jeopardy protection in this context is still unclear. Most importantly, the Court did not decide whether a defendant could be convicted under both provisions if “he received and possessed different weapons at different times or in various places.”⁶⁷ *Ball* simply decided that a defendant could not be convicted for “receiving” and “possessing” the same gun. But what if Ball had received ten guns in a suitcase that he continuously possessed until the police apprehended him? Would that change the result in *Ball*? That question becomes more complicated when you consider that the statutes at issue in *Ball* punished the “receipt” and “possession” of “any” firearm. This statutory ambiguity implicates another criminal law doctrine, the rule of lenity, which will be discussed in the next section.

B. *Ball and Bell: Double Jeopardy and the Rule of Lenity Converge*

The rule of lenity dictates that, “[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.”⁶⁸ The rule of lenity rests on the notion that courts should not impose penalties more severe than the legislature intends. This doctrine has been applied in cases where it is impossible to discern the proper unit of prosecution for a proscribed criminal offense. In *Bell*, the defendant was convicted on two counts of knowingly transporting two women in interstate commerce for the purpose of prostitution in violation of the Mann Act.⁶⁹ The Mann Act punished “whoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution.”⁷⁰ The Court invoked the rule of lenity and reversed one the defendant’s convictions because the Mann Act ambiguously defined the unit of prosecution by using the phrase “any woman or girl.”⁷¹

After *Bell*, use of “the word ‘any’ has typically been found ambiguous in connection with the allowable unit of prosecution, for it contemplates the plural, rather than specifying the singular.”⁷² For example, it is unlawful for a convicted felon to “possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition.”⁷³

67. *Id.* at 859, n.6.

68. *Bell v. United States*, 349 U.S. 81, 83 (1955).

69. *Id.* at 82.

70. *Id.* (emphasis added).

71. *Id.* at 83–84.

72. *United States v. Coiro*, 922 F.2d 1008, 1014 (2d Cir. 1991) (internal quotes omitted). *Accord Ladner v. United States*, 358 U.S. 169 (1958); *United States v. Deaton*, 468 F.2d 541 (5th Cir. 1972).

73. 18 U.S.C. § 922(g)(1) (2008) (emphasis added). Section 922(g)(1) is the predecessor to § 922(h), one of the statutes at issue in *Ball*.

Applying the principle of lenity established in *Bell*, the Circuits “are in agreement that the allowable unit of prosecution under § 922(g) is the incident of possession, regardless of whether a defendant possessed more than one firearm, or possessed a firearm and ammunition.”⁷⁴ Likewise, a defendant who receives multiple weapons at the same time cannot be convicted on two counts.⁷⁵

When a statute punishes “receipt” and “possession” of “any” contraband, the principles established in *Ball* and *Bell* become intertwined. At a minimum, *Ball* stands for the proposition that receipt and continuous possession of a firearm is a single criminal act intended by the legislature to result in one punishment. Applied more generally, *Ball* supports the idea that possession of contraband is a continuous offense that is triggered the moment receipt occurs. When coupled with the rule of lenity, the fundamental proposition stated in *Ball* should apply equally where the defendant possesses numerous units of contraband received at once. That is, each conviction must rest on an instance of receipt from which the possession stems.

Consider again the hypothetical defendant who is caught in possession of a suitcase filled with ten guns. Assuming he received the suitcase and all the guns inside at the same time, the holdings in *Ball* and *Bell* should combine to bar convictions for “receipt” and “possession” on double jeopardy grounds. Otherwise, the prosecution could circumvent the double jeopardy protection afforded to the defendant in *Ball* by offering five guns to prove “receipt” and five guns to prove “possession,” even though the defendant acquired all of the guns through a single act.

A more difficult question would arise if the defendant possessed the suitcase full of guns but acquired the weapons at different times. This would seemingly distinguish *Ball* because the defendant no longer acquired all of the guns through a single act. In fact, that distinction was made before *Ball* was even decided. Prior to *Ball*, the Circuits agreed that separate instances of receipt or storage were necessary to support multiple convictions under the federal statutes prohibiting felons from “receiving” and “possessing” firearms.⁷⁶ In *United States v. Bullock*, the Fifth Circuit defended this statutory construction as follows:

Common sense and logic . . . will not support a holding that the receipt of firearms at separate times must merge into one possession,

74. *United States v. Tann*, 577 F.3d 533, 537 (3d Cir. 2009).

75. *See, e.g., United States v. Frankenberry*, 696 F.2d 239, 245 (3d Cir. 1982).

76. *See United States v. Marino*, 682 F.2d 449, 455 (3d Cir. 1982); *United States v. Wiga*, 662 F.2d 1325, 1336–37 (9th Cir. 1981); *United States v. Hodges*, 628 F.2d 350, 351–352 (5th Cir. 1980); *United States v. Rosenbarger*, 536 F.2d 715, 721 (6th Cir. 1976); *United States v. Calhoun*, 510 F.2d 861, 869 (7th Cir. 1975).

thus, one offense. In addressing this evil, could Congress have intended to deter receipt as well as possession of firearms by convicted felons and yet design the statute to only allow one punishment no matter how many separate receipts and possessions occurred? We think not. Any other determination would allow convicted felons and terrorists to establish armories where all of their weapons would be kept. The person in custody of the armory would then be subject to only a single charge of possession, although thousands of illegal and dangerous weapons were received and stockpiled at different times.⁷⁷

To be sure, a statutory scheme that does not link punishment to the number of contraband items acquired is undesirable. But if Congress wanted to punish those who stockpile weapons more severely, why did it use the patently ambiguous term, "any," to define the relevant unit of prosecution for both "receipt" and "possession?" The Fifth Circuit was justifiably concerned that a defendant who acquired an armory would be punished the same as a defendant who receives and possesses a single firearm. But the court's holding does not completely prevent that result because a criminal can simply acquire their stockpile of weapons all at once and avoid multiple convictions.

Admittedly, it is extremely unlikely for a defendant to acquire a stockpile of weapons through one massive instance of "receipt." But that is not the point. The court's decision in *Bullock* rested on the notion that there should be a linear relationship between the number of guns received and the amount of punishment imposed. But the problem with *Bullock* is that it fashions a middle ground where *sometimes* there is a linear relationship between the number of guns received and the number of convictions imposed—but that will not always be true. For example, imagine two defendants. The first is caught with two firearms under his mattress and the second is caught with thirty in his closet. There is clear evidence that the first defendant acquired one firearm on Monday and the other on Tuesday. There is no evidence regarding when the second defendant acquired any of his thirty firearms. Under *Bullock*, the first defendant may be convicted on two counts but the second may only be convicted on one count. Does it make any sense to impose twice the punishment on the first defendant in this situation?

Perhaps the argument can be made that Congress intended to punish each act of "receipt" to deter separate instances of transfer. But that argument fails to consider the gravamen of "receipt" and "possession" offenses generally and Congress's specific intent "to keep firearms away from the persons . . . classified as potentially irresponsible and danger-

77. *United States v. Bullock*, 615 F.2d 1082, 1085–86 (5th Cir. 1980).

ous.”⁷⁸ Consider who is more dangerous: The felon who receives thirty firearms at once or the felon who receives two firearms on separate dates? Because the statute ambiguously defines the relevant unit of prosecution for both “receipt” and “possession,” the Judiciary is tasked with choosing between two dissatisfactory options. If separate instances of “receipt” are merged into a single count, more culpable defendants receive relatively less punishment. On the other hand, if separate instances of “receipt” constitute separate convictions, some defendants will inevitably be subjected to harsher punishment than they really deserve, simply because they acquired their firearms at different times. Choosing the latter option, as the court did in *Bullock*, is inconsistent with the overarching policy behind the rule of lenity. The rule of lenity is rooted in the Judiciary’s reluctance to impose a punishment more severe than the legislature intended. It follows that making an arbitrary choice between two options, one making punishment more severe and the other less severe, should be resolved in favor of the more lenient option.⁷⁹

Courts are similarly tasked with choosing between these two options when defendants are convicted for “receiving” and/or “possessing” child pornography in violation of § 2252. But, in the context of child pornography, the choice made between the two options has more significant ramifications on sentencing because of the differences in punishment for “receipt” and “possession.” The next section of this Note will analyze the recent line of child pornography cases applying *Ball* to dual convictions for “receipt” and “possession.” A review of those cases reveals that the analysis conducted above regarding the firearm statutes at issue in *Ball* applies equally to § 2252’s provisions punishing “receipt” and “possession” of child pornography.

C. 18 U.S.C. § 2252: *Put to the (Blockburger) Test*

Many federal child pornography cases proceed in a similar fashion. Defendants access a website or file-sharing program and download images or videos onto their computer. Once that occurs, law enforcement authorities are able to track the defendant’s Internet Protocol (“IP”) address and, eventually, their residence. After obtaining a search warrant, authorities search the residence and inevitably find a computer with images of child pornography stored on the hard drive. Defendants

78. *Barrett v. United States*, 423 U.S. 212, 218 (1976) (discussing the legislative history of the Gun Control Act).

79. *Ladner v. United States*, 358 U.S. 169, 178 (1958) (The “policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.”).

caught in this fashion are therefore in “possession” of child pornography on their hard drive. There is also evidence that the defendant “received” the child pornography because law enforcement authorities are capable of accurately pinpointing when the download occurred. Thus, the typical downloader can easily be prosecuted and convicted of “receipt” and/or “possession.”⁸⁰

The Ninth Circuit was the first to address whether “possessing” child pornography was a lesser included offense of “receiving” child pornography under *Blockburger*. In *United States v. Davenport*,⁸¹ authorities learned that Davenport had accessed a file-sharing program to download images of child pornography.⁸² A search of Davenport’s computer revealed 496 images and 334 videos containing child pornography.⁸³ Davenport was charged with “receiving” and “possessing” child pornography and pled guilty to both counts.⁸⁴ On appeal, Davenport challenged his convictions on double jeopardy grounds. As a matter of first impression, the Ninth Circuit applied the *Blockburger* test and concluded that “a conviction for receipt necessarily includes proof of the elements required for conviction under possession, and possession is a lesser included offense of receipt.”⁸⁵ Like the Court in *Ball*, the Ninth Circuit accepted the “basic proposition that . . . [i]t is impossible to ‘receive’ something without, at least at the very instant of ‘receipt,’ also ‘possessing’ it.”⁸⁶ As a result, the court held that Davenport’s convictions violated the Double Jeopardy Clause.⁸⁷ In accordance with the remedy supplied in *Ball*, the court remanded so that the district court could vacate one of Davenport’s convictions.⁸⁸

One member of the three-judge panel in *Davenport* dissented from the majority’s opinion on two separate grounds.⁸⁹ The dissent first rejected the majority’s *Blockburger* analysis of § 2252A because it did not take into account subsection (d), which provides an affirmative

80. In 2006, over ninety-five percent of federal child pornography cases resulted in a conviction. MOTIVANS & KYCKELHAHN, *supra* note 2, at 6.

81. 519 F.3d 940 (9th Cir. 2008).

82. *Id.* at 942.

83. *Id.*

84. *Id.* Davenport was charged with “receiving” child pornography in violation of 18 U.S.C. § 2252A(a)(2) and “possessing” child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Throughout this Note, I have referred to § 2252, not § 2252A. However, it is important to note that § 2252A is materially identical to § 2252. Section 2252A was enacted in 1996 as part of the Child Pornography Prevention Act and it essentially mirrors § 2252. *See* S. REP. NO. 104-358, at 9 (1996). Therefore, analysis of § 2252A and § 2252 can proceed in the same fashion.

85. *Davenport*, 519 F.3d at 945.

86. *Id.*

87. *Id.* at 944.

88. *Id.* at 948.

89. *Id.*

defense for “possession” but not “receipt.” Section 2252A(d) makes it an affirmative defense to possess less than three images, provided that the defendant promptly destroys the images or notifies a law enforcement agency.⁹⁰ When comparing two different statutory provisions to determine if one requires proof of a fact that the other does not, the dissent argued that affirmative defenses should be part of the *Blockburger* analysis.⁹¹ Therefore, the dissent would have effectively read the affirmative defense into the statute as an actual element of the crime. The dissent opined that “[t]he crime of possession requires proof that the defendant possessed three or more images or failed to delete the images or inform the police about them.”⁹² Because “receipt” did not require proof of any of these facts, the dissent maintained that there was no double jeopardy problem under *Blockburger*.

But the majority took a different approach when considering how affirmative defenses should factor into the *Blockburger* test. The majority focused on the fact that the government is not *required* to prove an affirmative defense at all; a fact completely overlooked by the dissent.⁹³ To be sure, the government is not burdened with proving the nonexistence of an affirmative defense.⁹⁴ In fact, if it were, the affirmative defense would morph into an element of the crime itself. The majority correctly concluded that § 2252A(d)’s affirmative defense did not *require* proof of a fact needed for “possession” that was not *required* for “receipt.”⁹⁵ As a result, a majority of the Ninth Circuit was convinced that the statute was problematic under *Blockburger*.

The dissent in *Davenport* also disagreed with the majority’s conclusion that Congress did not clearly intend to create multiple punishments for “receipt” and “possession” of child pornography.⁹⁶ The dissent stressed, and the majority acknowledged, that even if the “receipt” and “possession” provisions of § 2252 were problematic under *Blockburger*; the court could still impose two punishments if Congress intended to.⁹⁷ But the majority and the dissent essentially disagreed about the clarity

90. 18 U.S.C. § 2252A(d) (2008).

91. *United States v. Davenport*, 519 F.3d 940, 948 (9th Cir. 2008).

92. *Id.*

93. *Id.* at 945.

94. *Patterson v. New York*, 432 U.S. 197, 210 (1977) (“Proof of the nonexistence of all affirmative defenses has never been constitutionally required.”).

95. *Davenport*, 519 F.3d at 945 (“The factual prerequisites of [the affirmative defense]—namely, that the defendant possessed fewer than three images of child pornography and, among other things, promptly either took reasonable steps to destroy each image or reported the matter to law enforcement—are not facts that *require* proof under *Blockburger* at all.”).

96. *Id.* at 946 (“We disagree with the dissent’s conclusion that Congress has ‘clearly expressed’ a ‘legislative intention to the contrary.’”).

97. *Id.* at 946, 949.

with which Congress must express its intent when authorizing multiple punishments for the same offense.⁹⁸ At its core, this is a disagreement about the effect of *Blockburger* and the weight of the presumption its test creates. The majority concluded, “the presumption against multiple punishment arising from a *Blockburger* analysis could be overcome by a clear expression of legislative intent to the contrary.”⁹⁹ The dissenting judge criticized this reading because, in her view, it “improperly views ‘the application of the *Blockburger* rule as a conclusive determinant of legislative intent, rather than as a useful canon of statutory construction.’”¹⁰⁰ But the *Blockburger* test becomes a “useful canon of statutory construction” instead of conclusive if, and only if, there are other clear indicators of congressional intent that rebut the presumption against imposing multiple punishments.¹⁰¹ So what indicators of congressional intent can the courts look to and how clear do they have to be to overcome the *Blockburger* presumption? That is the key question and one that split the court in *Davenport*.

The dissent looked at two different indicators to reach the conclusion that “Congress clearly intended to permit cumulative punishment for receipt of child pornography and possession of child pornography.”¹⁰² The dissent would have authorized multiple punishments because “Congress plainly authorized cumulative punishments when it enacted the law in 1996” and “amended the statute to ‘get tougher’ on child pornography crimes.”¹⁰³ Those indicators were not conclusive enough to persuade the majority that Congress clearly intended to impose multiple punishments for “receipt” and “possession” under § 2252.¹⁰⁴ The majority was particularly concerned that Congress never “frame[d] receipt and possession as two distinct harms.”¹⁰⁵ But the dissenting judge opined that an express statutory provision authorizing

98. *Id.* at 946 (“[N]owhere in its congressional findings does Congress explicitly frame receipt and possession as two distinct harms; the dissent’s characterization of two distinct harms emanating from receipt and possession, while perhaps reasonable, is superimposed onto Congress’s findings. An equally plausible interpretation of Congress’s findings is that the harms Congress identified emanate from the general existence of child pornography, and relate simultaneously to both receipt and possession of those illicit materials.”). *Contra id.* at 950 (“Congress explicitly found that child pornography causes many harms. Some of those harms are caused by receipt but not by possession, and others are caused by possession but not by receipt.”).

99. *Id.* at 947.

100. *Id.* at 951 (quoting *Garrett v. United States*, 471 U.S. 773, 779 (1985)).

101. *See, e.g., Garrett*, 472 U.S. at 471, 779 (The “*Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history”); *Missouri v. Hunter*, 559 U.S. 359, 368 (1983); *Albernaz v. United States*, 450 U.S. 333, 340 (1981); *Whalen v. United States*, 445 U.S. 684, 691–92 (1980).

102. *United States v. Davenport*, 519 F.3d 940, 952 (9th Cir. 2008).

103. *Id.*

104. *Id.* at 946.

105. *Id.*

multiple punishments is not necessary for courts to impose them, and criticized the majority for searching for clearer provisions.¹⁰⁶

To be sure, an express provision authorizing multiple punishments is not necessary to overcome a *Blockburger* presumption.¹⁰⁷ But some aspect of legislative history must demonstrate that “the two statutory provisions are ‘directed to separate evils’ or address ‘diverse societal harms.’”¹⁰⁸ The dissent found that “receipt” and “possession” of child pornography implicated distinct harms because “[s]ome . . . harms are caused by receipt but not by possession, and others are caused by possession but not by receipt.”¹⁰⁹ The dissent offered no explanation for this statement but other courts have acknowledged a distinction between the two offenses when confronted with Guideline challenges.¹¹⁰ Some courts distinguish “receipt” and “possession” on the grounds that “receiving” child pornography fosters the market for this material and keeps producers in business.¹¹¹

It is difficult to see how receivers increase the demand for child pornography but possessors do not. The distinction is purely semantic. Defendants “receive” child pornography for two reasons: (1) they want to possess it for personal use, or (2) they want to sell or trade it. Therefore, anyone who “receives” child pornography must be guilty of either possession or trafficking. Traffickers promote the further dissemination of child pornography and increase its availability to others. But personal-use receivers/possessors do not directly increase the availability of child pornography to others. They are, instead, the end-users that support the traffickers and keep them in business. Those who “receive” and continuously “possess” child pornography for personal use do not increase the market for child pornography any more than those who “receive” it and instantaneously discard it. Therefore, § 2252’s “receipt” and “possession” provisions cannot be directed at separate evils because

106. *Id.* at 951.

107. *See, e.g.,* *Garrett v. United States*, 471 U.S. 773, 778–86 (1985).

108. *United States v. Davenport*, 519 F.3d 940, 950 (9th Cir. 2008) (quoting *Ball v. United States*, 470 U.S. 856, 864 (1985); *Albernaz v. United States*, 450 U.S. 333, 343 (1981)).

109. *Davenport*, 519 F.3d at 950.

110. *See, e.g.,* *United States v. Myers*, 355 F.3d 1040, 1043 (7th Cir. 2004) (“possession and receipt are not the same conduct and threaten distinct harms”); *United States v. Grosenheider*, 200 F.3d 321, 332–33 (5th Cir. 2000) (“It is clear that Congress established a series of distinctly separate offenses respecting child pornography, with higher sentences for offenses involving conduct more likely to be, or more directly, harmful to minors than the mere possession offense”); *United States v. Ellison*, 113 F.3d 77, 81 (7th Cir. 1997) (Guideline § 2G2.2 punishes “receipt” more severely than “possession” because “receiving” child pornography “creates or strengthens the market for child pornography” and “receipt of the prohibited materials for personal use, without more, keeps producers and distributors of this filth in business.”).

111. *See, e.g., Ellison*, 113 F.3d at 81.

the harm that flows from “receipt” is necessarily committed by the possessors at some earlier time.

It is interesting that the dissent in *Davenport* cited *Ball* to suggest that Congress must show an intent to create punishments directed at two separate evils. This is because, in *Ball*, the Supreme Court specifically found that overlapping “receipt” and “possession” statutes were “simply not ‘directed to separate evils.’”¹¹² The Court in *Ball* by no means suggested that *all* statutes punishing “receipt” and “possession” of contraband punish the same evil. But one would think that, in light of *Ball*, Congress would offer more clarity if it truly intended to impose multiple punishments for “receipt” and “possession” of contraband. After all, a unanimous Court in *Ball* concluded: “Congress seems clearly to have recognized that a felon who receives a firearm must also possess it, and thus had no intention of subjecting that person to two convictions for the same criminal act.”¹¹³ It is safe to assume that Congress was aware of *Ball* when possession of child pornography was criminalized in 1990. Therefore, if Congress wanted to address some distinct evil caused by “possession” that did not extend to “receipt,” it would have or should have expressed itself more clearly. That is precisely what *Blockburger* requires. Because Congress did not clearly frame “receipt” and “possession” as distinct evils, it is much more likely that § 2252’s “possession” provision addressed the same evil as the already enacted “receipt” provision. As discussed in Part II, the “possession” provision was added so that personal-use possessors were punished under § 2252 in addition to personal-use receivers. Congress did not want the timing of law enforcement intervention to determine who could be punished. If anything, this indicates that Congress recognized the inherent nexus between the two offenses.

Since *Davenport*, no court applying *Blockburger* to § 2252 has come to the dissent’s conclusion in that case. Other Ninth Circuit decisions have affirmed the *Davenport* majority’s *Blockburger* analysis.¹¹⁴ These decisions recognize that it is *per se* double jeopardy error to convict defendants of both “receiving” and “possessing” the same images of child pornography, no matter how large the collection. In *Giberson*, a search of the defendant’s computer “revealed more than 700 images of child pornography.”¹¹⁵ In *Brobst*, officers found twenty-eight printed pages of child pornography at the defendant’s residence.¹¹⁶ Therefore, at

112. *Ball*, 470 U.S. at 864 (quoting *Albernaz*, 450 U.S. at 343).

113. *Id.* at 862.

114. *United States v. Brobst*, 558 F.3d 982 (9th Cir. 2009); *United States v. Giberson*, 527 F.3d 882 (9th Cir. 2008).

115. *Giberson*, 527 F.3d at 885.

116. *Brobst*, 558 F.3d at 988.

least in the Ninth Circuit, Defendants cannot be convicted for “receipt” and “possession” of the same images of child pornography.

Soon after *Davenport*, the Third Circuit held that “possessing” child pornography is a lesser included offense of “receiving” child pornography under *Blockburger* in *United States v. Miller*.¹¹⁷ The Third Circuit did not discuss the *Davenport* decision but found *Ball* controlling to its *Blockburger* analysis.¹¹⁸ In *Miller*, the defendant was found guilty of “receiving” twenty images of child pornography and “possessing” the same twenty images.¹¹⁹ The Third Circuit held that “the double jeopardy clause barred convictions for both receiving and possessing the same images of child pornography.”¹²⁰

Like the Ninth Circuit, the Third Circuit qualified its holding by stating that “receipt” and “possession” convictions violated the Double Jeopardy Clause when they were based on the “same images.”¹²¹ The court in *Miller* remanded the case to the district court so that it could vacate one of the defendant’s convictions.¹²² Consistent with *Ball*, the court in *Miller* let the “the District Court . . . exercise its discretion to vacate one of the underlying convictions.”¹²³

D. Prosecutorial Manipulation of Double Jeopardy Protection

In *Ball*, the discretion given to the district court to vacate either conviction was essentially trivial because felons convicted of “receiving” or “possessing” firearms were not subject to radically different mandatory punishments. But in child pornography cases, the district court’s decision to vacate either conviction becomes extremely consequential. In *Miller* and *Davenport*, the Third and Ninth Circuits effectively stripped the government’s unwarranted power to determine the defendants’ sentence by seeking convictions for “receipt” and “possession.” By allowing the sentencing judge discretion to vacate “receipt” convictions on remand, the remedy in *Miller* and *Davenport* allows the judge to avoid the harsh five-year mandatory minimum if the facts so warrant. Such a result is desirable, particularly when “the Court finds that the mandatory minimum exceeds a fair and just sentence that is sufficient but not greater than necessary to comply with” the sentencing

117. 527 F.3d 54, 72 (3d Cir. 2008).

118. *Id.*

119. *Id.* at 58.

120. *Id.*

121. *Id.*

122. *Id.* at 74.

123. *Id.* (quoting *Ball v. United States*, 470 U.S. 856, 864 (1985)).

factors in 18 U.S.C. § 3553(a).¹²⁴ This properly restores sentencing authority with the Judiciary and avoids arbitrary manipulation of § 2252's ambiguity by the Executive.

But prosecutors can avoid the result in *Miller* and *Davenport* and ensure that defendants receive the five-year mandatory minimum sentence imposed for "receipt" convictions. In *United States v. Bobb*¹²⁵ and *United States v. Polouizzi*,¹²⁶ the Eleventh and Second Circuits addressed the double jeopardy issues implicated by § 2252. In both cases, the government found the defendant in possession of a collection of child pornography images and videos that were downloaded.¹²⁷ The government then used some files from the collection to prove "receipt" on specific dates and other files to prove "possession" on a later date.¹²⁸ By charging defendants this way, the government was able to obtain convictions for both "receipt" and "possession" without violating the double jeopardy principles laid out in *Miller* and *Davenport*.¹²⁹ In *Bobb*, the Eleventh Circuit distinguished *Miller* and *Davenport* on the grounds that "receipt" and "possession" occurred on different dates as alleged in the indictment.¹³⁰ In *Polouizzi*, the Second Circuit distinguished *Miller* and *Davenport* on the grounds that different images were used to prove "receipt" and "possession."¹³¹ But a closer analysis of *Bobb* and *Polouizzi* reveals that distinguishing *Miller* and *Davenport* on these grounds does not adequately protect defendants from double jeopardy. The prosecutorial approach used in *Bobb* and *Polouizzi* simply allows the government to arbitrarily manipulate the rule in *Blockburger*.

In *Bobb*, the Federal Bureau of Investigation ("FBI") discovered that an individual in Miami, Florida downloaded seven zip files and numerous picture files of child pornography from a website.¹³² The FBI eventually traced that activity to the defendant's residence and obtained a search warrant for his apartment.¹³³ During the search, the FBI discovered 6124 images and seven "zip files" containing child pornography on

124. *United States v. Szymanski*, No. 08-CR-417, 2009 WL 1212252, at *4 (N.D. Ohio Apr. 30, 2009).

125. 577 F.3d 1366 (11th Cir. 2009). I feel obligated to disclose that I assisted Bobb's counsel after the Eleventh Circuit's decision. Bobb filed a petition for a writ of certiorari in the United States Supreme Court challenging his convictions on double jeopardy grounds. The Court ordered the Solicitor General to respond to the petition, indicating that the arguments raised and the issued presented warranted further briefing. The Court eventually denied Bobb's petition.

126. 564 F.3d 142 (2d Cir. 2009).

127. *Bobb*, 577 F.3d at 1368; *Polouizzi*, 564 F.3d at 147.

128. *Bobb*, 577 F.3d at 1369–70; *Polouizzi*, 564 F.3d at 147–48.

129. *Bobb*, 577 F.3d at 1371; *Polouizzi*, 564 F.3d at 150.

130. *Bobb*, 577 F.3d at 1375.

131. *Polouizzi*, 564 F.3d at 159.

132. *Bobb*, 577 F.3d at 1368.

133. *Id.*

the defendant's laptop computer.¹³⁴ The indictment charged the defendant "with one count of 'receiving' child pornography on November 12, 2004, in violation of 18 U.S.C. § 2252A(a)(2)(B) and one count of knowingly 'possessing' child pornography on August 4, 2005, in violation of 18 U.S.C. § 2252A(a)(5)(B)."¹³⁵ At trial, the Government used the seven zip files downloaded on November 12, 2004 to prove the "receiving" count and the additional images found during the execution of the search warrant to prove the "possession" count.¹³⁶ A jury found the defendant guilty on both counts and the district court sentenced him to "ninety-six months' imprisonment and five years' supervised release."¹³⁷

On appeal, the Eleventh Circuit agreed with the defendant's initial argument that "possession" is a lesser-included offense of "receipt" under *Blockburger* and *Ball*.¹³⁸ However, the court eventually affirmed both of Bobb's convictions. The court distinguished *Ball*, *Miller*, *Davenport*, *Giberson*, and *Brobst* on the grounds that the defendant's convictions "were based on two distinct offenses, occurring on two different dates, and proscribed by two different statutes."¹³⁹ The *Bobb* court failed to fully examine the complexity of this issue by distinguishing these authorities on the grounds that "receipt" and "possession" allegedly occurred on "two different dates." The fact that the defendant "received" and "possessed" child pornography on two separate dates does not distinguish *Miller*, *Davenport*, *Giberson*, or *Brobst*. In each case, the defendant "possessed" images that were "received" at an earlier time. Unless the defendant is caught in possession of images on the same day he receives them, the date of "receipt" and "possession" will always diverge. Thus, there is no distinction between the facts in *Bobb* and the authorities distinguished by the Eleventh Circuit.

The only distinction that can be drawn between *Bobb* and the other cases is the indictment. The indictment in *Bobb* charged the defendant with "receipt" on a specific date and "possession" around the time the search was conducted.¹⁴⁰ The Government broke up the collection of images found in Bobb's possession during the search and offered some

134. *Id.* at 1368.

135. *Id.* at 1369–70.

136. *Id.* at 1370.

137. *Id.* at 1371.

138. *Id.* at 1375.

139. *Id.*

140. *Id.* at 1369–70 ("[A] federal grand jury returned an indictment charging Bobb with one count of 'receiving' child pornography on November 12, 2004, in violation of 18 U.S.C. § 2252A(a)(2)(B) ('Count I'), and one count of knowingly 'possessing' child pornography on August 4, 2005, in violation of 18 U.S.C. § 2252A(a)(5)(B) ('Count II').").

images to prove “receipt” and others to prove “possession.”¹⁴¹ The same could have been done in *Miller*, *Davenport*, *Giberson*, or *Brobst*. Thus, the court in *Bobb* allowed the government to circumvent the double jeopardy protection afforded in those cases. Any time a defendant possesses multiple images, the government will be able to follow this approach and obtain convictions for “receipt” and “possession.” This ultimately allows the prosecutor to determine the defendant’s minimum sentence because it leaves judges no choice but to sentence the offender to five years imprisonment—even if such a sentence is extremely excessive in light of the defendant’s conduct.

In *Polouizzi*, the Second Circuit sanctioned an approach to prosecution similar to the approach used in *Bobb*. The defendant in *Polouizzi* was charged with twelve counts of “receipt” and eleven counts of “possession.”¹⁴² The “possession” counts were based on images the defendant possessed when the authorities searched his home.¹⁴³ The “receipt” counts charged the defendant with receiving images on four different dates prior the search of his home.¹⁴⁴ Seven of the images used to prove “receipt” were also used to prove “possession.”¹⁴⁵ The jury convicted the defendant on all counts.¹⁴⁶

Before trial, the defendant requested that the jury “be informed of the statutory mandatory minimum (five years) and maximum (twenty years) sentence” that accompany “receipt” convictions under § 2252(a)(2).¹⁴⁷ The court rejected that request and allowed the trial to proceed. After the jury reached its verdict the court gave each juror an opportunity to express his or her view on how the defendant should be punished.¹⁴⁸ Five of the jurors expressly told the court that the defendant should receive compulsory mental health treatment instead of incarceration.¹⁴⁹ Four of those five jurors told the court that they would have found the defendant not guilty had they known the mandatory minimum and maximum punishments for the “receipt” convictions.¹⁵⁰ The defendant moved for a new trial pursuant to Rule 33 of the Federal Rules of

141. *Id.* at 1370 (“[T]he evidence the Government planned to use to prove Count I, the ‘receiving’ count, was the seven zip files that Bobb had allegedly downloaded from the Center’s website on November 12, 2004, and the rest of the images would be used to prove Count II, the ‘possessing’ count.”).

142. *United States v. Polouizzi*, 564 F.3d 142, 146 (2d Cir. 2009).

143. *Id.* at 148.

144. *Id.* at 147.

145. *Id.* at 148 (“[E]ach image charged in Counts 18-24 also was the subject of a receipt count.”).

146. *Id.*

147. *Id.*

148. *Id.* at 150.

149. *Id.* at 151.

150. *Id.*

Criminal Procedure based on the fact that the court refused to inform the jury of the mandatory punishments when it had the discretion to do so.¹⁵¹ The court granted the defendant's "motion for a new trial on the receipt counts," conceding "that it had erred in refusing to advise the jury of the mandatory minimum sentence for those counts."¹⁵²

On appeal by defendant and cross-appeal by the government, the Second Circuit addressed the double jeopardy issues implicated by the defendant's convictions.¹⁵³ The court began by accepting the defendant's argument "that Congress intended to subject a person who simultaneously possesses multiple [images] of child pornography to only one conviction under 18 U.S.C. § 2252(a)(4)(B)."¹⁵⁴ Indeed, "the plain language of the statute provides that a person who possesses '1 or more' matters containing a prohibited image has violated the statute only once."¹⁵⁵ Therefore, the district court was instructed to vacate all but one of the defendant's convictions for "possession" on remand.¹⁵⁶

Even though no "receipt" convictions were entered against the defendant, the court decided to address the defendant's double jeopardy argument as to the "receipt" counts "in view of the fact that the district court [was] likely to be faced with [those] issues on remand."¹⁵⁷ Because Congress criminalized the "receipt" of "any" images of child pornography, the court invoked the rule of lenity and concluded "that a person who receives multiple prohibited images in a single transaction can only be charged with a single violation of § 2252(a)(2)."¹⁵⁸ Therefore, according to the Second Circuit, evidence that the defendant downloaded images on four separate days "would appear to support [the defendant's] conviction on four receipt counts—one for each date on which he received images—but not multiple receipt counts per day."¹⁵⁹

The court then addressed the defendant's *Blockburger* argument that he could not be convicted of both "receipt" and "possession." The court found "*Davenport* and *Miller* persuasive" and acknowledged that another case from the Second Circuit already assumed that "possessing" child pornography is a lesser-included offense of "receiving" it.¹⁶⁰ However, the court in *Polouizzi* distinguished *Davenport* and *Miller* on the grounds that four of the files used to prove "possession" were not used

151. *Id.*

152. *Id.*

153. *Id.* at 153–59.

154. *Id.* at 155.

155. *Id.*

156. *Id.* at 157.

157. *Id.*

158. *Id.* at 158.

159. *Id.* at 158.

160. *Id.* at 159 (citing *United States v. Irving*, 554 F.3d 64, 78 (2d Cir. 2009)).

to prove “receipt.”¹⁶¹ Therefore, the court held that *Blockburger* did not apply because, “[i]n such circumstances, it would appear that Congress intended to allow separate convictions.”¹⁶²

E. *In Search of a Consistent Judicial Approach*

The courts in *Davenport*, *Miller*, *Bobb* and *Polouizzi* have established four general principles that apply in cases where defendants are charged with “receiving” and “possessing” multiple images of child pornography:

1. First Principle: The rule of lenity permits only one “possession” conviction when a defendant possesses multiple images.¹⁶³
2. Second Principle: The rule of lenity permits only one “receipt” conviction when a defendant receives multiple images in one “transaction.”¹⁶⁴
3. Third Principle: Defendants can only be convicted of “receipt” and “possession” if the dates alleged for “receipt” and “possession” are different.¹⁶⁵
4. Fourth Principle: Defendants can only be convicted of “receipt” and “possession” if the images offered to prove “receipt” are different from the images offered to prove “possession.”¹⁶⁶

When combined, these four principles have several consequences that can be illustrated using hypothetical situations.

First, imagine a defendant who downloads one large file folder that contains thirty images of child pornography on January 1st. The government searches the defendant’s house on February 1st and finds all thirty images stored on his computer. The government proceeds to charge the defendant with “possession” of fifteen images of child pornography on February 1st and “receipt” of fifteen images of child pornography on January 1st. At trial, the government simply does not attempt to prove when the fifteen images offered to prove “possession” were received. The defendant is then convicted on both counts. There is no double jeopardy error in this scenario under current law because the alleged dates of “receipt” and “possession” are different and the images used to prove “receipt” are different from the images used to prove “possession.”

161. *Polouizzi*, 564 F.3d at 159.

162. *Id.* (emphasis added).

163. *Id.* at 155.

164. *Id.* at 158.

165. *United States v. Bobb*, 577 F.3d 1366, 1375 (11th Cir. 2009).

166. *Bobb*, 577 F.3d at 1375; *Polouizzi*, 564 F.3d at 159; *United States v. Miller*, 527 F.3d 54, 72 (3d Cir. 2008); *United States v. Davenport*, 519 F.3d 940, 945 (9th Cir. 2008).

These convictions would satisfy the four established principles. However, this hypothetical demonstrates how the government can use the indictment to arbitrarily manipulate the holdings in *Miller* and *Davenport* when defendants receive multiple images at once and continuously possesses those same images.

At a bare minimum, the government should be required to prove separate acts of “receipt” to obtain two convictions. This is precisely what was required of the government when prosecuting felons for “receiving” and “possessing” firearms.¹⁶⁷ In *Bobb* and *Polouizzi*, the courts improperly focused on the fact that the dates for “receipt” and “possession” were different and that the images used to prove each offense were different. In doing so, the courts lost sight of the relevant inquiry. That is, were the images offered to prove “receipt” and “possession” received through the same transaction (i.e., through the same act)? If the images offered to prove “possession” were received coincident to the images offered to prove “receipt,” the convictions rest upon the same act in violation of the Double Jeopardy Clause. But, in *Bobb* and *Polouizzi*, the government never proved when the defendant received the images offered to prove “possession.” Therefore, the Third Principle is irrelevant if the government does not prove separate acts of “receipt” because the time of “receipt” and “possession” will always differ—with “receipt” always occurring before “possession.”

However, in almost all child pornography cases, the government will be able to prove separate acts of “receipt.” Typical child pornography defendants download and receive multiple images through separate “transactions,” regardless of how “transactions” are defined. These cases require a slightly different double jeopardy analysis. Imagine a defendant who downloads ten images on January 1st, ten images on February 1st and ten images on March 1st. The government searches the defendant’s house on April 1st and finds all thirty images stored on his computer. Under the First Principle, the defendant can only be convicted on one count of “possession” which occurred on April 1st. Under the Second Principle, the defendant can also be convicted on three counts of “receipt” which occurred on January 1st, February 1st and March 1st. These convictions would not violate the Third Principle because the date of “possession” is different from the dates of “receipt.” Yet these convictions would violate the Fourth Principle because the images offered to prove each count of “receipt” were used to prove the single count of “possession.”

There are two ways the government can avoid violating the Fourth Principle in this scenario and still convict the defendant of “receipt” and

167. See discussion *infra* Part III.B.

“possession.” First, it could charge the defendant with only two counts of “receipt” occurring on January 1st and February 1st. Then, it could offer the ten images received on March 1st to prove “possession” without violating the Fourth Principle. The government could also use the approach taken in the first hypothetical to obtain convictions on all three “receipt” counts and still convict the defendant on one “possession” count. This could be achieved by simply breaking up the images received on one of the dates into two sets. For example, the government could break up the images received on March 1st into two sets of five images. In the indictment, the government could charge the defendant with “receiving” five images on March 1st and “possessing” the left over five images on April 1st. This approach complies with the Fourth Principle, but it demonstrates just how easy it is for the government to arbitrarily avoid the double jeopardy protection afforded to the defendants in *Miller* and *Davenport*.

The Second Principle is what really allows the government to circumvent the double jeopardy protection afforded in *Miller* and *Davenport*. Like the court in *Bullock*, the Second Circuit in *Polouizzi* refused to merge multiple “receipt” counts into one. Instead, *Polouizzi* established the Second Principle that separate “transactions” support separate “receipt” counts. The Second Principle creates the same “merger” problem the court faced in *Bullock* in the firearm context. Just as with firearms, it is problematic to allow multiple “receipt” convictions based on separate “transactions” involving child pornography.

There are two main reasons why separate instances of “receiving” child pornography should merge into a single count. First, the stockpiling problem that concerned the court in *Bullock* is adequately addressed by the child pornography Guidelines, which take into account the number of images involved.¹⁶⁸ Like the firearm statute at issue in *Bullock*, § 2252 ambiguously punishes the “receipt” of “any” child pornography. This ambiguity creates the same sentencing problem that resulted from the *Bullock* decision. That is, someone who receives a thousand images of child pornography at once can receive only one conviction whereas someone who receives less total images, but at different times, can be convicted on multiple counts. The child pornography Guidelines create the necessary link between the severity of punishment and the culpability of the defendant.¹⁶⁹ Defendants who “receive” and “possess” more images are subjected to more punishment under the Guidelines through

168. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (2008) (“If the offense involved— (A) at least 10 images, but fewer than 150, increase by 2 levels; (B) at least 150 images, but fewer than 300, increase by 3 levels; (C) at least 300 images, but fewer than 600, increase by 4 levels; and (D) 600 or more images, increase by 5 levels.”).

169. *Id.*

enhancements.¹⁷⁰ If “receipt” counts are not merged, Defendants will inevitably be subjected to inconsistent prosecution and punishment.

Merging “receipt” counts also eliminates the need to decipher when a separate “transaction” occurs under the Second Principle—a difficult and potentially arbitrary task. This is especially true in the context of downloading because efforts to differentiate between acts of “receipt” are unsatisfying. The court was able to dodge this technical issue in *Polouizzi* because the government alleged that the defendant downloaded images on four different dates, but did not try to prove separate instances of “receipt” within those four days. Because “the evidence did not show, and the jury was not asked to determine whether [the defendant’s] receipt of multiple images on any one of these dates reflected a single simultaneous transfer or discrete and distinct transfers,” the court held that the evidence could only support four counts of “receipt”—one for each day.¹⁷¹

But, eventually, courts will have to decide what evidence can support separate convictions for “receiving” child pornography. In the most technical sense, it would seem as though each download constitutes a separate “transaction” that could result in one “receipt” conviction. This would result in multiple “receipt” convictions for typical child pornography defendants, most of whom download numerous images at different times. But if each download constitutes a single act of “receipt,” the *Bullock* problem still infects sentencing integrity. Under this construction, a defendant who “receives” ten images by clicking on and downloading each individual image at different times would be subject to ten “receipt” counts. At the same time, another defendant who clicks on and downloads one file containing one thousand images would be subject to only one count under the Second Principle.

The most consistent way for courts to resolve the double jeopardy problem is to merge all instances of “receiving” child pornography into a single count. That places all child pornography defendants in substantially the same position and prevents the kind of disparate sentencing that occurs when prosecutors are given the discretion to charge similarly situated defendants in different ways. If all instances of “receipt” merged into a single count, convicting defendants of “receipt” and “possession” would become *per se* double jeopardy error regardless of how many images were involved and regardless of how many different instances of “transfer” occurred. That is because the images used to prove “receipt” would have to be the same as the images used to prove “possession,” violating the Fourth Principle. Consistent with *Ball*, all

170. *Id.*

171. *Polouizzi*, 564 F.3d at 158.

child pornography downloaders could be charged with one count of "receipt" and one count of "possession." But if the defendant is convicted on both counts, the district court would be required to vacate one of those convictions at its discretion to prevent double jeopardy error. Then, regardless of which conviction is vacated, Guideline § 2G2.2(b)(7) would allow judges to enhance the defendant's sentence in accordance with the number of images received or possessed. Consequently, the judge's discretion to vacate "receipt" convictions would ultimately restore sentencing authority with the Judiciary while simultaneously stripping it from the Executive.

IV. CONCLUSION

The decisions in *Bobb* and *Polouizzi* cast serious doubt on the future of double jeopardy protection for defendants convicted of "receiving" and "possessing" child pornography. Those cases sanction an approach to prosecution that will swallow up the double jeopardy protection necessary to prevent disparate sentencing and multiple convictions that punish what is essentially the same offense. If each download constitutes the offense of "receipt," the double jeopardy protection afforded in *Miller* and *Davenport* becomes meaningless. Prosecutors can always allege one instance of "receipt" that occurred at a definitive point in time and use other images received at a different time to prove "possession." This method of prosecution is consistent with the rationale in *Bullock*. But, in the context of child pornography, it allows prosecutors to manipulate the statutory scheme to obtain "receipt" convictions when it is at best unclear whether Congress intended to impose five-year mandatory sentences on every person who receives and, by definition, possesses child pornography.

It appears as though there is no adequate judicial solution to this problem. Even if courts were to require the merger of "receipt" counts, the government could always just charge defendants with "receipt" and not "possession." This would avoid the *Blockburger* problem altogether and lock in five-year mandatory sentences for every child pornography offender convicted. The judge would then have no discretion to vacate the "receipt" conviction because there would be no double jeopardy error to begin with. This is why, ultimately, Congress must fix the "puzzle" recognized by Judge Posner so that "receipt" and "possession" of child pornography are punished equally.

Before fixing the "puzzle," however, Congress must determine whether it wants personal-use receivers and possessors of child pornography to serve mandatory five-year prison sentences. If Congress determines that all receivers and possessors deserve a minimum of five years

in prison, then it should amend § 2252 by eliminating § 2252(b)(2) and adding violations of § 2252(a)(4) within the scope of § 2252(b)(1). Currently, § 2252(b)(1) punishes anyone who “violates, or attempts or conspires to violate, paragraph (1), (2), or (3) of [§ 2252(a)]” for a period of “not less than 5 years and not more than 20 years” imprisonment.¹⁷² By simply adding violations of paragraph (4) to § 2252(b)(1), Congress could easily make the mandatory minimum and maximum punishments for “receipt” and “possession” of child pornography equal.

If Congress determined that simple receivers and possessors of child pornography deserve some lesser degree of mandatory punishment or no mandatory punishment at all, it would be easiest to alter the Guidelines. Congress could alter the Guidelines by directing the U.S. Sentencing Commission to take “receipt” convictions outside the scope of § 2G2.2. The Commission could then create a new Guideline section that specifically addresses convictions for simple “receipt” and “possession” of child pornography. The new Guideline section must punish simple “receipt” and “possession” equally. This is exactly what Chairman Wilkens initially suggested when “possession” of child pornography was first criminalized in 1990.¹⁷³

If Congress does not ensure that “receipt” and “possession” are punished equally, prosecutors will continue to determine the sentencing fate of a growing number of child pornography defendants. The government’s broad discretion to charge defendant’s with “receipt,” “possession” or both has a profound impact on child pornography sentencing, which is already illogical and inconsistent.¹⁷⁴ This discretion is particularly troubling considering that the difference “between the receipt of child pornography and the possession of child pornography is a distinction without a difference.”¹⁷⁵ The arbitrary differences in punishment for “receipt” and “possession” ultimately furnishes the Executive with unwarranted power to determine punishment—a quasi-legislative and quasi-judicial function. By fixing § 2252’s paradox, Congress can lend clarity and consistency to an extremely confused and consequential area of the law and, at the same time, restore judges and prosecutors to their proper roles.

172. 18 U.S.C. § 2252(b)(1) (2008).

173. See 137 CONG. REC. H6736-02 (1991) (letter from Chairman Wilkens).

174. Interestingly enough, the Department of Justice under President Obama may now recognize the need to resolve, or at least look into, these inconsistencies. See Marcia Coyle, *DOJ Wants Sentences Examined*, NAT’L L.J., July 19, 2010, at 21 (citing an annual report issued by the Department of Justice that urged the U.S. Sentencing Commission to investigate disparate child pornography sentences).

175. *United States v. Szymanski*, No. 08-CR-417, 2009 WL 1212252, at *4.

