COMMENT

TODAY'S TOOL FOR INTERPRETING YESTERDAY'S CONVICTION: UNDERSTANDING THE MANDATORY STATUTORY SENTENCE ENHANCEMENT IN FEDERAL CHILD PORNOGRAPHY CASES

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The child pornography problem has become a digital dilemma. As technology improves, the ground allowing offenders to commit these crimes (and remain undetected) becomes more fertile. The number of offenders who are caught and prosecuted is growing but so is the debate over how these offenders should be sentenced.

This Comment examines the statutory structure for imposing mandatory minimum sentences in federal child pornography cases. When an offender has a "qualifying" prior conviction, that conviction triggers a recidivist enhancement, or statutory mandatory minimum sentence. As a result of ambiguous statutory language, vague Supreme Court precedent, and variations among state penal codes, federal sentencing judges are struggling to define consistently exactly what qualifies as a "qualifying" conviction in child pornography cases. The recidivist enhancement—intended to target the most dangerous repeat offenders—is now applied in almost lottery-like fashion. This Comment explains how inconsistent application of the recidivist enhancement is one underlying, but typically overlooked, cause for judicial rebellion against the child pornography sentencing structure.

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INTRODUCTION

There is one indisputable fact present in all child pornography cases: a minor was a victim of a crime.[1] Every image is a permanent depiction of immediate abuse and continuing harm.[2] As the technology to produce, store, and send child pornography continues to expand, the number of victims continues to grow. The belief that child pornography

1. "The child victims are first sexually assaulted in order to produce the vile, and often violent, images. They are then victimized again when these images of their sexual assault are traded over the Internet in massive numbers by like-minded people across the globe." U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 3 (2010), *available at* http://www.justice.gov/psc/docs/natstrategyreport.pdf.

2. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: FEDERAL CHILD PORNOGRAPHY OFFENSES 311 (2012), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Sex_Offense_Topics/201212_Federal_Child_Pornography_Offenses/Full_Report_to_Congress.pdf. "Many victims live with persistent concern over who has seen images of their sexual abuse and suffer by knowing that their images are being used for sexual gratification." *Id.*

is not a serious crime is dangerously flawed.[3] Even the phrase "child pornography" masks the "true nature of what these images and videos portray, which is the sexual exploitation and abuse of children."[4]

Victims of child pornography endure unimaginable long-term harm. After a child is sexually abused in front of a camera, he or she goes through the rest of life knowing that the recording is "circulating within the mass distribution system for child pornography."[5] Because there is a widespread, permanent visual record of a child pornography victim's suffering, it is usually more difficult for him or her to recover than it is for a victim of other types of childhood sexual abuse.[6] Long into adulthood, child pornography victims commonly suffer from

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3. *Compare* Mark Hansen, *A Reluctant Rebellion*, A.B.A. J., June 2009, at 54, 57, *available at* http://www.abajournal.com/magazine/article/a_reluctant_rebellion (describing the view that an "offender who swaps a few images online" does not contribute to the growing child pornography problem), *and* Mary G. Leary, *Judicial Challenges to Mandatory Minimum Sentences: A New Frontier the in Debate over Child Pornography Sentencing?*, SEX OFFENDER L. REP., Dec./Jan. 2012, at 3, 3, *with* Melissa Wells & Kimberly J. Mitchell, *Youth Sexual Exploitation on the Internet: DSM-IV Diagnoses and Gender Differences in Co-occurring Mental Health Issues*, 24 CHILD & ADOLESCENT SOC. WORK J. 235, 256 (2007) ("[Y]outh victims of Internet-related sexual exploitation have some of the same mental health characteristics as traditional sexual abuse victims.").

4. ALEXANDRA GELBER, U.S. DEP'T OF JUSTICE, RESPONSE TO "A RELUCTANT REBELLION" 1 (2009), *available at* http://www.justice.gov/criminal/ceos/downloads/ReluctantRebellionResponse.pdf. To understand the problem posed by child pornography, the reader must be aware of the severe abuse inflicted on victims. For example:

> The pictures, films and tapes range from revealing stills of naked children, through more explicit shots of their genitalia thumbed apart, to the recording of oral, anal and vaginal abuse and intercourse. Commonly the children are required to have sex with other youngsters as well as with adults (both male and female). Frequently they are made to urinate on each other or their abusers. Almost invariably their faces, chests or genitalia are coated in semen when the adult men ejaculate over them. Occasionally they are photographed having sex with an animal.

Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J.L. 1, 6–7 (2011) (quoting TIM TATE, CHILD PORNOGRAPHY: AN INVESTIGATION 15–16 (1990)).

5. *United States v. Hicks,* No. 1:09-cr-150, 2009 WL 4110260, at *2 (E.D. Va. Nov. 24, 2009) (quoting S. REP. No. 104-358, at 14 (1996)). One victim explained:

> This knowledge has given me paranoia. I wonder if the people I know have seen these images. I wonder if the men I pass at the grocery store have seen them. Because the most intimate parts of me are being viewed by thousands of strangers and traded around, . . . [i]t feels like I am being raped by each and every one of them.

Id. at *3.

6. David P. Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535, 545 (1981).

post-traumatic stress disorder, including nightmares that area a "graphically realistic rendition[] of the original abuse trauma."[7] Additionally, sexually abused children often display cognitive and emotional effects stemming from the abuse.[8] Evidence indicates that victims of child pornography are at an even greater risk of depression, suicidal tendencies, substance abuse, and general interpersonal problems than are other victims of childhood sexual abuse.[9]

At its core, the Internet child pornography problem is a digital dilemma that is not only the product of child sexual abuse but also the cause of continuing tangible harm of the most vulnerable members of society. An individual who receives, distributes, or possesses child pornography is inextricably linked to a victim's harm. By downloading images of child pornography, the offender creates a demand for the production of additional images.[10] Using the Internet, offenders can easily compile collections consisting of thousands of images, requiring more photographs to be taken to supply the heightened demand.[11] There is evidence that some of the newest images appearing on the Internet depict the abuse of "ever-younger children, in more violent and victimizing situations."[12]

Despite widespread recognition of the child pornography problem and its associated harms, the child pornography industry continues to grow exponentially.[13] The Internet provides an ideal platform for offenders to obtain, share, trade, produce, advertise, and sell child

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7. Molly Smolen, *Redressing Transgression*, 18 BERKELEY J. CRIM. L. 36, 45–46 (2013) (quoting JOHN N. BRIERE, CHILD ABUSE TRAUMA: THEORY AND TREATMENT OF THE LASTING EFFECTS 21 (1992)).

8. *Id.*

9. *Id.* at 45.

10. *Id.* at 55, 59.

11. *Id.* at 55.

12. *Id.*; *see also* MAX TAYLOR & ETHEL QUAYLE, CHILD PORNOGRAPHY: AN INTERNET CRIME 194 (2003) (explaining that once an image is uploaded, there is simply no way to destroy it permanently and end the ongoing harm).

13. U.S. DEP'T OF JUSTICE, *supra* note 1, at 15–16. The number of web sites reported to contain child pornography increased from 261,653 in 2001 to 480,000 in 2004. Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 34, Human Rights Council, U.N. Doc. A/HRC/12/23 (July 13, 2009) (by Najat M'jid Maalla). In 2009, the National Center on Missing and Exploited Children (NCMEC) identified 592,044 child pornography web sites. *Id.* ¶ 35. Although it is impossible to quantify precisely the volume of the child pornography market, a number of factors underscore the fact that the problem is on the rise. The most telling is probably the overwhelming increase in the volume of child pornography images and videos exchanged online combined with the fact that the illegal content is produced using increasingly sophisticated technology. *See* U.S. DEP'T OF JUSTICE, *supra* note 1, at 11–12.

pornography. As technology improves, the ground allowing offenders to commit these crimes (and remain undetected) becomes more fertile.[14] Improved digital recording technology, expansive computer memory storage, quick download and upload Internet speeds, and advances in file sharing technology make it easy for offenders to quickly create, transfer, or receive large volumes of images and videos (collections).[15] While the evolution of technology undoubtedly accounts for much of the rise in child pornography crime, the individuals utilizing the technology are to blame.

Lawmakers,[16] prosecutors,[17] and state and federal authorities[18] alike have been keenly aware of the problem for over two decades.[19] Since 1996, Congress's most notable response to the mass proliferation of child pornography through the Internet has been to impose and increase mandatory minimum sentences for certain sex crimes against children,[20] including child pornography crimes.[21] These mandatory minimum

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14. U.S. DEP'T OF JUSTICE, *supra* note 1, at 9.

15. *Id.* at 11.

16. *See, e.g.*, *Data Retention as a Tool for Investigating Internet Child Pornography and Other Internet Crimes: Hearing Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the H. Comm. on the Judiciary*, 112th Cong. 4–5 (2011) (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary), *available at* http://judiciary.house.gov/_files/hearings/printers/112th/112-3_63873.PDF (proclaiming that the Internet has given predators free reign for nearly effortless trafficking of child pornography, leading to the loss of children's innocence as well as their lives); U.S. SENTENCING COMM'N, *supra* note 2, at 1–6.

17. U.S. SENTENCING COMM'N, *supra* note 2, at 38 (explaining that in addition to a robust effort to prosecute child pornography offenders at the federal level, state prosecutors also zealously investigate and prosecute child exploitation, abuse, and pornography crimes); *see also* U.S. DEP'T OF JUSTICE, *supra* note 1, at 5 (explaining how arrests and prosecutions for child pornography offenses have substantially increased over the past decade, and that "in 2009, 2,427 suspects were indicted for federal child pornography offenses").

18. *See infra* Part I.C.

19. U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 1–2 (2009), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/sex-offenses/20091030_History_Child_Pornography_Guidelines.pdf.

20. *See infra* notes 65–75 and accompanying text.

21. Although the material prohibited by 18 U.S.C. § 2252 is consistently referred to as "child pornography" (and will be referred to as such throughout this Comment), it should be noted that the phrase "child pornography" is not found within § 2252(a). *See* 18 U.S.C. § 2252(a) (2012). Instead, the material prohibited by § 2252(a) is described as any "visual depiction involv[ing] the use of a minor engaging in sexually explicit conduct." § 2252(a)(1)(A). The term "sexually explicit conduct" is described in § 2256(2)(A) as "actual or simulated (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.*

sentences for sex crimes against children arise in two distinct ways. A substantial number of federal crimes against children statutorily require that a convicted offender serve a mandatory minimum sentence,[22] meaning that a sentencing judge *must* impose a sentence at least as long as the minimum length required by the statute of conviction.[23]

Other child exploitation statutes contain a *mandatory statutory sentence enhancement* (MSSE)[24]—a type of recidivist enhancement.[25] When a defendant is convicted under a statute with the MSSE provision, he receives a mandatory minimum sentence *only if* he has a qualifying prior conviction.[26] Qualifying prior convictions include convictions under enumerated federal statutes[27] as well as state-level convictions. Specifically, to trigger the MSSE for a child pornography offense, a defendant's prior conviction must be "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children."[28]

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22. For examples of such crimes, see § 1591(b)(1) (requiring at least a 15-year sentence for an offense of sex trafficking of children under the age of 14 by force, fraud, or coercion); § 2241(c) (requiring at least a 30-year sentence for an offense of engaging in a sexual act with a child under 12, or engaging in a sexual act by force with a child above age 12); § 2251(a), (e) (requiring at least a 15-year sentence for an offense of engaging in explicit conduct with a child for the purpose of producing any visual depiction of such conduct); § 2251(c)(1), (e) (requiring at least a 15-year sentence for an offense of enticing a minor to engage in explicit conduct outside of the United States for the purpose of producing any visual depiction); and § 2251A(b) (requiring at least a 30-year sentence for an offense of purchasing a child for the purpose of sexual exploitation).

23. *See supra* note 22.

24. Though it is not an official abbreviation, the phrase "mandatory statutory sentencing enhancement" is abbreviated as "MSSE" throughout this Comment for simplicity. It is a mandatory minimum sentence imposed by federal statue; however, it is only imposed if it is *triggered* by one of the enumerated prior convictions. Thus, it has qualities of a sentencing "enhancement" rather than just an all-or-nothing mandatory minimum (e.g., "all-or-nothing" in that a defendant is convicted of a federal crime and, in all cases, the conviction alone triggers a mandatory minimum).

25. *See, e.g.*, § 2251(b).

26. *See, e.g.*, § 2252(b)(2). Receipt or distribution of child pornography carries a five-year mandatory minimum sentence, but because the statute contains an MSSE provision, the same crimes carry 10- to 15-year mandatory minimum sentences, respectively, if the defendant has a prior qualifying conviction. *See* § 2252(b)(1)–(2). Possession of child pornography carries no minimum sentence. *See* § 2251(b)(2). However, the statute also contains an MSSE provision, so the same crime carries a 10- to 20-year mandatory minimum sentence (depending on the age(s) of the victims) if the defendant has a prior qualifying conviction. *See id.*

27. For examples of offenses, see chapters 71, 109A, 110, or 117 of title 18 of the 2012 edition of the U.S. Code or 10 U.S.C. § 920 (2012).

28. *See, e.g.*, 18 U.S.C. § 2252(b)(1).

This Comment explores the implications and complications of when and how a defendant might face a mandatory minimum sentence under child pornography statutes.[29] The mandatory statutory sentence enhancement exists so that, ideally, a defendant with a criminal history of sexually targeting and harming children[30] incurs a harsher sentence than a first-time offender. The all-important inquiry is whether a federal defendant's prior state-level criminal conviction falls within the scope of a child pornography statute's MSSE provision[31] and therefore triggers a mandatory recidivist enhancement.

But in practice, the MSSE provision is problematic. A growing inconsistency in how sentencing judges apply the recidivist enhancement[32] is one cause of the growing disparity in sentence lengths among similarly situated defendants.[33] Without consistent interpretation and application, the MSSE perpetuates one of the problems Congress intended it to combat[34]: unwarranted disparity in the length of sentences served by similarly situated defendants. When applied, the MSSE-mandated sentences rarely reflect any meaningful distinctions among defendants—even those with vastly different criminal histories.[35] To make matters worse, recent developments in sentencing jurisprudence have made it more difficult for a sentencing judge to interpret and apply the MSSE's already clumsy language with any discernable consistency.[36]

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29. *Id.* §§ 2252–2252A (2012).

30. If convicted, these defendants are considered "reoffenders." Throughout this Comment, the term "reoffender" refers specifically to a defendant who has two or more convictions for some type of sexual crime against a child.

31. Throughout this Comment, a prior conviction that triggers a mandatory sentence required by statute (i.e., triggers the MSSE) is referred to as a "qualifying conviction" or a "qualifying prior conviction"—with "qualifying" used to mean that the conviction is, indeed, within the scope of the statute's MSSE provision, requiring the sentencing judge to impose a sentence at least as long as the mandatory minimum length provided by the statute of conviction.

32. *Id.* §§ 2252(b)(2), 2252A(b)(2).

33. SpearIt, *Child Pornography Sentencing and Demographic Data: Reforming Through Research*, 24 FED. SENT'G REP. 102, 105 (2011). The sentiment of the dissatisfied judges can best be described as frustration with their inability to assess offenders as falling on a continuum "from low risk, low deviance offenders who are unlikely to pursue their sexual interests into 'contact' offenses at one extreme, to those who are high risk and high deviance who display many of the pre-disposing attitudes and behavior supportive of serial sexual abuse." *Id.*

34. *See infra* Part I.C.

35. Arlen Specter & Linda Dale Hoffa, *A Quiet but Growing Judicial Rebellion Against Harsh Sentences for Child Pornography Offenses — Should the Laws Be Changed?*, CHAMPION, Oct. 2011, at 12.

36. *See infra* Part II. Among federal sentencing judges, there is a growing sentiment of frustration over sentencing child pornography offenders; specifically, many judges believe that the formal statutory and sentencing schemes fail to make meaningful distinctions among defendants. *See infra* Part II.D.

The primary problem lies in the text of the child pornography MSSE: the statute imposes a mandatory minimum sentence if the defendant has a prior conviction "*relating to* aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor."[37] The narrow and categorical interpretation[38] of that key phrase excludes varying degrees of predatory conduct of conviction from consideration during an important stage in sentencing.[39] Put another way, a narrow interpretation means that even if the conduct of the prior conviction involved abusive sexual contact with a minor, the specific conviction will not necessarily trigger the MSSE. But the narrow categorical interpretation can be just as overinclusive as it can be underinclusive. A narrow reading also means that a prior conviction will occasionally trigger the MSSE when a defendant's conduct of conviction probably did not rise to the level of "abusive sexual conduct" involving a minor.[40]

A flexible interpretation of the recidivist enhancement would distinguish offenders more accurately and consistently, reducing some of the unwarranted disparities in sentence length. Part I of this Comment explains how child pornography crime fits in with other child exploitation crime, discusses important differences among offenders, and describes the legislative response to the rising child pornography problem. It then explains the general process courts use to determine whether a prior state conviction triggers the MSSE. Part II explains the MSSE's role in combating the child pornography problem. Part II also illustrates the current roadblocks inhibiting the possible effectiveness of mandatory recidivist enhancements, including ambiguity in the application of the MSSE and problems associated with interpreting it in a way that encompasses the type of conduct it was intended to target. Part III suggests that distinguishing child pornography crimes from other crimes with mandatory minimum sentences could help to restore some consistency to sentencing child pornography offenders.

I. THE FEDERAL CHILD PORNOGRAPHY STATUTES AND THEIR DIGITAL TARGETS

This Part first discusses the offenders involved in child pornography crimes. The federal statutes make a clear distinction between offenders

37. § 2252(b)(2) (emphasis added).

38. Under a categorical interpretation, a court looks to a defendant's prior conviction and considers *only* the statute the defendant was convicted under; that is, the court does not consider any of the individual defendant's specific criminal conduct ("conduct of conviction"). *See infra* notes 79–82 and accompanying text. *See generally United States v. Barker*, 723 F.3d 315, 324 (2d Cir. 2013).

39. *See, e.g.*, Hansen, *supra* note 3; Leary, *supra* note 3.

40. *See infra* Part II.B.4.

who were physically involved with child pornography (i.e., contact or production offenders) and offenders who were digitally involved with child pornography (i.e., noncontact offenders).[41] While the statutory distinction ends there, this Part explores the important differences among digital offenders. Next, this Part examines the formal legal approach to the child pornography problem. Finally, this Part explains how federal child pornography statutes and MSSEs are applied.

A. An Initial Matter: Distinguishing Contact vs. Noncontact Child Pornography Offenses

Although this Comment focuses specifically on noncontact child pornography offenders, the MSSE is not unique to child pornography statutes. There are two general groups of federal offenders[42] to whom mandatory minimums triggered by the recidivist enhancement may apply.[43] While both groups have qualifying *prior* convictions, the distinction is based on whether the federal crime of conviction required physical contact.[44]

A "contact offender" (or "sexual abuse offender") has traveled across state lines with the intent to have sex with a child;[45] produced child pornography;[46] or bought, sold, or transferred a child for the purpose of participating in the production of child pornography, prostitution, or for other criminal sexual activity.[47] On the other hand, a "child pornography offender" (or "noncontact offender") has not had physical contact with a child but instead has distributed, transported (including by shipping or mailing), received, or possessed child pornography.[48] Both contact and noncontact offenses trigger the MSSE,[49]

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41. *See* §§ 2251, 2252–2252A, 2260.

42. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 295 (2011), *available at* http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system.

43. This means the prior conviction triggers the MSSE, and the offender receives a mandatory minimum sentence.

44. This also includes attempted physical contact, as each statute criminalizes attempt in the same way. It is important to note that although the U.S. Code makes these distinctions through the type of activity it criminalizes, it does not label offenses this way. Additionally, the idea to divide offenses in this way is not my own; the U.S. Sentencing Commission made the distinction in a report to Congress. *See* U.S. SENTENCING COMM'N, *supra* note 42, at 295–300.

45. § 2241(c).

46. *Id.* §§ 2251(e), 2260(c)(1).

47. *Id.* § 2251A(a)–(b) (2012).

48. These offenses are typically grouped together (e.g., "knowingly receives or distributes"). *See id.* §§ 2251, 2252–2252A, 2260.

but there is a higher mandatory minimum sentence for sexual abuse reoffenders than for child pornography reoffenders.[50]

B. The Next Step: First-Time vs. Repeat (Noncontact) Offenders

Does imposing a mandatory minimum sentence on a noncontact child pornography offender actually protect children from physical harm?[51] Child pornography statutes are narrow statutes that target an incredibly diverse group of offenders. Within that group, noncontact offenders who have a history of certain behavior are known to pose a greater contact risk to children. The MSSE is triggered by convictions for this type of behavior, meaning a child pornography offender receives a mandatory minimum sentence when his criminal history indicates a high likelihood for recidivism.[52] This Section explains the background ideas behind the rationale that a noncontact child pornography offender is more dangerous, and thus should receive a higher sentence, when that offender has a prior conviction involving physical sexual assault of a child.

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49. The MSSE is phrased the same way in both types of statutes; thus, the same types of prior convictions trigger mandatory minimum sentences for both types of convictions. *See supra* notes 22–28 and accompanying text. There is criticism that the statutory and sentencing scheme does not treat these two groups differently enough. Many of these critics argue that child pornography crime sentences are too long and suggest that shortening those sentences would create a difference in average sentence length that reflects the "seriousness" of contact versus noncontact crimes. Carissa Byrne Hessick, *Disentangling Child Pornography From Child Sex Abuse*, 88 WASH. U. L. REV. 853, 901–02 (2011). Congress's rationale for treating similarly offenses involving physical contact and those that do not: "[t]he people who consume child pornography create the market for it, and thereby encourage the victimization of children." *See, e.g.*, H.R. REP. NO. 112-638, at 6 (2012).

50. Under § 2251 (sexual exploitation offenses), the recidivist enhancement triggers a 25-year mandatory minimum for one qualifying prior conviction and a 35-year mandatory minimum for two qualifying prior convictions. § 2251. Under § 2252A (child pornography offenses), the recidivist enhancement triggers a 15-year mandatory minimum in distribution, transportation, and receipt cases, and a 10-year mandatory minimum in possession cases. *Id.* § 2252A.

51. This is an important initial matter because the argument that the MSSE needs to be revised to serve its purpose necessarily depends on the premise that there is, indeed, some reason to distinguish first-time offenders from repeat offenders.

52. *See* Troy Stabenow, *A Method for Careful Study: A Proposal for Reforming the Child Pornography Guidelines*, FED. SENT'G REP., Dec. 2011, at 108. However, a noncontact child pornography offense *alone* should not be used as a proxy to incapacitate "undetected child molesters." Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 560 (2011).

1. THE CHILD PORNOGRAPHY STATUTES TARGET A DIVERSE GROUP OF OFFENDERS

A significantly heterogeneous group of individuals comprise the majority of child pornography offenders, making any "one size fits all"[53] label or approach impossible. Offenders are "distributed along a wide spectrum with multiple dimensions (e.g., criminogenic, sexual deviance, demographic)."[54] Some are "highly criminalized, behaviorally dysregulated, and sexually deviant," while others are "not generally antisocial or sexually deviant, and have relatively intact self-regulatory mechanisms."[55] Offenders all along the spectrum obviously commit the same crimes (noncontact child pornography offenses), but they are vastly different in terms of the risk they pose to public safety and the risk of recidivism.[56]

If an offender has a criminal history of sexually abusing children, it is an important distinguishing factor that should not be overlooked. The salient point is that sentencing online offenders warrants an expansive consideration of "precidivism,"[57] which includes an expansive interpretation of qualifying prior convictions. While speculation about the risk posed by a child pornography offender-defendant with no history involving contact abuse should not influence the sentencing decision, an offender-defendant who *does* have a criminal history of child contact abuse charged with the same crime should not benefit from the same presumption.

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53. Andres E. Hernandez, *Psychological and Behavioral Characteristics of Child Pornography Offenders in Treatment* 2 (Apr. 5–7, 2009), *available at* http://sandiegoconference.org/Program/documents/E5_Laramie_CP_Hernandez_position_paper_Global_Symposium.pdf.

54. *Id.* at 3.

55. *Id.*

56. There is still no definitive predictive assessment of what *contact* risk a first-time noncontact child pornography offender poses to children. Hansen, *supra* note 3, at 57. Although "scientific evidence informing the relationship between online sexual exploitation of children and contact sexual crimes against children is still in its infancy," some research suggests that there is considerable overlap between offline and online offending. R. Karl Hanson & Kelly Babshichin, *How Should We Advance Our Knowledge of Risk Assessment for Internet Sexual Offenders?* 5–6 (Apr. 5–7, 2009) (on file with author) ("[T]here is considerable overlap between online and offline offending . . . [and there] is sufficient evidence of a relationship between possession of child pornography and the commission of contact offenses against children to make this a cause of acute concern.").

57. U.S. SENTENCING COMM'N, *supra* note 2, at 169. The following discussion is limited to prior acts of *criminal conviction*; however, an offender's sexually deviant behavior may be relevant regarding the offender's sexual dangerousness even if such behavior does not rise to the level of a criminal offense or if the offender admits to prior criminal behavior that went undetected at a later time.

2. WHEN AND WHY PRIOR CONVICTIONS BECOME IMPORTANT

There appears to be a general agreement that offenders who engaged in criminal sexually dangerous behavior (CSDB)[58] are qualitatively different from child pornography offenders who never engaged in CSBD.[59] Nonproduction offenders with histories of CSDB pose a greater risk of sexual recidivism than nonproduction offenders without any such history of CSDB.[60] Offenders with prior convictions are also more likely to have engaged in *other* undetected acts of CSDB in the past.[61] In the same manner that any offender who has committed multiple related offenses is generally more culpable than an otherwise similarly situated offender who committed only a single offense, an offender with prior CSDB convictions is more culpable for having engaged in the instant offense.[62] While the amount of reliable data about the prevalence of sexual dangerousness among *all* nonproduction offenders may be inconclusive, the known risk posed by certain nonproduction offenders is an aggravating factor relevant to sentencing in nonproduction cases.

C. Just Lock Them Up for Longer: The Not-So-Subtle Sentiment of Congressional Responses to the Growing Child Pornography Problem

Since child pornography first became an area of congressional concern in the 1970s,[63] child pornography law has undergone significant

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58. U.S. SENTENCING COMM'N, *supra* note 2. This acronym and its meaning come from the U.S. Sentencing Commission's 2012 report. *Id.* According to the Commission:

> [CSDB] includes both "contact" and "non-contact" sex offenses committed by a child pornography offender before his arrest and prosecution on child pornography charges as well as an offender's commission of a prior non-production child pornography offense separated from the instant child pornography offense by an arrest or other official law enforcement intervention known to the offender.

Id. at 169 n.2. The Commission uses this term in the context of child pornography offenders because it "captures a primary concern of policy-makers, judges, and law enforcement officers, i.e., whether child pornography offenders have engaged in sexually dangerous behavior involving abusive, exploitative, or predatory sexual conduct in addition to their non-production child pornography offenses." *Id.* at 174 n.23.

59. U.S. SENTENCING COMM'N, *supra* note 216, at 170. This is true despite the fact that there is a lack of consensus among social scientists and others about the prevalence of contact offenses among child pornography offenders convicted of nonproduction child pornography offenses. *Id.*

60. *Id.* at 170.

61. *Id.* at 170–71.

62. *Id.* at 171.

63. *See* U.S. SENTENCING COMM'N, *supra* note 19, at 8–9.

revision.[64] In 1978, Congress took its first steps in recognizing the harms associated with the production and distribution of child pornography.[65] Since then, the scope of child pornography offenses and the severity of penalties for offenders have been frequently modified, typically to expand the reach of child pornography crimes and increase incapacitation of offenders.[66]

To address the effects of technology on the child pornography market, Congress passed the Child Pornography Prevention Act (CPPA) of 1996,[67] which criminalized virtual child pornography and introduced mandatory minimum sentences for certain sex crimes against children.[68] After the Supreme Court struck down key provisions of the CPPA in

64. *See id.* at 1. Significant revision is also happening outside of the formal "law on the books" (i.e., the statutes). The U.S. Department of Justice and the Federal Bureau of Investigation oversee a number of organizations and initiatives that combat crimes against children, with a special focus on the child pornography problem. For example, in 2007, the DOJ announced that along with the "fight on terrorism" and "ridding our communities of illegal guns and drugs," one of its primary responsibilities is "protecting our children from pernicious predators who exploit the advances of technology and the anonymity of the Internet to achieve their nefarious aims." U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, STRATEGIC PLAN: FISCAL YEARS 2007–2012, at 1 (2006), *available at* http://www.justice.gov/archive/mps/strategic2007-2012/strategic_plan20072012.pdf. An incomplete list is as follows: the Child Exploitation and Obscenity Section (CEOS) and its High Technology Investigative Unit (HTIU), the Innocent Images National Initiative (IINI), the Innocence Lost National Initiative (ILNI), Project Safe Childhood (started in 2006), the Child Exploitation Prevention and Interdiction, the National Center for Missing & Exploited Children (NCMEC, created in 1984). U.S. DEP'T OF JUSTICE, *supra* note 1, at 41–93. The Federal Bureau of Prisons oversees a Sex Offender Management Program responsible for the treatment of incarcerated "sexual predators" that includes treatment, assessment, specialized correctional management, community treatment services, and population management. *Id.* at 54.

65. In 1977, Congress passed the Protection of Children Against Sexual Exploitation Act, Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified at 18 U.S.C. §§ 2251–2253, 2423 (2012)). This Act prohibited the commercial production of child pornography. *Id.* § 2, 92 Stat. at 7–8. Possession of child pornography became a federal crime in 1990 through the Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818–19 (1990) (codified at 18 U.S.C. § 2252 (2012)).

66. U.S. SENTENCING COMM'N, *supra* note 19, at 3. For a detailed history of child pornography law through 2009, see *id.* For example, following the 1978 legislation, Congress passed the Child Protection Act of 1984 (notably, this raised the age of a minor to 18 and removed the "obscenity requirement" so production and distribution of pornographic images of a minor is illegal even if it does not rise to the higher standard of "obscenity"), the Child Protection and Obscenity Enforcement Act of 1988 (extending child pornography laws to the use of a computer to transport, distribute, or receive material), and the Sex Crimes Against Children Act of 1995. *Id.*

67. Pub. L. No. 104-208, 110 Stat. 3009 (codified at 18 U.S.C. § 2251 (2012)).

68. *Id.*

Ashcroft v. Free Speech Coalition,[69] Congress responded by passing the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today (PROTECT) Act in 2003.[70] The PROTECT Act of 2003 increased the length of many preexisting mandatory minimum sentences for certain sex crimes against children.[71] It also introduced mandatory minimum sentences specifically for child pornography crimes.[72] Subsequent legislation involving sex crimes against children followed stride: mandatory minimum sentences and statutory maximum penalties for child pornography offenses were again increased in 2006,[73] 2008,[74] and 2012.[75]

II. TODAY'S TOOL FOR INTERPRETING YESTERDAY'S CONVICTION: HOW AND WHY COURTS FAIL TO INTERPRET PRIOR CONVICTIONS IN CHILD PORNOGRAPHY CASES WITH CONSISTENCY

The federal child pornography statutes call for a mandatory enhanced penalty if the defendant has a qualifying prior state conviction "relating to aggravated sexual abuse, sexual abuse, abusive sexual conduct involving a minor or ward, or sex trafficking of children, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography."[76] Because Congress did not further define the MSSE phrase, the critical question of which state convictions fall into this category is a difficult one for sentencing courts to answer—and answer consistently. This Section first introduces the general way courts interpret prior convictions. It then gives examples of

69. 535 U.S. 243, 244–48 (2002) (holding that sections of the CPPA were unconstitutionally overbroad in violation of the First Amendment because the Act contained no exception for works of serious literary, artistic, political, or scientific value, and could apply to speech that is neither obscene nor child pornography).

70. Pub. L. No. 108-21, 117 Stat. 650 (2003) (codified as amended at 18 U.S.C. § 2257(h)(3) (2012)).

71. *Id.* It also criminalized "pandering" material in a manner that reflects the belief, or that is intended to cause another to believe, that it contains child pornography. *Id.*

72. *Id.*

73. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 206, 120 Stat. 587, 613 (codified as amended at 18 U.S.C. §§ 2241(c), 2244 (2012)).

74. PROTECT Our Children Act of 2008, Pub. L. No. 110-410, § 304, 122 Stat. 4229, 4242–43 (codified as amended at 18 U.S.C. § 2252A(a) (2012)).

75. Child Protection Act of 2012, Pub. L. No. 112-206, § 2, 126 Stat. 1490, 1490 (2012) (codified as amended at 18 U.S.C. §§ 2252(b)(2), 2252A(b)(2) (2012)).

76. *See supra* note 26. Qualifying convictions under this MSSE trigger a 5-year mandatory minimum in child pornography possession cases and a 10- to 15-year mandatory minimum in receipt and distribution cases. *See id.*

the approach in action, and a messy picture emerges that contrasts with the seemingly straightforward process first described.

A. The Supreme Court's View on Interpreting Prior Convictions

The Supreme Court has developed two methods for courts to use when interpreting prior convictions[77]: the categorical approach and the modified categorical approach.[78] When interpreting a prior conviction under the categorical approach, a court looks to "the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding a defendant's particular conduct."[79] In doing so, the court compares the statutory elements of a prior conviction with the elements of the "generic" crime.[80] Put another way, a "court must confine its consideration only to the fact of conviction and the statutory definition of the offense."[81] If a statute's elements are the same as, or narrower than, those of the generic offense, the prior conviction qualifies as a predicate offense.[82]

In most cases, the categorical approach begins and ends the analysis.[83] However, there is a "narrow range of cases" where it is appropriate for the court to analyze a prior conviction using the modified categorical approach.[84] When the prior conviction at issue is for violating a statute that sets out one or more of the elements in the alternative (i.e., the defendant was convicted under a "divisible statute"), courts apply the modified categorical approach.[85] Under this approach, a court is

77. In the case of sentencing a federal child pornography defendant, the court must determine whether a state offense qualifies as a predicate offense for a federal MSSE using one of these two methods.

78. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013).

79. *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011) (quoting *Itani v. Ashcroft*, 298 F.3d 1213, 1216 (11th Cir. 2002)).

80. *Descamps*, 133 S. Ct. at 2281 ("*i.e.*, the offense as commonly understood").

81. *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1280 (11th Cir. 2013).

82. *Taylor v. United States*, 495 U.S. 575, 599 (1990). In *Taylor v. United States*, the Court addressed the application of a mandatory sentencing enhancement for a defendant convicted of being a felon in possession of a firearm. *Id.* at 577–78. The Court held that "only the statutory definitions of the prior offenses" are to be examined and "not the particular facts underlying those convictions." *Id.* at 600.

83. *United States v. Estrella*, 758 F.3d 1239, 1245 (11th Cir. 2014).

84. *Descamps*, 133 S. Ct. at 2283 (quoting *Taylor*, 495 U.S. at 602).

85. *Shepard v. United States*, 544 U.S. 13, 17 (2005). In *Shepard v. United States*, the Court recognized that there are circumstances under which using the categorical approach will be inadequate because the state law covers a broad range of conduct, some of which may be within the scope of the conduct that triggers the enhanced penalty. *Id.* Under these circumstances, the Court expanded the permissible scope of inquiry to a "modified categorical approach," in which "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge

permitted to consult a limited pool of documents, such as indictments, plea agreements, and jury instructions, for one purpose: to determine which alternative element "formed the basis of the [defendant's prior] conviction."[86] The modified categorical analysis "does *not* involve an inquiry into facts previously presented and tried," but rather "the focus is on the *elements* required to sustain the conviction."[87]

The Supreme Court's recent decision in *United States v. Descamps*[88] resolved a split among the circuit courts as to the use of the modified categorical approach.[89] The Court held that the modified categorical approach serves a "limited function," and "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements."[90] In practice, *Descamps* means that once the court identifies the particular provision of state law under which a defendant was previously convicted, the court compares the elements of that provision to the generic federal sentencing enhancement to determine its applicability, just as it would under a categorical approach.[91]

As an example, consider a state statute that criminalizes a single offense (e.g., "an unlawful sexual act with a person under the age of 16 to whom the offender is not married").[92] Such a statute is not "divisible into predicate and nonpredicate offenses, i.e., divided into disjunctive subsections, or separately listed within a single provision."[93] In other words, the example statute is not one "listing potential offense elements in the alternative."[94] As a result, the court sentencing a defendant under the child pornography statutes would use a categorical approach in determining whether the state statute of conviction triggers the MSSE.

On the other hand, consider a defendant with a prior state conviction for sexual battery, but imagine that the statute of conviction did not have an element that the minor was the victim. The court is not permitted to

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and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information" are examined. *Id.* at 26.

86. *Descamps*, 133 S. Ct. at 2281; *see also Shepard*, 544 U.S. at 26.

87. *In re Sweetser,* 22 I&N Dec. 709, 714 (BIA 1999) (emphasis added); *see also Descamps*, 133 S. Ct. at 2285.

88. *Descamps*, 133 S. Ct. at 2283.

89. *Id.* It is important to note that the issue in *Descamps* was whether a prior burglary conviction under California law qualified as a "violent felony" within the meaning of the Armed Career Criminal Act. *Id.* at 2281–82. It was not a child pornography case; the Court only ruled on the categorical approach versus modified categorical approach as applied to prior convictions generally. *Id.* at 2293.

90. *Id.* at 2282–83.

91. *Id.* at 2285.

92. *United States v. Barker*, 723 F.3d 315, 320 (2d Cir. 2013).

93. *Id.* (quoting *United States v. Beardsley*, 691 F.3d 252, 275 (2d Cir. 2012)).

94. *Descamps*, 133 S. Ct. at 2283.

look beyond the charge of conviction (i.e., "peek behind the statute") to gather more facts about the conviction—even if the reliable *Shepard* documents do reveal that the victim was, for example, 10 years old. The statute is "merely broad, not divisible"[95] and would not trigger the MSSE.

B. Interpreting Prior Convictions—In Action: Does a Defendant's Prior Conviction Trigger a Mandatory Statutory Sentencing Enhancement? It Depends on Which Circuit You Ask

Neither the categorical nor modified categorical approach permits the district court to examine documents from a defendant's state court conviction to determine whether the context and facts of the defendant's crime fit the generic offense in the sentencing enhancement statute.[96] In action, this seemingly straightforward rule is proving problematic to apply in child pornography cases. Specifically, the standard makes it very difficult for courts to determine whether a prior conviction triggers the MSSE. This Section explores some of these problems.

1. AN EXPANSIVE APPROACH

First, it is helpful to examine examples of expansive readings of the MSSE. In *United States v. Colson*,[97] defendant Colson had a prior conviction for "Production, Publication, Sale, or Possession, etc. of Obscene Items Involving Children" involving "producing a lewd exhibition of nudity of a minor."[98] The court reasoned that Congress chose the expansive term "relating to" to ensure that individuals with prior convictions bearing some relation to the MSSE triggers received an enhanced sentence.[99] The court applied the categorical approach because the statutory language of the prior conviction included the term "lewd."[100] In *United States v. Stults*,[101] the Eighth Circuit also relied on an expansive reading of the MSSE when it held that *attempted* sexual assault of a child triggers the mandatory minimum sentence.[102] The court

95. *Beardsley*, 691 F.3d at 258.

96. *Descamps*, 133 S. Ct. at 2287.

97. 683 F.3d 507 (4th Cir. 2012).

98. *Id.* at 509.

99. *Id.* at 511–12; *see also United States v. Sinerius*, 504 F.3d 737, 743 (9th Cir. 2007); *United States v. Hubbard*, 480 F.3d 341, 347 (5th Cir. 2007); *United States v. McCutchen*, 419 F.3d 1122, 1126–27 (10th Cir. 2005).

100. *Colson*, 683 F.3d at 512.

101. 575 F.3d 834 (8th Cir. 2009).

102. *Id.* at 846.

explained that attempted physical and nonphysical harm also trigger the MSSE—even where no child was actually harmed.[103]

2. THE MODIFIED CATEGORICAL APPROACH—PRE-*DESCAMPS*

Prior to *Descamps*, a number of courts dealt with the MSSE using the modified categorical approach. The narrow modified categorical approach announced in *Decamps* severely limits how often and in what circumstances a sentencing court may consider anything beyond the language of a statute of conviction.[104] Because many courts described their pre-*Descamps* approach as "modified categorical," these jurisdictions would seem unaffected by *Descamps*. However, when courts applied the pre-*Descamps* "modified categorical" reasoning in interpreting 18 U.S.C. §§ 2252 and 2252A, the approach was actually something more expansive than what *Descamps* now allows[105] (i.e., they applied the modified categorical approach in many cases where a statute was merely overbroad—not necessarily divisible—which is exactly what *Descamps* prohibits).[106]

3. BOTH APPROACHES AS UNDERINCLUSIVE

In *United States v. Beardsley*,[107] the court found that under the categorical approach, a state conviction for "Endangering the Welfare of a Child" (the defendant admitted to raping his 18-month-old daughter)

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103. *Id.* at 845 (quoting *Hubbard*, 480 F.3d at 343).

104. *Descamps v. United States*, 133 S. Ct. 2276, 2286 (2013).

105. *See, e.g.*, *United States v. Rood*, 679 F.3d 95 (2d Cir. 2012) (citing *Shepard v. United States*, 544 U.S. 13, 16, 26 (2005)) (applying the modified categorical approach because the MSSE focuses on whether the state sex offense involves *conduct* that would be a federal sex offense, thereby inviting an inquiry into the facts underlying the defendant's conviction; reasoning that it permits a judge to evaluate whether the factual elements of the analogous federal crime were necessarily proven at the time of the defendant's conviction on the state charges). In *United States v. Hendryx*, the defendant had a prior state conviction for "sexual abuse of a child under the age of sixteen." 380 F. App'x 682, 683–84 (9th Cir. 2010). The court applied a modified categorical approach because the state statute was broader than the generic crime "in that it covers more conduct than" the MSSE. *Id.* In doing so, the court looked to the Information, which revealed that the defendant was 41 when he committed the crime and his victim was 12, and the court concluded that the district court properly applied the MSSE. *Id.* In *United States v. Strickland*, a defendant's pre-sentencing report described his Maryland conviction for "child abuse" in graphic detail and treated the conviction as a sexual offense. 601 F.3d 963, 965–68 (9th Cir. 2010). The court applied the modified categorical approach even though "child abuse" encompasses conduct that does not trigger the MSSE and is not divisible. *Id.*

106. *Descamps*, 133 S. Ct. at 2285.

107. 691 F.3d 252 (2d Cir. 2012).

did not trigger the MSSE because nothing in the statute required sexual conduct.[108] It refused to apply the modified categorical approach because the statute of conviction was merely overbroad (it criminalizes conduct that would not trigger the MMSE), not divisible.[109] To argue that raping an 18-month-old is not per se "abusive sexual contact involving a minor"[110] would seem outrageous, at best. But such is the result when courts are forced to apply an approach best suited for (and, indeed, formulated in light of) gun and drug crimes to child exploitation, sexual abuse, and pornography cases.

Even the "expansive" reading of the pre-*Descamps* modified categorical approach described above can be problematic. In *United States v. Cole*,[111] the court applied the modified categorical approach because the statute of prior conviction was overbroad.[112] It "'facially criminalize[d] every instance in which a child is photographed while willfully and intentionally exhibiting his or her genitals' without requiring proof that 'the exhibition of the genitals by the minor was volitional and in a lewd manner.'"[113] The statute was overly broad because federal "sexually explicit conduct" requires "lascivious exhibition."[114] The court rejected a more expansive approach and found that prior conviction did not trigger the MSSE.[115]

4. OVERINCLUSIVE

Although the majority of this discussion focuses on how MSSEs fail to encompass relevant "precidivist" behavior, the MSSEs can also be overinclusive. For example, in *United States v. Barker*,[116] the Second Circuit concluded that all statutory rape laws proscribe "non-consensual sexual acts with a minor victim [that are] by . . . nature, 'abusive sexual conduct involving a minor'" and trigger the MSSE.[117] In jurisdictions where statutory rape is per se abusive, the MSSE will apply essentially to

108. *Id.* at 257–58.

109. *Id.* at 258.

110. This language triggers the MSSE. 18 U.S.C. § 2252(b)(1) (2012).

111. 329 F. App'x 613 (6th Cir. 2009).

112. *Id.* at 614–15.

113. *Id.* (alteration in original) (quoting *Purcell v. Commonwealth*, 149 S.W.3d 382, 390, 393 (Ky. 2004)).

114. *Id.* at 615.

115. *Id.*

116. 723 F.3d 315 (2d Cir. 2013).

117. *Id.* at 324 (quoting *United States v. Sonnenberg*, 556 F.3d 667, 671 (8th Cir. 2009)).

first-time offenders,[118] causing unwarranted disparities among similarly situated defendants. Additionally, a number of courts have determined that the phrase "involving a minor" modifies only the last category of offenses (abusive sexual conduct); thus, a conviction for "sexual abuse" of an adult triggers the MSSE.[119] While this approach might be somewhat helpful in targeting predatory precidivist behavior, it nonetheless targets offenders who are first-time defendants in crimes against children.

C. Unfortunate Incompatibilities: The Current Child Pornography Statutory Scheme and the Categorical Approach

1. "RELATING TO"

While courts used to justify reading the MSSE expansively by relying on the phrase "*relating to*," *Descamps* recently limited courts' ability to do so. In *Descamps*, the Court reasoned that the Armed Career Criminal Act shows that Congress intended sentencing courts "to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."[120] In contrast, the plain language of 18 U.S.C. §§ 2252 and 2252A indicates that Congress intended for any prior conviction *relating to* varying degrees of sex crimes to trigger the MMSE: convictions *relating to* "sexual abuse," "aggravated sexual abuse," and "sexual conduct involving a minor" (which, notably, is not specifically defined as a federal crime anywhere in Title 18); and convictions under the laws of any states *relating to* the "production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography."[121]

The Supreme Court had previously determined that "relating to" carries a broad ordinary meaning, (i.e., it means "to stand in some relation to; to have bearing or concern; to pertain; refer; to bring into

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118. Though the argument for a "per se abusive" classification of statutory rape is strong, such a rule only highlights the incompatibility of the categorical approach and sex crimes. *See, e.g.*, *United States v. Osborne*, 551 F.3d 718, 720 (7th Cir. 2009) (describing a number of sexual situations that commonly occur between high school students that qualify as statutory rape but should not be understood as "abusive" sexual conduct).

119. *See, e.g.*, *United States v. Spence*, 661 F.3d 194, 196–97 (4th Cir. 2011) (applying the MSSE when the defendant had a prior state conviction for "assault and battery of a high and aggravated nature," which is defined as "an unlawful act of violent injury . . . accompanied by circumstances of aggravation, . . . [which include taking] indecent liberties with a female").

120. *Descamps v. United States*, 133 S. Ct. 2276, 2286 (2013).

121. 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1) (2012).

association with or connection with.")[122] Thus, courts have construed the "relating to" language very broadly in interpreting §§ 2252 and 2252A.[123] But under *Descamps*, the only use of the modified categorical approach is as a tool that enables courts to discover the *elements* of the defendant's prior conviction,[124] leaving courts with less flexibility to interpret "relating to" expansively. Therefore this "tool" for interpreting prior convictions is essentially useless without a federal statute that enumerates generic offenses consisting of articulable elements.

2. NO "GENERIC OFFENSE ELEMENTS"

Under a categorical approach, courts compare the statute forming the basis of the defendant's prior conviction with the applicable generic offense in the federal sentencing statute.[125] Courts must consider the prior conviction generically, in terms of how the law defines the offense, and not in terms of how an individual offender might have committed it on a particular occasion.[126] In interpreting §§ 2252 and 2252A, "aggravated sexual abuse," "sexual abuse," and "abusive sexual conduct involving a minor" should be read as "generic" offenses, understood by their "ordinary and common meaning."[127]

The MMSE generic definition contains three elements: 1) sexual conduct, 2) with a minor, 3) that constitutes abuse.[128] From there, the application becomes complicated. First, "abuse" has vague elements (unlike burglary, arson, etc.). For example, some courts find that for purposes of §§ 2252 and 2252A, "sexual abuse" has two elements: 1) the abuse element, where "abuse" means "to use or treat so as to injure, hurt, or damage . . . to commit indecent assault on," which "encompasses behavior that is harmful emotionally and physically," and 2) the sexual element, where "'sexual' [is given] its ordinary and commonsense

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122. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)).

123. *See supra* note 105.

124. *Descamps*, 133 S. Ct. at 2287.

125. *United States v. Barker*, 723 F.3d 315, 319 (2d Cir. 2013); *see also Descamps*, 133 S. Ct. at 2281 (describing "generic crime" as "the offense as commonly understood").

126. *Barker*, 723 F.3d at 321 (2d Cir. 2013).

127. *See, e.g.*, *United States v. Pierson*, 544 F.3d 933, 942 (8th Cir. 2008); *United States v. Sinerius*, 504 F.3d 737, 742–43 (9th Cir. 2007) (reasoning that the MSSE language does not "simply mandate a sentencing enhancement for individuals convicted of state offenses *equivalent* to sexual abuse" but instead mandates the MSSE for a prior conviction "that stands in some relation, bears upon, or is associated with that generic offense"); *United States v. Hubbard*, 480 F.3d 341, 347–48 (5th Cir. 2007); *United States v. Harding*, 172 F. App'x 910, 913–14 (11th Cir. 2006).

128. *United States v. Lopez-Solis*, 447 F.3d 1201, 1206–07 (2006).

meaning."[129] However, in applying the MSSE, many jurisdictions do not require *actual* physical contact between a defendant and the victim (or physical harm suffered by the victim).[130] Similarly, some courts find that the victim need not have suffered mental harm (nor physical harm).[131] Additionally, some courts require that the statute of conviction states that the sexual conduct be for purposes of sexual gratification.[132]

A messy picture emerges when determining culpability for crimes against children. The nature of the crime calls for a complex inquiry. Courts are expected to consider abstract "elements," such as offenders' motivation ("for sexual gratification"), victim impact (physical or emotional harm), and what constitutes "lewd" exposure—notions not consistently codified in state statutes, at least not without other, nonqualifying elements. While the full impact of *Descamps* on sentencing under 18 U.S.C. §§ 2252 and 2252A has yet to be seen, there is a distinct possibility that courts will be forced to exclude categorically prior convictions for seemingly-relevant CSDB.

D. Disparity in Sentence Length: Problems

Part I of this Comment addressed one cause of disparity in the length of sentences of similarly situated offenders—the current statutory classification. In contemplating a plausible solution, one important factor to consider is the role of the sentencing judge's discretion. Because judges are now rebelling against even sentences *within* the guidelines,[133] mandatory minimum sentences are still important because child pornography offenses are undeniably serious offenses.

There is little dispute that the current charging and sentencing structure fails to provide sentencing courts with tools to make meaningful distinctions among defendants.[134] As a result, sentences for child pornography offenses frequently do not punish offenders congruently with their culpability. Especially relevant to this discussion is the charging and sentencing structure's failure to assist sentencing judges in differentiating among offenders with respect to their past and

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129. *Sinerius*, 504 F.3d at 740–41 (first alteration in original).

130. *Hubbard*, 480 F.3d at 347, 350.

131. *United States v. Colson*, 638 F.3d 507, 511 (4th Cir. 2012); *United States v. Stults*, 575 F.3d 834, 845 (8th Cir. 2009).

132. *United States v. Diaz-Ibarra*, 522 F.3d 343, 352 (4th Cir. 2008).

133. *See infra* note 140 and accompanying text.

134. The U.S. Sentencing Commission, the U.S. Department of Justice, the defense bar, and a majority of federal sentencing judges agree that U.S.S.G. § 2G2.2 (the Guidelines section applicable for most child pornography offenses) and the corresponding penal statutes should be revised for this reason. U.S. SENTENCING COMM'N, *supra* note 2, at 10.

future sexual dangerousness.[135] Other major criticisms that have garnered widespread agreement include the following:

- There is no baseline sentence that reflects typical offense conduct;[136] thus, first-time offenders with no criminal history do not "get the benefit of the low end of the statutory range."[137]
- The penalty scheme does not account for certain types of aggravated conduct that "may be worthy of targeted, incremental punishment"[138] (e.g., an offender's possession of child pornography depicting sexual abuse of infants and toddlers;[139] an offender's involvement in the child pornography Internet "community").[140]

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135. *United States v. Cunningham*, 680 F. Supp. 2d 844, 862 (N.D. Ohio 2010) ("With a growing number of district judges finding that the Guidelines in this area are entitled to no deference, sentencing disparities are bound to grow exponentially.").

136. For example, offense characteristics in U.S.S.G. § 2G2.2 do not reflect changes in technology, and several enhancements apply to the vast majority of offenders. *See Unites States v. Diaz*, 720 F. Supp. 2d 1039, 1042 (E.D. Wis. 2010); *United States v. Stern*, 590 F. Supp. 2d 945, 961 (N.D. Ohio 2008) ("In the absence of coherent and defensible Guidelines, district courts are left without a meaningful baseline from which they can apply sentencing principles."); *see also* James M. Fottrell, Steve Debrota & Francey Hakes, U.S. Dep't of Justice, Statement for the Record Before the United States Sentencing Commission Hearing on the Child Pornography Guidelines 8 (Feb. 15, 2012), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215/Testimony_15_Hakes_DeBrota_Fottrell.pdf (contending that "the guideline has not kept pace with technological advancements in both computer media and internet and software technologies" and that "there is a range of aggravating conduct that we see today that is not captured in the current guideline").

137. M. Casey Rodgers, Chief U.S. Dist. Judge, N. Dist. of Fla., Statement on Behalf of the Judicial Conference of the United States Committee on Criminal Law Before the United States Sentencing Commission Public Hearing on Federal Child Pornography Offenses 14 (Feb. 15, 2012), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20120215-16/Testimony_15_Rodgers.pdf.

138. U.S. SENTENCING COMM'N, *supra* note 2, at 12.

139. Virtually all federal offenders (96 percent) possessed images of minors who were prepubescent or under 12 years of age (a U.S.S.G. § 2G2.2 offense-level increase). *Id.* at 31. Approximately half of offenders possessed images depicting sexual abuse of a child under six years old, and approximately one-quarter of offenders possessed images depicting sexual abuse of a child two years or younger. *Id.*

140. The risk of physical child abuse by child pornography collectors is especially evident when offenders participate in online groups, forums, or social networking sites centered on pedophilic interests. "In one online group investigated recently, for instance, a member posted a survey asking, 'have you thought about whether or not you would abduct a preteen girl/boy?' Over fifty percent of the responders answered, 'I would absolutely do it,' or 'if the circumstances were right, I'd do it.'" Drew Oosterbaan, *The Fallacy of Simple Possession: The Impact of Targeting, Charging, and*

- In some cases, the guidelines result in notable disproportionality: some child pornography offenders with no history of sexually abusing a child receive prison sentences equal to or greater than the sentences received by contact sex offenders.[141]

Because the current system fails to make important distinctions between offenders, an increasing number of parties and courts ignore the statutory and guideline schemes.[142] As a result, there is widespread sentencing disparity among similarly situated offenders.[143] Courts reduce a defendant's sentence more than two times as often in child pornography cases than in all other federal cases.[144] This is unsurprising

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Plea Bargaining at Sentencing, U.S. ATT'YS BULL., Sept. 2011, at 86, 89; *see also United States v. Brown*, 634 F.3d 954, 955–56 (7th Cir. 2011) (affirming a sentence based in part on graphic discussions within a child predator Internet community, including one discussion in which the defendant fantasized about having a daughter so he could have sex with her); *United States v. Wayerski*, 624 F.3d 1342, 1354 (11th Cir. 2010) (affirming a sentence based in part on posts to an online predator community where defendant described his sexual fantasies about his eight-year-old neighbor).

141. *See, e.g.*, *United States v. Dorvee*, 616 F.3d 174, 187 (2d Cir. 2010) ("The irrationality in § 2G2.2 is easily illustrated [by the fact that] [h]ad Dorvee actually engaged in sexual conduct with a minor, his applicable Guidelines range could have been considerably lower."); *United States v. Cruikshank*, 667 F. Supp. 2d 697, 702 (S.D. W. Va. 2009) ("In an instance of troubling irony, an individual who, sitting alone, obtained images of sexually exploited children on his computer, could receive a higher sentence than the Guidelines would recommend for an offender who actually rapes a child.").

142. *See, e.g.*, *United States v. Cameron*, No. 1:09-cr-00024-JAW, 2011 WL 890502, at *19 (D. Me. Mar. 11, 2011) ("The guidelines under § 2G2.2 are at risk of practical irrelevance and defendants will increasingly be left to the disparate sense of justice among federal judges, which is what led to the guidelines in the first place."); *United States v. Stern*, 590 F. Supp. 2d 945, 961 (N.D. Ohio 2008) ("[O]ne would be hard pressed to find a consistent set of principles to explain exactly why some federal child porn defendants face decades in federal prison, some face many years in federal prison, while others only end up facing months." (quoting Douglas A. Berman, *Is There an Ivy-Leaguer Exception to Federal Child Porn Charges?*, SENT'G L. & POL'Y (Oct. 22, 2008, 7:33 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2008/10/is-there-an-ivy.html)); AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, REPORT OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE NEED FOR REVIEW OF THE FEDERAL SENTENCING GUIDELINES FOR CHILD PORNOGRAPHY OFFENSES 10 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/2011a_resolution_105a.authcheckdam.pdf (contending that "unwarranted disparity" in sentencing is occurring because many sentencing judges are "finding a need to depart or vary from these guidelines to achieve justice").

143. U.S. SENTENCING COMM'N, *supra* note 2, at 13.

144. In 2013, federal courts departed downward or imposed a non-government-sponsored, below-Guidelines sentence in over 40 percent of non-contact child pornography cases. *See* U.S. SENTENCING COMM'N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 27, *available at* http://www.ussc.gov/sites/default/files/pdf/

in light of a survey of district court judges conducted in 2010. Seventy percent of judges opined that guidelines result in inappropriately high sentences in child pornography receipt and possession cases.[145]

While downward departures and variances are most certainly warranted in certain case-specific situations, judges are increasingly sentencing below guidelines (and sometimes even below statuary minimums) for a variety of reasons. For example, in a four hundred-plus page opinion in *United States v. C.R.*,[146] the court refused to impose a five-year mandatory minimum based on its categorical objection to mandatory minimum sentences.[147] Additionally, the court in *United States v. McGrath*[148] recently explained that many district courts have "determined that the Guidelines in child pornography cases are owed less deference than those for other offenses."[149]

E. Disparity in Sentence Length: Possibilities

Prosecutors, defense attorneys, judges, advocacy groups, and many others agree that the U.S. Sentencing Guidelines for crimes against children are in desperate need of repair.[150] Amending the Guidelines would almost certainly help to reduce the unwanted disparity in sentence length among similarly situated child pornography offenders. However, such change would not be a remedy for the problems caused by the U.S.

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research-and-publications/annual-reports-and-sourcebooks/2013/Table27.pdf. In contrast, courts departed downward or imposed non-government-sponsored, below-Guidelines sentences in 18.7 percent of all federal cases. *Id.* tbl. N, *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/TableN.pdf.

145. U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010, at tbl.8 (2010), *available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/20100608_Judge_Survey.pdf.

146. 792 F. Supp. 2d 343 (E.D.N.Y. 2011).

147. *Id.* at 493, 509–10.

148. No. 8:12CR422, 2014 WL 351975 (D. Neb. Jan. 31, 2014).

149. *Id.* at *7 n.7 (explaining that child pornography crimes are "largely the product of congressional directives, some of which the Sentencing Commission actively opposed, rather than Commission study and expertise" (quoting *United States v. Diaz*, 720 F. Supp. 2d 1039, 1042 (E.D. Wis. 2010))). As examples, the court cites: *United States v. Cameron*, No. 1:09-cr-00024-JAW, 2011 WL 890502, at *5–6 (D. Me. Mar. 11, 2011); *United States v. Riley*, 655 F. Supp. 2d 1298, 1304–05 (S.D. Fla. 2009); *United States v. McElheney*, 630 F. Supp. 2d 886, 891 (E.D. Tenn. 2009); *United States v. Beiermann*, 599 F. Supp. 2d 1087, 1100 (N.D. Iowa 2009); *United States v. Phinney,* 599 F. Supp. 2d 1037, 1040 (E.D. Wis. 2009); *United States v. Grober,* 595 F. Supp. 2d 382, 402 (D. N.J. 2008); *United States v. Doktor*, No. 6:08-cr-46-Orl-31DAB, 2008 WL 5334121, at *1 (M.D. Fla. Dec. 19, 2008); and *United States v. Stern*, 590 F. Supp. 2d 945, 960–61 (N.D. Ohio 2008).

150. *See supra* note 134 and accompanying text.

Code's current federal child pornography statutes—especially the problematic MSSE scheme.[151]

A person with federal sentencing experience might suggest that the federal system is already equipped with the procedural tools necessary to sentence markedly different defendants accordingly. Indeed, both the advisory Sentencing Guidelines[152] and 18 U.S.C. § 3553(a)[153] seem to account for substantial variance among defendants and adjust sentence length accordingly.[154] However, Congress has the exclusive right and responsibility to legislate statutory minimum sentences, and once a statutory minimum is triggered, it trumps any inconsistent Guidelines range.[155]

In order to achieve more consistency in applying the MSSE, Congress should clearly define "the generic elements" of the offense. The Internet creates a forum where extreme predatory conduct could likely be understood as "abusive" (within the MSSE definition), but until Congress clarifies whether actual physical "contact" is required, the application of the MSSE will likely remain inconsistent.

Another possibility is carving out one important exception to *Descamps* to be applied *only* in child pornography cases. For example, a workable exception would be one that always permits a sentencing judge

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151. 18 U.S.C. §§ 2252–2252A (2012).

152. The U.S. Sentencing Guidelines direct federal trial courts to an advisory sentencing range (in number of months) for a given defendant based on an assessment of the defendant's offense of conviction and criminal history. The Guidelines seek to assist courts in achieving accurate and uniform sentencing, but sentencing judges have the discretion to reject a Guidelines range on the basis of a policy disagreement. *Spears v. United States*, 555 U.S. 261, 265–66 (2009); *United States v. Booker*, 543 U.S. 220, 259–60 (2005) (Breyer, J., opinion of the court).

153. Under 18 U.S.C. § 3553(a), Congress listed additional factors a court must consider in calculating a sentence, including, but not limited to: pertinent policy statements; avoiding unwarranted sentence disparities among similar defendants with similar conduct of conviction; the kinds of sentences available; and the need for the sentence to reflect the seriousness of the offense and provide a just punishment, afford adequate deterrence, protect the public, and provide the defendant with the most effective treatment, training, or care. § 3553(a); *Booker*, 543 U.S. at 260 (Breyer, J., opinion of the court).

154. For example, U.S.S.G. § 2G2.2 (the Guidelines section applicable for most child pornography offenses) suggests adjustments in the offense-level determination based on: age of the minor depicted in the material (whether the minor had attained the age of 12); pecuniary gain from the offense; whether the material was distributed to a minor to coerce the minor into engaging in illegal activity; the number of images; and whether the material portrays sadistic, masochistic, or other violent conduct. U.S. SENTENCING GUIDELINES MANUAL § 2G2.2 (2014).

155. *United States v. Evans*, 333 U.S. 483, 486 (1948) (explaining that "as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions").

to consult *Shepard*[156] documents in child exploitation cases in certain, limited circumstances. For example, a sentencing judge could consult the reliable documents from a defendant's prior conviction to determine *the victim's age*. Such an exception might limit some inconsistency (and absurdity) in applying the MSSE post-*Descamps*. As noted above, many state statutes would likely trigger the MSSE if the statute required the victim to be a minor. Without that, however, the MSSE is only triggered by a "sexual abuse" conviction—which *does* have a narrow generic definition. If a sentencing judge was always permitted to "peek behind the statute of conviction" for the sole purpose of identifying if the victim of a "merely broad" statute was a minor, the MSSE would work more effectively in applying to those offenders who target minors repeatedly.

CONCLUSION

Prosecutors are making increased efforts to charge more offenders, but the formal legal scheme offers little opportunity to "differentiate" among these offenders (or even determine who might be considered more culpable, more dangerous, etc.). The high moral stigma associated with the crime of child pornography means that there is little social objection to severe punishment and increased sentences. It also means that there is little push to create new mechanisms that would assist sentencing judges in consistently making meaningful distinctions among offenders, formally or otherwise. Despite the fact that the punishment of child pornography offenders has only become more severe, any deterrent effect of these increased sentences seems mitigated by the size and scope of the Internet issue—offering offenders a forum where the probability of being caught and punished for activity is low.

The formal system needs a way to recognize and adapt to the existence of the differentiated child pornography offender. One way for the system to adapt is to better reflect an understanding of how informative a criminal history of abusive sexual conduct involving children can be. Any reduction in the problematic sentencing disparities could help restore faith in a statutory scheme that—at its core—seeks to protect the most vulnerable members of society.

156. *See supra* notes 85–87 and accompanying text.