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How Many Is Any: Interpreting Sec. 2252A's Unit of Prosecution for Child Pornography Possession

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COMMENTS

HOW MANY IS "ANY"?: INTERPRETING § 2252A'S UNIT OF PROSECUTION FOR CHILD PORNOGRAPHY POSSESSION

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Individuals convicted for possession of child pornography should not receive drastically different sentences based solely on the statute under which they are convicted. Yet courts interpret the current statutory scheme in this way.

Depending on which of two statutes a prosecutor chooses to bring charges under, and on which circuit has jurisdiction, the same defendant could receive one count of possession—or ten counts or one hundred counts. This discrepancy results from a slight difference in phrasing between two near-identical statutes: 18 U.S.C. § 2252(a)(4)(B) and § 2252A(a)(5)(B). Under § 2252, a defendant may only be convicted of one count of possession for all illicit materials simultaneously possessed in one place, and sentencing is tailored to the number of images possessed, among other factors. Under § 2252A, however, individuals can be convicted of a separate count for each physical storage device or each type of storage medium utilized. Both statutes are currently in effect, leading to the potential for widely disparate punishments for similar levels of possession.

Based on the application of various canons of construction, this Comment argues that § 2252A does not authorize separate punishment for separate devices or storage media types simultaneously possessed in one place. Furthermore, this Comment argues that it is neither fair nor productive to penalize a defendant for choosing a certain organizational system rather than for the underlying crime of possessing child pornography.

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TABLE OF CONTENTS

INTRODUCTION

Imagine an individual has ten images of child pornography stored on a desktop computer. How many crimes of possession has he committed? Has he committed ten crimes of possessing one image each? Or, has he committed only a single crime of child pornography possession? Next, imagine that the individual moves one image onto an external hard drive and another image onto a second external hard drive. Has he now committed two crimes, one for each type of storage medium (*i.e.*, one count for the external hard drives and a second count for the original computer)? Alternatively, has he committed three crimes, one for each physical storage device (*i.e.*, one count for each drive and a third count for the computer)? Should a different and harsher punishment result merely because the individual moved two images from one device to another? Depending on the jurisdiction and statute involved, the answer to how many crimes have been committed may be any of the above.[1]

With the rise of the Internet, the child pornography market has surged, making it increasingly difficult for law enforcement to identify and prosecute individuals involved in the child pornography industry.[2] To make matters more difficult, advances in technology, such as the ability to digitally alter electronic media, can frustrate the government's ability to prove that an actual minor is depicted in a given image or video. For example, images of adults can be digitally altered to make the adults appear younger, innocent images of

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1. *See generally* Orin Kerr, *Counting Crimes when Defendants Possess Many Images of Child Pornography on Several Devices*, VOLOKH CONSPIRACY (July 28, 2012, 2:18 PM), http://www.volokh.com/2012/07/25/counting-crimes-when-defendants-possess-many-images-of-child-pornography-on-several-devices (discussing how the number of crimes committed is counted differently under each of the two primary federal child pornography possession statutes, and noting an Arizona state appellate court's alternative method of counting each individual image as a separate crime under state law).

2. *See Child Exploitation & Obscenity Section*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/ceos/subjectareas/childporn.html (last visited Aug. 23, 2013) (describing the ease with which producers, distributors, and consumers of child pornography can now connect with one another and share pornographic images via the Internet, thereby increasing the quantity of readily-available child pornography); U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 3 (Aug. 2010), *available at* http://www.justice.gov/psc/docs/natstrategyreport.pdf ("The anonymity afforded by the Internet makes the offenders more difficult to locate, and makes them bolder in their actions."); *see also* Deb Shinder, *What Makes Cybercrime Law So Difficult To Enforce*, TECHREPUBLIC (Jan. 26, 2011, 12:05 PM), http://www.techrepublic.com/blog/it-security/what-makes-cybercrime-laws-so-difficult-to-enforce ("[D]iscover[ing] where—and who—the criminal is . . . is a problem with online crime because there are so many ways to hide one's identity. There are numerous services that will mask a user's IP address by routing traffic through various servers, usually for a fee.").

children can be digitally altered into sexually explicit images, and computer-generated images can be made to look like child pornography even though no real children were involved in their creation.[3] Such imagery, deemed "virtual child pornography,"[4] has become the target of recent legislation.

Federal law criminalizes possession of virtual child pornography in 18 U.S.C. § 2252A, which targets offenses involving actual and virtual child pornography.[5] Section 2252A(a)(5)(B) prohibits the knowing possession of "*any* book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography."[6] Section 2252A is almost a mirror image of an older statute that is still in effect and targets only *actual* child pornography: § 2252.[7] Section 2252(a)(4)(B) prohibits the knowing possession of "*1 or more* books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction . . . of a minor engaging in sexually explicit conduct."[8] The small wording change from "1 or more" in § 2252 to "any" in § 2252A has had large consequences for some defendants because courts have interpreted it to mean that the "unit of prosecution" changed.[9]

A unit of prosecution is the unit of conduct, or the actus reus, that the legislature intended to punish in the statutory provision defining

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3. *See* Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV. J. ON LEGIS. 439, 440–41, 441 n.8 (1997) (describing "morphing," a technique using technology to digitally create child pornography from non-obscene images or from adult pornography); Kate Dugan, Note, *Regulating What's Not Real: Federal Regulation in the Aftermath of* Ashcroft v. Free Speech Coalition, 48 ST. LOUIS U. L.J. 1063, 1064–65 (2004) (explaining several kinds of computer-generated, virtual child pornography, including images that are produced with three-dimensional modeling programs and are indistinguishable from actual child pornography).

4. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 241 (2002) (noting that then-18 U.S.C. § 2256(8)(B) defined child pornography to encompass "a range of depictions, sometimes called 'virtual child pornography,' which include computer-generated images").

5. 18 U.S.C. § 2252A (2006). In addition to possession of virtual child pornography, § 2252A also prohibits mailing, transporting, receiving, distributing, reproducing, advertising, and selling child pornography, as well as possessing child pornography with the intent to sell it. *Id.*

6. *Id.* § 2252A(a)(5)(B) (emphasis added).

7. *Id.* § 2252; *see also* Burke, *supra* note 3, at 442 (explaining that actual child pornography depicts actual minors engaging in sexual activities).

8. 18 U.S.C. § 2252(a)(4)(B) (emphasis added).

9. *See* United States v. Hinkeldey, 626 F.3d 1010, 1013–14 (8th Cir. 2010) (explaining that, unlike § 2252A's use of the word "any," the words "1 or more" in § 2252(a) reflect an intent to include multiple materials in a single prosecution); United States v. Planck, 493 F.3d 501, 504–05 (5th Cir. 2007) (finding that the government must charge and prove separate receipts of pornography to sustain separate possession counts under § 2252(a), but that simultaneous possession of material in more than one storage device constitutes multiple counts under § 2252A).

the crime.[10] Depending on how a court interprets a statute's unit of prosecution, a defendant may be convicted of any number of counts arising from the same criminal event. Take the following illustration for example: If Congress crafted a statute prohibiting the sale of child pornography such that the unit of prosecution was one image, then a defendant could be charged with and convicted of a separate count for each individual image sold in the course of a single transaction. On the other hand, if Congress worded the statute such that each transaction as a whole was criminalized, then a defendant could only be convicted of one count per transaction, regardless of how many images were sold in that transaction. Consequently, a court's interpretation of the allowable unit of prosecution may lead to a drastic difference in the number of counts a defendant receives from a single incident.[11]

Courts have largely agreed that § 2252's unit of prosecution for possession encompasses all of the storage devices possessed by an individual at the same place and time, regardless of the number or type.[12] Accordingly, in the hypothetical above, the defendant in

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10. *See* Jeffrey M. Chemerinsky, Note, *Counting Offenses*, 58 DUKE L.J. 709, 712 (2009) (defining a "unit of prosecution" as the act that the legislature intended to be the basis of a single conviction and sentence (citing Brown v. State, 535 A.2d 485, 489 (Md. 1988)); *see also Planck*, 493 F.3d at 503 ("[W]e must first determine the 'allowable unit of prosecution', which is the *actus reus* of the defendant." (citations omitted)).

11. *Compare* United States v. Polouizzi, 564 F.3d 142, 156–57 (2d Cir. 2009) (holding that § 2252(a) only authorizes one possession count for simultaneously-possessed child pornography such that defendant's multiple possession convictions were erroneous), *with* United States v. Schales, 546 F.3d 965, 979 (9th Cir. 2008) (stating in dictum that the government may charge a defendant who has stored images of child pornography in separate mediums "with separate counts [under § 2252(a)] for each type of material or media possessed").

12. *See* United States v. Chiaradio, 684 F.3d 265, 274 (1st Cir.) (holding that "the plain language of section 2252(a)(4)(B) memorializes Congress's intent . . . that one who simultaneously possesses a multitude of forbidden images at a single time and in a single place will have committed only a single offense"), *cert. denied*, 133 S. Ct. 589 (2012); *Polouizzi*, 564 F.3d at 156 (holding that Congress did not intend to permit separate prosecutions and convictions under § 2252 for each individual piece of child pornography possessed); United States v. Kimbrough, 69 F.3d 723, 729 n.5, 730 (5th Cir. 1995) (considering a former version of § 2252's possession provision and holding that "the plain language of the statute's requirement that a defendant possess 'three or more' items indicates that the legislature did not intend for [the] statute to be used to charge multiple offenses"). *But see Schales*, 546 F.3d at 979 (stating in dictum that "where a defendant has stored sexually explicit images in separate mediums, the government may constitutionally charge that defendant with separate counts for each type of material or media possessed" but supporting the proposition with *Planck*, 493 F.3d at 504, which interpreted § 2252A); United States v. Hamilton, Civil No. 07-50054, 2007 WL 2903018, at *2 (W.D. Ark. Oct. 1, 2007) (holding that Congress did not intend to limit charges for possession of child pornography under § 2252 to a maximum of one count); United States v. Flyer, No. CR 05-1049 TUC-FRZ, 2006 WL 2590459, at *4 (D. Ariz. Sept. 7, 2006) (finding "the common usage of the phrase '1 or more' can not reasonably be interpreted to only

possession of ten illicit images stored across one computer and two drives could only be convicted of one count of possession under § 2252.

In contrast, courts interpreting § 2252A have concluded that the switch to "any" indicates a singular unit of prosecution, such that possessing multiple devices can lead to multiple possession counts.[13] Thus far, only two circuit courts of appeal have conclusively addressed the issue of § 2252A's allowable unit of prosecution for possession. The U.S. Court of Appeals for the Fifth Circuit, in *United States v. Planck*,[14] concluded that § 2252A permits a separate count of possession for each *type* of storage medium containing child pornography.[15] Accordingly, the court upheld the defendant's conviction of three counts of possession: one each for illicit materials stored on a desktop computer, on a laptop computer, and on a number of diskettes.[16] Alternatively, the U.S. Court of Appeals for the Eighth Circuit, in *United States v. Hinkeldey*,[17] concluded that § 2252A's possession unit of prosecution is each physical storage *device*.[18] Consequently, the court upheld the defendant's six counts of

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allow a maximum of one count of possession, regardless of the number of visual depictions of child pornography a defendant may have on various forms of physical media"), *rev'd*, 633 F.3d 911, 913 n.1, 919–20 (9th Cir. 2011) (finding insufficient evidence to support one of the counts of possession due to lack of any indication that the defendant was in actual possession of the images cited in that count and declining to address the issue of multiplicity because the reversal of one of the possession counts mooted the defendant's multiplicity claim).

In *Hamilton*, the court relied on the reasoning of the *Flyer* court because the Eighth Circuit, which had appellate jurisdiction, had not addressed whether § 2252 allowed for more than one count of possession. *See* 2007 WL 2903018, at *1–3 (agreeing expressly with the *Flyer* court's analysis that § 2252 does not limit the maximum number of possession counts to one count). Subsequently, the Eighth Circuit cast doubt on the decision of the *Hamilton* court, finding that "the phrase '1 or more' in § 2252(a)(4)(B) arguably manifests a clear intention to include multiple materials in a single unit of prosecution." *Hinkeldey*, 626 F.3d at 1014. Thus, the only three decisions to find that more than one possession count can be brought under § 2252 have either been discredited or were based on a faulty premise.

13. *See Hinkeldey*, 626 F.3d at 1013 (finding Congress did not conclusively limit the word "any" in § 2252A to permit only a single possession count); *Planck*, 493 F.3d at 505 (holding that § 2252A permits multiple possession counts).

14. 493 F.3d 501 (5th Cir. 2007).

15. *Id.* at 504 (establishing that the government may charge a defendant who has stored child pornography in separate types of media with multiple counts of possession under § 2252A).

16. *Id.* at 505 ("Through different transactions, [the defendant] possessed child pornography in three separate places . . . and, therefore, committed three separate crimes. The counts are not multiplicitous.").

17. 626 F.3d 1010 (8th Cir. 2010).

18. *Id.* at 1013 (affirming the district court's judgment that the six possession counts, one each for six separate electronic storage devices, were not multiplicitous because each device constituted a separate unit of prosecution).

possession for one computer, one zip drive, and four computer disks.[19]

The *Planck* and *Hinkeldey* decisions illustrate a slight circuit split between the Fifth and Eighth Circuits. While both circuits agree that, unlike under § 2252, defendants can be convicted of multiple possession counts under § 2252A, they disagree on § 2252A's precise unit of prosecution. To illustrate the practical difference between the two circuits' definitions of § 2252A's possession unit of prosecution, consider once again the hypothetical discussed above. Under *Planck*'s reasoning, the hypothetical defendant possessing ten illicit images spread across three devices could be convicted of two separate counts of possession: one count for storage on the desktop computer, and one count for storage on the two external hard drives (which would be grouped into one count because they constitute one *type* of medium).[20] Under *Hinkeldey*'s reasoning, however, the hypothetical defendant could be convicted of three counts of possession—one count each for the computer, the first drive, and the second drive—because all three are separate devices.[21]

Charging defendants with, and convicting them of, multiple counts arising from the same event or course of conduct can have significant consequences. Prosecutors have broad discretion in deciding how to charge defendants.[22] Prior to trial, the mere presence of multiple counts gives the prosecutor a greater ability to pressure a defendant into taking a plea bargain favorable to the government because the stakes of going to trial are higher.[23] If the defendant does not accept

19. *Id.* at 1014.

20. *See supra* note 15 and accompanying text (discussing *Planck*).

21. *See supra* note 18 and accompanying text (discussing *Hinkeldey*).

22. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (establishing that a prosecutor generally has complete discretion to decide whether to prosecute and what charges to file against a defendant); United States v. Batchelder, 442 U.S. 114, 123–24 (1979) ("This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." (citations omitted)). *See generally* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 746 (1996) (arguing that many state legislatures "have effectively abdicated public policy-making to the prosecutor since it is the prosecutor, and not the legislature, that has the final decision in determining which public policy, if any, is breached by an individual's conduct"). Misner discusses prosecutorial discretion in state courts, but his argument translates to the federal context where overlapping penal provisions make it possible for a single act to be charged under more than one statute, thereby creating power in prosecutors to decide which violations to bring against defendants. *Id.* at 745–46.

23. *See* Chemerinsky, *supra* note 10, at 737–38 (expressing concern with the "enormous power" prosecutors have when they are able to charge multiple counts for one act—a power that can be abused through the over-charging of defendants).

a plea bargain and instead chooses a jury trial, the number of charged counts can affect the jury's opinion of the defendant,[24] for example, by amplifying the charged conduct.[25] Prosecutorial discretion is particularly relevant to sentencing because the charges brought determine the range of sentences a defendant can receive if convicted.[26] If a defendant is convicted of multiple counts, then the court has discretion to order the sentence for each count to run consecutively.[27] Alternatively, even if sentences run concurrently, the existence of multiple convictions on a defendant's record can lead to lengthier sentences for future convictions under recidivist statutes, delays in parole eligibility, decreased credibility, and greater societal stigma.[28]

The repulsive nature of child pornography may lead one to believe that the more counts a possessor can receive, the better.[29] The *Planck*

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24. Misner, *supra* note 22, at 748.

25. *See id.* (noting that the number of charges may influence a jury's view of the defendant, which could mean a defendant facing many charges is at a disadvantage in the eyes of the jury).

26. *See id.* at 742, 748 (describing the growth in the number of statutes carrying mandatory minimum sentences and explaining that a prosecutor's decision to charge a defendant with violating a statute that carries a mandatory minimum penalty limits the judge's ability to reduce the defendant's sentence below the prescribed minimum); *see also* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1405 (9th ed. 2010) ("[T]he power of the prosecutor to choose the charge upon which to proceed before a judge or jury and to press for either harsh or lenient treatment is substantial."); Stephen L. Bacon, Note, *A Distinction Without a Difference: "Receipt" and "Possession" of Child Pornography and the Double Jeopardy Problem*, 65 U. MIAMI L. REV. 1027, 1030–31 (2011) (illustrating how a prosecutor's decision whether to charge a defendant with receipt or possession has large consequences, as receipt carries a mandatory minimum sentence of five years while possession carries no minimum sentence, and suggesting that this punishment differential is illogical).

27. *See* 18 U.S.C. § 3584(a) (2006) (providing that "[i]f multiple terms of imprisonment are imposed on a defendant at the same time, . . . the terms may run concurrently or consecutively").

28. *See* Rutledge v. United States, 517 U.S. 292, 302 (1996) ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." (quoting Ball v. United States, 470 U.S. 856, 864–65 (1985))); *see also* Misner, *supra* note 22, at 749 (listing several collateral consequences of multiple-count convictions, including increased sentences for subsequent convictions under sentencing enhancement statutes, adverse impact on a prisoner's ability to obtain parole, adverse influence on society's perception of the defendant, and adverse effect on the defendant's perception of him- or herself).

29. *See* Audrey Rogers, *Child Pornography's Forgotten Victims*, 28 PACE L. REV. 847, 848–49 (2008) (expressing concern that some federal judges have reduced the sentences of defendants convicted of multiple counts of child pornography possession on the grounds that child pornography is a victimless crime); Holly H. Krohel, Comment, *Dangerous Discretion: Protecting Children by Amending the Federal Child Pornography Statutes to Enforce Sentencing Enhancements and Prevent Noncustodial Sentences*, 48 SAN DIEGO L. REV. 623, 626–28, 675 (2011) (recommending that Congress create a mandatory minimum sentence for possession of child

and *Hinkeldey* approaches, however, are not the appropriate way to accomplish this goal, nor is this goal necessarily desirable.[30] Rather than reach more just outcomes, both approaches will lead to increased sentencing disparities between similarly situated defendants.[31]

Defendants possessing an identical collection of illicit images can be convicted of a different number of counts, depending on whether they are charged under § 2252 or § 2252A and on the number of devices or media types they used to store their images.[32] All other sentencing factors being equal, these defendants may receive drastically different sentence lengths based on the different number of counts, and may suffer disproportionate secondary consequences from having multiple convictions on their record.[33] Such disparity is precisely what Congress sought to alleviate in the Sentencing Reform Act of 1984 by creating the U.S. Sentencing Commission and empowering it to promulgate the Federal Sentencing Guidelines ("the Guidelines").[34]

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pornography and incorporate the advisory sentence enhancements into statutes to prevent judges from departing downwards from the sentencing guidelines). *But see* Melissa Hamilton, *The Child Pornography Crusade and Its Net-Widening Effect*, 33 CARDOZO L. REV. 1679, 1682–83 (2012) (arguing that policymakers have undertaken an overinclusive "child pornography crusade" that takes an undifferentiated view of all child pornography offenders as heinous child abusers, and asserting that passive possession should not be grouped with production and solicitation offenses that involve direct contact with minors).

30. *See* Hamilton, *supra* note 29 (explaining that the undifferentiated approach treats all offenses equally despite the differing harm to children).

31. *See supra* text accompanying notes 20–21 (discussing the different outcomes under the *Hinkeldey* and *Planck* approaches).

32. *See supra* text accompanying notes 12–13 (demonstrating the difference in counts that can be brought against a defendant based on the statute used and the number and types of media involved).

33. *See supra* note 28 and accompanying text (listing examples of secondary consequences of conviction on multiple counts).

34. 28 U.S.C. § 991(b)(1)(B) (2006) states:

> The purposes of the United States Sentencing Commission are to . . . establish sentencing policies and practices for the Federal criminal justice system that . . . provide certainty and fairness in meeting the purposes of sentencing, *avoiding unwarranted sentencing disparities* among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors.

Id. (emphasis added); *see also* SALTZBURG & CAPRA, *supra* note 26, at 1435 (explaining the calls for increased consistency in federal sentencing practices that led Congress to enact the Sentencing Reform Act).

The Guidelines seek to reduce discretion in federal sentencing and to make sentencing more uniform. *Id.* at 1435. The Sentencing Reform Act of 1984 organizes federal criminal offenses into classes and designates a sentencing range for each class. *Id.* Each offense starts with a base offense level determined by the seriousness of the offense; the base offense level may be increased or decreased based on a number of factors set forth in the Guidelines, such as the defendant's

The purpose of this Comment is not to take sides on whether individuals should receive harsher punishments for possession of child pornography. Instead, this Comment argues only that the basis for charging a defendant with counts of possession of child pornography should not be determined by the number or type of storage devices. Neither factor accurately indicates culpability and neither factor is clearly expressed in the statute as Congress's intended unit of prosecution. This Comment argues that the *Planck* and *Hinkeldey* courts misinterpreted § 2252A's possession unit of prosecution such that the additional possession counts in both cases should have been dismissed as multiplicitous. Section 2252A's "any" language should be interpreted as equivalent to § 2252's "1 or more" language, and the unit of prosecution should not depend on the number or types of physical storage devices. Thus, in the hypothetical with which this Comment began, the defendant should only receive one count of possession, regardless of how he arranged the images across devices, and his sentence should be determined based on the number of images possessed, along with the other sentencing factors considered.[35]

Part I provides a historical overview of federal child pornography laws, including § 2252 and § 2252A, explains the problem of

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criminal history. *Id.* at 1436.

When first enacted, the Guidelines and the sentencing ranges prescribed therein were binding on sentencing courts. *Id.* at 1435. The Supreme Court, however, struck down the provision of the Reform Act that made the Guidelines mandatory. United States v. Booker, 543 U.S. 220, 226–27 (2005). Although the Guidelines are now advisory rather than mandatory, courts are still required to calculate the Guideline range for each defendant. *See id.* at 245–46 ("So modified, the [Reform Act] . . . requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well." (citations omitted)).

35. For a list of factors courts are advised to consider during sentencing, see 18 U.S.C § 3553(a) (2006) (held not mandatory by *Booker*, 543 U.S. 220). Section 3553(a) lists the following factors:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for—(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

Id.

multiplicity, and describes the test for multiplicity in the context of identifying a statute's unit of prosecution. This Part also summarizes *United States v. Planck* and *United States v. Hinkeldey*, as well as *United States v. Anson*. Cases interpreting § 2252's possession unit of prosecution are also addressed, as well as cases interpreting units of prosecution in contexts other than possession of child pornography. Finally, Part I briefly introduces relevant statutory canons of construction for discerning Congress's intended unit of prosecution for § 2252A.

Part II applies the pertinent canons of construction to analyze § 2252A's language, statutory scheme, and legislative history, and argues that the possession provision is ambiguous as to the unit of prosecution. This Part also argues that the rule of lenity should apply, construing § 2252A's unit of prosecution for possession in the defendant's favor. This application is contrary to how courts have thus far interpreted the statute. Finally, this Part discusses the purposes of punishment in our criminal justice system and explains why these purposes are not better served by charging defendants separately for each device or type of storage medium they possess.

This Comment concludes by arguing that the unit of prosecution in § 2252A's possession provision should be interpreted to include any number and type of storage devices that defendants possess at the same place and time. Accordingly, defendants' sentences should be determined by the number of images in their possession, along with other advisory factors, as recommended by the Guidelines.[36]

I. BACKGROUND

The following provides an overview of the history of federal child pornography legislation, including the enactment of § 2252 and § 2252A, before launching into an explanation of multiplicity claims. A discussion of how courts interpret possession units of prosecution in the child pornography context under § 2252, as well as in other contexts, follows. Finally, this Part provides a summary of the decisions interpreting § 2252A's possession provision and introduces the canons of statutory construction that make up the unit of prosecution test.

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36. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.2(b)(7) (2012). This section states:

> 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.

Id.

A. History of Federal Child Pornography Laws, Including § 2252 and § 2252A

Federal legislation regarding child pornography began in earnest with the Protection of Children Against Sexual Exploitation Act of 1977.[37] This Act, which prohibited the commercial production of child pornography,[38] was the first of several statutes passed over the next three decades that expanded federal involvement in prosecuting child pornography.[39] While these statutes criminalized various aspects of the child pornography industry, it was not until 1990 that Congress added simple possession of child pornography to the other offenses already listed in § 2252 by passing the Child Protection Restoration and Penalties Enhancement Act of 1990 (CPRPEA).[40]

By the mid-nineties, Congress recognized the need to address the effects of technology on the child pornography market. Section 2252 offenses require evidence that an actual minor was involved in the creation of a given visual depiction.[41] The rise of virtual child pornography, however, has cast doubt on whether a real minor is portrayed in a given image and thus impedes the government's ability to prove this key element.[42] The result of Congress's efforts was the

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37. Pub. L. No. 95-225, 92 Stat. 7 (1978).

38. *See* Michael J. Henzey, *Going on the Offensive: A Comprehensive Overview of Internet Child Pornography Distribution and Aggressive Legal Action*, 11 APPALACHIAN J.L. 1, 11–12 (2011) (explaining that a late 1970s national media campaign in opposition to the rise of the child pornography market "provided the impetus for [federal] legislators to act" to prohibit the manufacture and commercial distribution of child pornography).

39. *See generally* Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545, 549–50 (2011) (tracing the history and enactment of four pieces of federal legislation that expanded the reach of federal child pornography law: the Protection of Children Against Sexual Exploitation Act of 1977, which targeted commercial production of obscene images of children; the Child Protection Act of 1984, which deleted the obscenity requirement in favor of criminalizing all actual child pornography; the Child Protection and Obscenity Enforcement Act of 1988, which "specifically prohibited the use of a computer to transport, distribute, or receive" images of actual pornography; and the Crime Control Act of 1990, which established possession of child pornography as a federal offense). Hamilton argues that the current Federal Sentencing Guidelines do not sufficiently acknowledge the differing levels of culpability that attach to the various child pornography offenses and, as a result, are too severe on possession and receipt offenders. This has led to many federal judges departing downward from the Guidelines, thereby increasing sentencing disparities. *Id.* at 546–47.

40. Pub. L. No. 101-647, 104 Stat. 4816 (1990) (codified at 18 U.S.C § 2252 (1994)). The offenses included a prohibition on the knowing possession of "*3 or more* books, magazines, periodicals, films, video tapes, or other matter" containing a visual depiction of actual child pornography. § 323(a), 104 Stat. at 4818 (emphasis added).

41. 18 U.S.C. § 2252(a) (2006).

42. *See supra* note 3 and accompanying text (discussing methods of creating virtual child pornography).

Child Pornography Prevention Act of 1996 (CPPA), which added § 2252A to the existing scheme of federal child pornography laws.[43] Section 2252A, as originally enacted, was almost a mirror image of § 2252, except that it replaced the phrase "visual depiction . . . of a minor engaging in sexually explicit conduct"[44] with the phrase "child pornography,"[45] which was broadly defined to include various forms of virtual child pornography.[46]

In 2002, the Supreme Court struck down key provisions of the CPPA in *Ashcroft v. Free Speech Coalition*.[47] *Free Speech Coalition* held that the CPPA's definition of "child pornography" was overbroad and thus infringed on First Amendment free speech rights.[48] The CPPA originally defined "child pornography" as

> [A]ny visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where . . . such visual depiction is, *or appears to be*, of a minor engaging in sexually explicit conduct.[49]

In *Free Speech Coalition*, the Court found the "appears to be" language overbroad because it encompassed a substantial amount of non-obscene, lawful material, such as paintings and other works of art or expression.[50] Thus, in the interim between *Free Speech Coalition* and Congress's subsequent amendment of § 2252A, a visual depiction could not be constitutionally banned unless it depicted an actual

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43. Pub. L. No. 104-208, 110 Stat. 3009.

44. 18 U.S.C. § 2252(a)(4)(B) (2006).

45. 18 U.S.C. § 2252A(a)(5)(B) (Supp. 1997).

46. *Id.* § 2256(8); *see also infra* text accompanying note 49 (quoting the original definition of "child pornography" from § 2256(8)).

47. 535 U.S. 234 (2002). *See generally* Sue Ann Mota, *The U.S. Supreme Court Addresses the Child Pornography Prevention Act and Child Online Protection Act in* Ashcroft v. Free Speech Coalition *and* Ashcroft v. American Civil Liberties Union, 55 FED. COMM. L.J. 85, 88–93 (2002) (examining the CPPA and a circuit split over its constitutionality that led the Supreme Court to consider and ultimately strike down portions of the statute in *Free Speech Coalition*).

48. 535 U.S. at 256. The Court also struck down the CPPA's pandering provision as facially overbroad because "[i]t prohibit[ed] possession of material described, or pandered, as child pornography by someone earlier in the distribution chain" because it banned depictions of sexually explicit conduct that were "advertised, promoted, presented, described, or distributed in such a manner that *conveys the impression* that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." *Id.* at 258.

49. 18 U.S.C. § 2256(8) (2000) (emphasis added), *invalidated by Free Speech Coal.*, 535 U.S. at 256.

50. *See Free Speech Coal.*, 535 U.S. at 240, 241 (noting that pornography can generally be banned only if it is obscene but that, under the broad CPPA definition, even a Renaissance painting depicting classical mythology could constitute child pornography).

minor, its production involved the usage of an actual minor, or it was deemed obscene by a court.[51]

Without the broad definition of child pornography, § 2252A was left as the functional equivalent of § 2252.[52] Once the Court struck the definition of "child pornography" from the CPPA, "child pornography" was left undefined in this section. Following *Free Speech Coalition*, the only way to construe § 2252A constitutionally, absent further guidance from Congress, was to limit it to material that depicted actual minors or obscene materials.[53] Thus, the virtual child pornography loophole Congress set out to close in the CPPA was again wide open.

Concerned that it would weaken prosecutors' abilities to convict offenders,[54] Congress responded quickly to the Court's ruling in *Free Speech Coalition* with the passage of the Prosecutorial Remedies and Other Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act).[55] One of the main goals of the PROTECT Act was to reestablish prohibitions on virtual child pornography that conformed to the constitutional constraints laid out in *Free Speech Coalition*.[56] The Act accomplished this goal by redefining "child

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51. *See id.* at 245 (explaining certain categories where speech can be limited).

52. *See* United States v. Reedy, 304 F.3d 358, 364 n.3 (5th Cir. 2002) ("By striking down the overbroad portions of the child pornography definitions, the Court [in *Free Speech Coalition*] made § § 2252 and 2252A indistinguishable.").

53. *See Free Speech Coal.*, 535 U.S. at 245–46 (establishing that the First Amendment permits banning pornography that is obscene or that constitutes actual child pornography).

54. *See* Henzey, *supra* note 38, at 22 (commenting that the Court's decision in *Free Speech Coalition* was "almost universally criticized" and quoting the President and Chief Executive Officer of the National Center for Missing and Exploited Children, who testified before the House of Representatives' Subcommittee on Crime, Terrorism, and Homeland Security that *Free Speech Coalition* was "devastating for America's children").

55. Pub. L. No. 108-21, 117 Stat. 650. The findings for the Act stated:

> The impact of the Free Speech Coalition decision on the Government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.

§ 501(9), 117 Stat. 677.

56. *See* Henzey, *supra* note 38, at 23 (asserting that Congress passed, and President Bush signed, the PROTECT Act in response to the "perceived legal vacuum" created by *Free Speech Coalition*).

pornography" in more precise language than its CPPA counterpart. The PROTECT Act's definition of "child pornography," is "any visual depiction . . . whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct."[57] This definition delineates three categories of visual depiction. The first category comprises visual depictions that were produced using "a minor engaging in sexually explicit conduct."[58] The second category includes digital, computer, and computer-generated images that are of, or are "*indistinguishable from*, that of a minor engaging in sexually explicit conduct."[59] The final category consists of visual depictions that have "been created, adapted, or modified to appear" like they are of "an *identifiable minor* . . . engaging in sexually explicit conduct."[60] The "indistinguishable from" and "identifiable minor" language is how Congress intended the new definition of "child pornography" to pass constitutional muster after *Free Speech Coalition*.[61]

In their current forms, the possession provisions of § 2252 and § 2252A are almost identical, but § 2252A applies to a greater amount of material because the term "child pornography" therein applies to both actual and virtual child pornography. Section 2252A prohibits "knowingly possess[ing] . . . *any* book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography."[62] Section 2252 prohibits "knowingly possess[ing] . . . *1 or more* books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction," the production of which involved "the use of a minor engaging in sexually explicit conduct."[63] The wording change from "1 or more" to "any" led the *Planck* and *Hinkeldey* courts to conclude that the unit of prosecution changed from § 2252 to § 2252A, which in turn led

57. 18 U.S.C. § 2256(8) (2006).
58. *Id.* § 2256(8)(A).
59. *Id.* § 2256(8)(B) (emphasis added).
60. *Id.* § 2256(8)(C) (emphasis added).
61. *See* 149 CONG. REC. 445–46 (2003) (statement of Sen. Hatch) (introducing the PROTECT Act of 2003 and articulating that the Act is intended to "plug[] the loophole," created by *Free Speech Coalition*, "where child pornographers can escape prosecution by claiming that their sexually explicit material did not actually involve real children"). Whether the new definition of child pornography is constitutional has not yet been tested by the Supreme Court.
62. 18 U.S.C. § 2252A(a)(5)(B) (emphasis added).
63. *Id.* § 2252(a)(4)(B) (emphasis added).

both courts to reject the defendants' multiplicity claims and uphold their multiple counts of possession.[64]

B. Multiplicitous Counts and Units of Prosecution

1. Multiplicity generally

"Multiplicity is the charging of a single offense in more than one count."[65] When a defendant claims to have been charged with, or convicted of, multiplicitous counts, the defendant is arguing that two or more of the counts describe the same offense and are based on the same conduct and that therefore, only one conviction should result.[66] The danger of multiplicity is that it "may result in a defendant being punished twice for the same crime or may unfairly suggest that more than one crime has been committed."[67]

There is a presumption against multiplicitous counts[68] rooted in the Double Jeopardy Clause of the Fifth Amendment,[69] which states that no person shall "be subject for the same offence to be twice put

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64. *See supra* notes 9, 13–19 and accompanying text (discussing the reasoning of the *Hinkeldey* and *Planck* courts in upholding multiple counts of possession under § 2252A).

65. United States v. Esch, 832 F.2d 531, 541 (10th Cir. 1987) (quoting United States v. De La Torre, 634 F.2d 792, 794 (5th Cir. 1981)); *see also* United States v. Kerley, 544 F.3d 172, 178 (2d Cir. 2008) ("An indictment is multiplicitous when it charges a single offense as an offense multiple times, in separate counts, when, in law and fact, only one crime has been committed." (quoting United States v. Chacko, 169 F.3d 140, 145 (2d Cir. 1999))); United States v. Worthon, 315 F.3d 980, 983 (8th Cir. 2003) (noting that multiplicitous charges are not necessarily improper in well-pleaded indictments); 1A CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 142 (4th ed. 2008) (defining multiplicity as "charging a single offense in several counts").

66. *See* United States v. Planck, 493 F.3d 501, 503 (5th Cir. 2007) (reporting that the defendant appealed two of his three convictions for possession of child pornography on the grounds that he was being prosecuted three times for the same offense); *Esch*, 832 F.2d at 541–42 (rejecting the defendant's argument, on multiplicity grounds, that her indictment on multiple counts of production of child pornography was unconstitutional). *See generally* George C. Thomas III, *A Unified Theory of Multiple Punishment*, 47 U. PITT. L. REV. 1, 2–4 (1985) (noting the Fifth Amendment's Double Jeopardy Clause prohibits punishing a person more than once for the same offense and discussing the Supreme Court's still-developing jurisprudence regarding multiplicity).

67. United States v. Swafford, 512 F.3d 833, 844 (6th Cir. 2008) (citations omitted).

68. *See* Bell v. United States, 349 U.S. 81, 84 (1955) ("[I]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses . . . ."); United States v. Salameh, 261 F.3d 271, 278 (2d Cir. 2001) (per curiam) ("[A]s a matter of statutory construction, we are reluctant to turn[ ] a single transaction into multiple offenses." (alteration in original) (internal quotation marks omitted)).

69. Brown v. Ohio, 432 U.S. 161, 165 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense . . . .").

in jeopardy of life or limb."[70] The Double Jeopardy Clause protects defendants from successive prosecutions for the same offense after either acquittal or conviction, as well as from multiple punishments in the same proceeding for the same offense.[71] The latter category pertaining to multiple punishments has come to be known as "multiplicity."[72]

The notion that double jeopardy encompasses multiple punishments in the same prosecution, in addition to punishments in successive prosecutions, dates back more than one hundred years. In *Ex parte Lange*,[73] the Supreme Court declared that "[t]he argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."[74] Therefore, under the Supreme Court's Fifth Amendment jurisprudence, if a court determines that a defendant was convicted of one offense multiple times in the same proceeding, the court must vacate the multiplicitous convictions for violating double jeopardy.[75] This requirement applies even if the defendant's sentence was not increased by the multiplicitous conviction.[76]

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70. U.S. CONST. amend. V.

71. *See Brown*, 432 U.S. at 165 ("The Double Jeopardy Clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969))); *see also* United States v. Kimbrough, 69 F.3d 723, 729 (5th Cir. 1995) (establishing that the rule against multiplicitous convictions stems from the Fifth Amendment's Double Jeopardy Clause); SALTZBURG & CAPRA, *supra* note 26, at 1546 (explaining that the reach of the Double Jeopardy Clause is limited in instances of multiple punishments because the Fifth Amendment does not prohibit *legislatures* from imposing multiple punishments but, rather, prohibits *prosecutors and courts* from imposing multiple punishments without express statutory authorization). *But see* Chemerinsky, *supra* note 10, at 739 (noting that, although the Double Jeopardy Clause prohibits multiple punishments for the same offense, "it is unclear whether or how double jeopardy constrains prosecutors in defining an offense").

72. *See supra* note 65 and accompanying text (discussing multiplicity); *see also* BLACK'S LAW DICTIONARY 1112 (9th ed. 2009) (defining multiplicity as the "improper charging of the same offense in more than one count of a single indictment or information" and noting that multiplicity violates double jeopardy under the Fifth Amendment).

73. 85 U.S. (18 Wall.) 163 (1873).

74. *Id.* at 173.

75. *See* Ball v. United States, 470 U.S. 856, 864 (1985) (declaring that the only remedy for a finding that two convictions in the same proceeding—one for possessing a firearm and the other for receiving that same firearm—were multiplicitous was to remand to the district court to vacate one of the convictions); United States v. Ehle, 640 F.3d 689, 698–99 (6th Cir. 2011) (finding that the "only constitutionally sufficient remedy" where the defendant's counts for receiving and possessing the same child pornography were found to be multiplicitous was to remand to the district court and to vacate one of the convictions).

76. *See* Ball, 470 U.S. at 865 ("[T]he second conviction, even if it results in no greater sentence, is an impermissible punishment."); *see also supra* note 28 and

Multiplicity claims can arise two ways: (1) when a defendant is charged for the same conduct under two different statutory provisions; and (2) when a defendant is charged for the same conduct under the same statutory provision.[77] Only the second type of multiplicity is relevant here because the primary issue addressed in this Comment is whether a defendant can be charged with multiple counts of possession under one statutory provision—§ 2252A.

2. Unit of prosecution test

The standard by which to evaluate a multiplicity claim differs depending on which of the two types of multiplicity is at issue. The test for the first type of multiplicity (involving two statutes), was established in *Blockburger v. United States*.[78] The *Blockburger* test requires that each of the two violated statutory provisions include in their respective definitions of the crime at least one element that the other does not.[79] If this test is satisfied, then the "two offenses are sufficiently distinguishable to permit the imposition of cumulative punishment," and thus no multiplicity exists.[80] If this test is not satisfied, then the statutes either define the same offense or one defines a lesser included offense of the other; either way, double jeopardy permits only punishment.[81] Although this test is only applicable when the multiplicity claim involves the overlap of two different statutes, some courts have incorrectly applied it to the second type of multiplicity claim.[82]

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accompanying text (describing several collateral consequences for defendants of being subject to concurrent sentences for multiple convictions).

77. *See, e.g.*, United States v. Esch, 832 F.2d 531, 541 (10th Cir. 1987) (noting that the defendant's multiplicity claim arose when the government charged her for successive acts of possession of child pornography as separate crimes under the same statutory provision); United States v. Wiga, 662 F.2d 1325, 1334–36 (9th Cir. 1981) (differentiating between the government's arguments for reinstatement of three counts dismissed by the district court where the first two arguments involved the issue of multiple punishments under two different statutes and the third argument involved the issue of multiple punishments under one statute).

78. 284 U.S. 299 (1932).

79. *Id.* at 304.

80. Brown v. Ohio, 432 U.S. 161, 166 (1977).

81. *See, e.g., id.* In *Brown*, the Court found that the *Blockburger* test was not satisfied because only one of the offenses, auto theft, required proof of an element that the other offense, joy riding, did not; all of the elements of the joy riding offense were also elements of the auto theft offense. *Id.* at 167–68. Thus the Court held that one of the counts was multiplicitous. *Id.* at 168.

82. *See* Thomas III, *supra* note 66, at 24 n.115 (listing state cases that apply the *Blockburger* test to multiplicity claims based on violations of only one statute and demonstrating how doing so can lead to bizarre results). The *Blockburger* test cannot literally be applied when there is only one statute because then there are not two statutes from which to compare elements. *Id.* "Not to be deterred by this logical

When multiple counts are based on the *same* statutory provision—the second type of multiplicity—courts must determine what unit of prosecution the statute criminalizes.[83] Determining a statute's unit of prosecution requires ascertaining Congress's intent, which in turn requires statutory construction.[84] Such an inquiry is specific to each statute and to the facts of the case.[85] The Court has laid out three general sources that courts should look to when interpreting the congressional intent for a particular statutory offense's unit of prosecution: the statutory language, the statutory scheme, and the legislative history.[86] If the intended unit of prosecution is still unclear after applying these various canons of construction, then courts generally apply the rule of lenity to resolve the ambiguity in favor of the defendant.[87]

For example, in *In re Snow*,[88] the defendant was convicted of three counts of violating a statute that stated "if any male person . . . cohabits with more than one woman, he shall be deemed guilty of a

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inconsistency," these courts have instead looked to see if each count is supported by proof of a different *fact*. *Id.*

83. *See, e.g.*, United States v. Chipps, 410 F.3d 438, 447 (8th Cir. 2005) ("When the same statutory violation is charged twice, the question is whether Congress intended the facts underlying each count to make up a separate unit of prosecution."); United States v. Ansaldi, 372 F.3d 118, 124 (2d Cir. 2004) (citing Bell v. United States, 349 U.S. 81, 83–84 (1955)) (same). *See generally* Thomas III, *supra* note 66, at 11–25 (summarizing the Supreme Court's unit of prosecution jurisprudence).

84. *See, e.g.*, United States v. Chiaradio, 684 F.3d 265, 272–73 (1st Cir.) (noting that "Congress's intent is paramount" in determining whether an indictment is multiplicitous), *cert. denied*, 133 S. Ct. 589 (2012); *Chipps*, 410 F.3d at 448 (framing the multiplicity question, which revolved around two convictions for simple assault, in terms of congressional intent and looking at the statute's language (including interpretive canons), scheme, and legislative history to ascertain this intent); *see also* Chemerinsky, *supra* note 10, at 711–12 (observing that in the "vast majority" of state and federal offenses, the unit of prosecution is not specified by the statute so the courts infer the allowable unit from sources that shed light on the legislature's intent).

85. *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952) ("What Congress has made the allowable unit of prosecution . . . cannot be answered merely by a literal reading of the penalizing sections. Generalities about statutory construction help us little. . . . They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique.").

86. *See Chipps*, 410 F.3d at 448 (laying out the unit of prosecution test and looking to all three sources of guidance to determine whether Congress intended the statutory offense of simple assault to be a course-of-conduct offense or a separate-act offense).

87. *See* Bell v. United States, 349 U.S. 81, 83–84 (1955) (interpreting congressional ambiguity on punishment for a federal offense in favor of lenity and refusing to generate multiple offenses from a single transaction); *see, e.g.*, *Chipps*, 410 F.3d at 449 ("We conclude that Congress has not specified the unit of prosecution for simple assault with clarity, and so we apply the rule of lenity and resolve the doubt in favor of [the defendant].").

88. 120 U.S. 274 (1887).

misdemeanor."[89] The defendant had continuously lived with seven women as his wives for a period of three years.[90] Each count alleged a violation of the statute during a roughly one-year period.[91] In order to uphold all three convictions, the Court had to determine whether Congress intended the unit of prosecution for this statute to be cohabitation during a one-year period.[92] The Court found no support for this interpretation of the statute, and held that the temporal division of this continuous offense was "wholly arbitrary."[93] Because the Court determined that the defendant had only committed one offense, two of the three convictions were multiplicitous.[94] Accordingly, the court remanded the case to the trial court with instructions to grant a writ of habeas corpus for the defendant.[95]

a. Three sources of guidance

When determining Congress's intended unit of prosecution, courts apply methods of statutory interpretation. The starting point is always an analysis of the actual language of the statute.[96] After applying common canons of statutory construction, some of which are provided in greater detail below, if the language is still ambiguous as to the allowable unit of prosecution, then courts typically look to the statutory scheme[97] and legislative history[98] to discern Congress's intent.

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89. *Id.* at 275. Although each of the defendant's three convictions took place at separate trials, the statute's unit of prosecution was the key issue; if Congress only intended the defendant's actions to constitute a single offense, then the two successive trials for that same offense violated double jeopardy. *See generally id.* at 281–85 (laying out prior authority supporting this conclusion).

90. *Id.* at 276.

91. *Id.*

92. *See id.* at 281–82 (describing the inconsistency of charging a continuous offense as separate crimes based on temporal divisions).

93. *Id.* at 282.

94. *Id.* at 285.

95. *Id.* at 286–87.

96. *See, e.g.*, Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697 (1995) (beginning the analysis by looking at the text of the statute when interpreting the specific meaning of the term "harm," as used therein); United States v. Kinsley, 518 F.2d 665, 668 (8th Cir. 1975) (examining first the plain meaning of a statute prohibiting the possession of "any firearm" by a felon).

97. *See, e.g.*, United States v. Polouizzi, 564 F.3d 142, 158 (2d Cir. 2009) (finding no indication that the statutory structure of § 2252 implied that a defendant should receive one count for each image of child pornography received in one transaction).

98. *See, e.g.*, United States v. Esch, 832 F.2d 531, 542 (10th Cir. 1987) ("[Our] conclusion is supported by the legislative history of the statute, which indicates that Congress intended to protect children from the abuse inherent in the production of pornographic materials."); United States v. Corbin Farm Serv., 444 F. Supp. 510, 530–31 (E.D. Cal.) (analyzing the legislative history of the Migratory Bird Treaty Act, including amendments and a Senate Report in order to glean guidance as to the

The Supreme Court's decision in *United States v. Universal C.I.T. Credit Corp.*[99] illustrates an application of the unit of prosecution test where it was necessary to look to all three sources of statutory interpretation. There, the Court addressed alleged violations of the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act of 1938[100] (FLSA).[101] Under the FLSA's two penal provisions, the defendant corporation was charged with thirty-two counts: six for violating the minimum wage requirement, twenty for violating the overtime provision, and six for failing to comply with the record-keeping requirements.[102] Each of these counts alleged a breach of a statutory duty to one employee during a single workweek.[103] The defendant argued, and the district court agreed, that it could only be charged with one count for each of the three violated provisions and that the other counts were multiplicitous.[104]

Because the question before the Court involved determining whether the FLSA's penal provisions allowed for multiple counts under the same statutory section (*i.e.*, multiple counts for violating the minimum wage requirement, multiple counts for violating the overtime requirement, and multiple counts for violating the record-keeping requirement), the second type of multiplicity was at issue and the unit of prosecution test applied.[105] The Court first looked to both the language and statutory scheme of the two penal provisions. The first penal provision made it "unlawful for any person . . . to violate any of the provisions" of the sections describing the minimum wage, overtime, and record-keeping requirements.[106] The second provision fined "[a]ny person who willfully violates any of the provisions of" the first penal provision.[107]

The government argued that the unit of prosecution was each employee because the FLSA expressly created a civil cause of action for each employee to seek damages and restitution against an

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statute's intended unit of prosecution), *aff'd per curiam*, 578 F.2d 259 (9th Cir. 1978). *But see* United States v. Reedy, 304 F.3d 358, 367–68 & 367 n.12 (5th Cir. 2002) (applying the rule of lenity after determining that the statute's plain language was ambiguous without considering legislative history).

99. 344 U.S. 218 (1952).

100. 29 U.S.C. §§ 201–219 (2006 & Supp. V 2012).

101. *Universal C.I.T. Credit Corp.*, 344 U.S. at 218–19.

102. *Id.* at 219.

103. *Id.* at 220.

104. *Id.* at 220–21.

105. *See supra* Part I.B.1 (discussing the two multiplicity tests).

106. *Universal C.I.T. Credit Corp.*, 344 U.S. at 219 & n.1 (quoting 29 U.S.C. § 215 (1952)).

107. *Id.* (quoting 29 U.S.C. § 216(a)).

employer.[108] The Court, however, reasoned that the statute's language and scheme simultaneously supported and undermined this interpretation.[109] Because Congress expressly allowed civil liability on a per-employee basis, it could have easily done the same for criminal liability.[110] Next, the Court turned to the FLSA's legislative history for guidance.[111] When the bill from which the FLSA evolved was introduced in Congress, it explicitly provided for separate criminal offenses per employee for minimum wage and overtime violations, and per week for record-keeping violations.[112] FLSA's final form, however, contained no such provisions.[113]

The Court concluded that this legislative history, coupled with the ambiguity of the language, weighed against the government's definition of the unit of prosecution.[114] Agreeing with the lower court, the Court decided that the penal provisions were intended to criminalize a course of conduct as the unit of prosecution, rather than a violation of a statutory duty toward an employee each week.[115] Consequently, the defendant could only be charged with one count per course of conduct.[116]

b. Rule of Lenity

If Congress's intended unit of prosecution remains unclear after exhausting the foregoing three sources of guidance, then the rule of lenity applies and the court should construe the statute in the defendant's favor.[117] The rule of lenity is a judicially-created statutory canon of construction defined as, "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment."[118]

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108. *Id.* at 222.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 222–23.
113. *Id.* at 223.
114. *See id.* at 224 (concluding that the statute "cannot be said to be decisively clear on its face one way or the other" and that "the history of this legislation and the inexplicitness of its language weigh against the Government's construction").
115. *Id.*
116. *Id.* at 225–26.
117. Bell v. United States, 349 U.S. 81, 83 (1955); *see also* United States v. Dauray, 215 F.3d 257, 260 (2d Cir. 2000) (finding a prior version of § 2252(a)(4)(B) ambiguous and applying lenity to "resolve the ambiguity in [the defendant's] favor"); United States v. Kinsley, 518 F.2d 665, 666 (8th Cir. 1975) ("When Congress fails to set the unit of prosecution with clarity, doubt as to congressional intent is resolved in favor of lenity for the accused.").
118. BLACK'S LAW DICTIONARY, *supra* note 72, at 1449.

The rule of lenity is founded on the principles that citizens should have fair warning about which actions are prohibited by criminal statutes, and that the legislature, rather than the courts, should define criminal offenses and set the outer limits of punishment.[119] In *Universal C.I.T. Credit Corp.*, the Court declared that when there is more than one possible reading of a criminal statute, the Court will not choose the harsher reading unless Congress has spoken in clear and definitive language.[120] Additionally, the Court deemed it inappropriate for the judiciary to "derive criminal outlawry from some ambiguous implication."[121]

One of the oldest and most cited applications of the rule of lenity to a unit of prosecution case occurred in *Bell v. United States*.[122] There, the defendant transported two women at the same time in the same vehicle across state lines in violation of the Mann Act, which prohibited "knowingly transport[ing] . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[123] The defendant was charged with two counts of violating this statute, one for each woman.[124] The Supreme Court reversed and held that the defendant could only be charged with one count because the statute was ambiguous as to whether the unit of prosecution was each woman or each act of transportation and, therefore, the rule of lenity dictated resolution in the defendant's favor.[125] The Court famously declared that "[w]hen Congress has the will it has no difficulty in expressing it,"[126] meaning Congress could have explicitly made the unit of prosecution an individual woman, but it chose not to when it used the ambiguous word "any."

C. Interpreting Units of Prosecution

Courts have faced problems interpreting units of prosecution in a variety of contexts. The following cases illustrate applications of the unit of prosecution test to non-possession offenses, to firearms possession offenses, and to child pornography possession offenses under § 2252.

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119. *See* United States v. Bass, 404 U.S. 336, 347 (1971) (adopting a narrower interpretation of the statute at issue).
120. 344 U.S. at 221–22.
121. *Id.* at 222.
122. 349 U.S. 81 (1955).
123. *Id.* at 82 (quoting 18 U.S.C. § 2421 (1952)).
124. *Id.*
125. *See id.* at 82–83 ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.").
126. *Id.* at 83.

1. Units of prosecution outside the possession context

At least two circuits have addressed the unit of prosecution for *receiving* child pornography under § 2252, which criminalizes "knowingly receiv[ing] . . . *any* visual depiction . . . of a minor engaging in sexually explicit conduct."[127] In *United States v. Polouizzi*,[128] the defendant was charged with twelve counts of receipt of child pornography[129] for twelve images he received on four different dates.[130] Although the defendant was not yet convicted of receipt because the district court had ordered a new trial for the receipt counts,[131] the circuit court advised on how the new trial should proceed.[132] The court acknowledged that "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.'"[133] Because "any" is ambiguous and there was no readily discernible congressional intent or indication in the statutory structure as to the unit of prosecution, "the rule of lenity requires the conclusion that a person who receives multiple prohibited images in a single transaction can only be charged with a single violation of § 2252(a)(2)."[134] Presumably, as a consequence of this statement, the defendant could only be charged with four counts

127. 18 U.S.C. § 2252(a)(2) (2006) (emphasis added).

128. 564 F.3d 142 (2d Cir. 2009).

129. The only difference between possession and receipt of child pornography is the element of "possession" or "receipt." The other elements of both crimes are identical when compared within § 2252 and within § 2252A. The "receipt" element typically requires a prosecutor to prove how, when, and where a defendant obtained child pornography. For possession, proof of how the defendant obtained the child pornography is not necessary. Many courts, including the Courts of Appeals for the Third, Sixth, Ninth, and Eleventh Circuits, have concluded that possession is a lesser included offense of receipt. United States v. Ehle, 640 F.3d 689, 698 (6th Cir. 2011); United States v. Bobb, 577 F.3d 1366, 1374 (11th Cir. 2009); United States v. Miller, 527 F.3d 54, 71–72 (3d Cir. 2008); United States v. Davenport, 519 F.3d 940, 947 (9th Cir. 2008). Prosecutors, however, may be able to circumvent a merging of the counts by charging different dates for the receipt and possession counts or by charging the defendant with receipt of certain images and possession of other images. Bacon, *supra* note 26, at 1042, 1048; *see, e.g.*, *Bobb*, 577 F.3d at 1375 (affirming convictions because they were based on different items of child pornography). The main consequence for defendants is that under both § 2252 and § 2252A, receipt carries a minimum mandatory sentence of five years, while possession carries no minimum sentence. 18 U.S.C. § § 2252(b), 2252A(b)(1)–(2).

130. *Polouizzi*, 564 F.3d at 147.

131. *See id.* at 146 (noting that some of the jurors suggested that they would have voted differently on the receipt counts had they known about the mandatory minimum five-year sentence, and so the district court decided it had erred by refusing to inform the jury of the mandatory minimum beforehand).

132. *Id.* at 157.

133. *Id.* at 155 (quoting United States v. Coiro, 922 F.2d 1008, 1014 (2d Cir. 1991)).

134. *Id.* at 158.

of receipt on remand because there was only evidence of receipt transactions on four dates.

Similarly, *United States v. Buchanan*[135] involved a defendant charged with four counts of receiving child pornography, one count per image, for four images in violation of § 2252(a)(2).[136] The *Buchanan* court emphasized that the burden was on the State to prove separate receipts of the contraband if it wanted to charge the defendant with multiple receipt counts.[137] The State had failed to meet this burden because it did not allege that the four images had been separately received.[138] Additionally, none of the testimony at trial revealed that the defendant had taken more than one physical action to receive the images.[139] Thus, the court vacated the four convictions as multiplicitous and instructed the district court to reinstate only one count.[140]

The usage of "any"[141] also presented interpretation difficulties in *United States v. Corbin Farm Service*,[142] where the defendants were charged with ten counts of violating section 703 of the Migratory Bird Treaty Act,[143] which made it unlawful to "kill . . . any migratory bird."[144] The defendants made a single application of a pesticide to a field, which caused the death of several birds protected by the Act.[145] Each count charged the death of one bird,[146] but the defendants

135. 485 F.3d 274 (5th Cir. 2007).
136. *Id.* at 277–78.
137. *Id.* at 282.
138. *Id.*
139. *Id.* As the court explained, "[t]he differing times shown on the compact disc to which some of the temporary internet files were copied did not establish that the images had come from different webpages or that Buchanan had to take any action other than navigating to a single webpage." *Id.* (footnote omitted).
140. *Id.* at 282–83.
141. Unit of prosecution ambiguities often arise when the statute uses the word "any" in defining the offense. For example, in *United States v. Reedy*, 304 F.3d 358 (5th Cir. 2002), the defendants were charged with forty-three counts of violating § 2252(a)(2) which prohibits transporting "any visual depiction" of a minor engaging in sexually explicit conduct, and each count was based on one image. *Id.* at 363. The court found this provision to be ambiguous as to the unit of prosecution and applied the rule of lenity to hold that the defendants could only be charged with one count per website instead. *Id.* at 367–68. Additionally, in *Bell*, the Supreme Court found the statute prohibiting "knowingly transport[ing] . . . any woman or girl for [immoral purposes]" to be ambiguous as to the unit of prosecution. 349 U.S. 81, 82, 84 (1955); *see also supra* text accompanying notes 122–126 (summarizing the Court's analysis in *Bell* and its holding that the defendant could not be charged with a separate count for each woman simultaneously transported).
142. 444 F. Supp. 510 (E.D. Cal.), *aff'd per curiam*, 578 F.2d 259 (9th Cir. 1978).
143. *Id.* at 526 (referring to 16 U.S.C. § 703 (2006)).
144. *Id.* at 527.
145. *Id.* at 514.
146. *Id.* at 526.

argued that because they had only applied the pesticide one time, they could only be charged with one count.[147]

From the statute's language, the court found that the unit of prosecution could be interpreted as either each act or each bird's death.[148] The court turned to the legislative history of the Act and rejected the government's argument that the unit of prosecution was each bird, based on an amendment of section 703.[149] Section 703 was amended from prohibiting the killing of "any migratory bird" or "any part, nest, or egg of any such *bird(s)*," to prohibiting the killing of "any migratory bird" or "any part, nest, or egg of any such *bird*."[150] The court explained that this switch from plural to singular did not signify a change in the substantive meaning of the provision; rather, Congress merely could have wanted the language of the provision to conform to similar language in other parts of the Act.[151] After further examining the legislative intent behind the Act, the court still found the statute's usage of "any" unclear as to the allowable unit of prosecution. Accordingly, it applied the rule of lenity, found that the unit of prosecution was the act and not the number of birds killed, and dismissed nine of the ten counts as multiplicitous.[152]

2. Firearms possession units of prosecution

Units of prosecution for possession offenses can be particularly difficult to determine because "possession" is a passive act that is not easily broken up into discrete units. For federal firearms possession statutes, courts have generally agreed that items acquired at separate times or stored in separate places can constitute separate units of prosecution, and therefore can support separate convictions.[153] How

147. *Id.* at 527.
148. *Id.* at 530.
149. *Id.*
150. *Id.* at 529.
151. *Id.*
152. *Id.* at 531.
153. *See, e.g.*, United States v. Kennedy, 682 F.3d 244, 256 (3d Cir. 2012) (finding no multiplicity for firearms stored in two different cars because each car constituted a separate storage place); United States v. Verrecchia, 196 F.3d 294, 298 (1st Cir. 1999) (finding no multiplicity for firearms stored in a barn and in a truck because they were stored in separate places); United States v. Hutching, 75 F.3d 1453, 1460 (10th Cir. 1996) (finding no multiplicity for firearms stored in the defendant's bedroom, car, and truck); United States v. Berry, 977 F.2d 915, 920 (5th Cir. 1992) (finding multiplicity where separate acquisitions or storage places were not shown); United States v. Szalkiewicz, 944 F.2d 653, 654 (9th Cir. 1991) (per curiam) (finding multiplicity); United States v. Wiga, 662 F.2d 1325, 1336–37 (9th Cir. 1981) (finding no multiplicity because separate counts were supported by separate acquisition dates); *cf.* United States v. Prestenbach, 230 F.3d 780, 783–84 (5th Cir. 2000) ("Possession of multiple pieces of stolen mail that were stolen at the same time gives rise to only a single offense.").

courts apply this "separate times or places" analysis, however, has varied, even within the same circuit. Most courts require prosecutors to show that different firearms were *either* acquired at different times *or* stored in separate places.[154] At least one court, however, has stated that storage in separate places is likely insufficient and, instead, the prosecution *must* show that separate convictions are supported by separate acquisitions.[155] Additionally, courts disagree on whether it is sufficient for trial evidence to show acquisitions at different times or storage in separate places, or whether the government must allege these facts in the indictment and let the jury decide.[156]

In *United States v. Kinsley*,[157] the Eighth Circuit conducted a full analysis of one of the federal felon-in-possession statutes, which many courts subsequently followed.[158] The *Kinsley* court attempted to discern the allowable unit of prosecution from language prohibiting a formerly-convicted felon from possessing "any firearm."[159] The defendants were convicted of four counts of violating this statute for

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154. *See, e.g.*, United States v. Gann, 732 F.2d 714, 717, 721 (9th Cir. 1984) (finding no multiplicity because the firearms underlying the counts were stored separately in the defendant's car and bedroom closet); *Wiga*, 662 F.2d at 1336 ("The general rule . . . is that only one offense is charged under [the statute] regardless of the number of firearms involved, absent a showing that the firearms were stored *or* acquired at different times and places." (emphasis added) (internal quotation marks omitted)); United States v. Hodges, 628 F.2d 350, 352 (5th Cir. 1980) (same); United States v. Rosenbarger, 536 F.2d 715, 721 (6th Cir. 1976) (same).

155. *See* United States v. McDowell, 210 F. App'x 574, 576 n.2 (9th Cir. 2006) (declaring that the proposition "that separate *storage*—as opposed to acquisition of firearms—can support separate felon-in-possession charges is dicta at best, as [*Wiga* and *Szalkiewicz*, the cases cited by the government,] turned on the question of separate acquisition").

156. *See Szalkiewicz*, 944 F.2d at 654 (finding multiplicity because "the jury made no finding of fact as to separate acquisition or possession"); United States v. Valentine, 706 F.2d 282, 294 (10th Cir. 1983) (overturning multiplicitous convictions where the jury did not find—and was not asked to find—separate acquisitions, despite "uncontroverted evidence" indicating weapons were delivered into the defendant's possession at separate times); United States v. Bullock, 615 F.2d 1082, 1086–87 (5th Cir. 1980) (Goldberg, J., dissenting) (arguing that because the government did not allege separate acquisitions in the indictment or attempt to prove separate acquisitions at trial, the defendant's firearms possession counts were multiplicitous, despite the fact that there was evidence in the record showing the defendant acquired the firearms at different times).

157. 518 F.2d 665 (8th Cir. 1975).

158. *See, e.g.*, United States v. Marino, 682 F.2d 449, 454–55 (3d Cir. 1982) ("[T]he Eighth Circuit undertook a thorough analysis of the statutory language, the legislative history, and the general statutory scheme relating to section 1202(a). . . . We have nothing to add to the Eighth Circuit's painstaking analysis . . . ."); *Bullock*, 615 F.2d at 1084 (agreeing with the *Kinsley* court's "full analysis of the legislative history and the statutory scheme" and its finding that the statute is ambiguous as to the unit of prosecution, and noting that the Sixth and Seventh Circuits had followed suit).

159. *Kinsley*, 518 F.2d at 666.

simultaneously possessing four firearms.[160] They argued that these counts were multiplicitous and the court agreed.[161]

The court began with an overview of the unit of prosecution test and stated:

> Significantly, in many of the cases in which the courts have found a Bell-type ambiguity, the object of the offense has been prefaced by the word "any." Seemingly this is because "any" may be said to fully encompass (i.e., not necessarily exclude any part of) plural activity, and thus fails to unambiguously define the unit of prosecution in singular terms.[162]

Then, the court listed a number of cases dealing with a variety of criminal statutes where the usage of "any" proved ambiguous as to the unit of prosecution.[163] After determining that the surrounding language of the statute at issue did not clear up the ambiguity of "any," the court turned to the legislative history and statutory scheme for guidance.[164] Neither source, however, provided any indication of congressional intent, thus the court applied the rule of lenity and held that the defendants could only be charged with one count for the simultaneous possession of four firearms.[165]

Both the *Kinsley* and *Corbin Farm Service* courts also observed that the fact that one act, or its consequence, is sufficient to support a conviction does not mean that more than one such act or consequence is sufficient to support more than one conviction. In the context of possession, the *Kinsley* court noted that although possession of a single firearm constituted a violation of the statute, simultaneous possession of multiple firearms did not necessarily lead to multiple violations.[166] The *Corbin Farm Service* court agreed, stating that the Act "makes it clear that killing a single bird is sufficient to create criminal liability; [but it] does not, however, indicate that killing more than one bird constitutes more than one criminal offense."[167] This observation is significant because if the opposite were true, prosecutors could split up many crimes based on that logic

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160. *Id.*
161. *Id.* at 666, 670.
162. *Id.* at 667.
163. *See id.* at 667–68 (naming cases interpreting "any woman or girl," "interfere with any person," "harbors . . . any prisoner," "any narcotic drug," "any of the aforesaid drugs," and "any national-defense material").
164. *Id.* at 669–70.
165. *See id.* at 669 ("[T]he Supreme Court, in dealing with a different ambiguity problem in [this statute], found general arguments as to the gravity of the evil unavailing to prevent application of the *Bell* rule of lenity.").
166. *Id.*
167. 444 F. Supp. 510, 530 (E.D. Cal.), *aff'd per curiam*, 578 F.2d 259 (9th Cir. 1978).

and regularly convict defendants with many counts of violating the same statute arising from the same conduct.[168]

3. Child pornography possession unit of prosecution under § 2252

Particularly relevant to this Comment are cases where courts have interpreted the unit of prosecution for possessing child pornography under § 2252A's sister statute, § 2252, because such interpretations point out the key difference in the application of the two sections. Courts have generally agreed with defendants who object to multiple possession counts under § 2252.[169] Most recently, the U.S. Court of Appeals for the First Circuit addressed the issue of § 2252's possession unit of prosecution in *United States v. Chiaradio*,[170] where the defendant was charged with two counts of possession for images stored on a desktop computer in one room in his home and on a laptop in another room.[171] The court declared one of the two counts multiplicitous because the plain meaning of § 2252's "one or more" language clearly indicated Congress's intent that simultaneous possession of any number of images in the same place only constitutes one offense.[172]

In support of its conclusion, the court addressed the legislative history of § 2252, particularly the fact that Congress had amended the language from prohibiting possession of "three or more books, magazines, . . . or other matter" containing an illicit visual depiction of a minor to prohibiting "one or more books, magazines, . . . or other [such] matter."[173] This change, the court found, manifested Congress's intent to penalize the possession of even a single visual depiction; it did not indicate that "Congress intended to allow prosecutors to divide simultaneous possession by a single individual of several matters containing child pornography into multiple units of prosecution."[174] In so holding, the court rejected the government's argument that the desktop and the laptop constituted

168. *See* Chemerinsky, *supra* note 10, at 727–28 (finding "most unsatisfying" the logic of Johnson v. Commonwealth, 256 S.W. 388 (Ky. 1923), where the court ruled that, since a single hand of cards was sufficient to constitute a violation of an illegal gambling statute, each hand of cards during one sitting could be charged as a separate offense).

169. *See supra* note 12 and accompanying text (citing cases holding that defendants cannot be charged with more than one count of possession under § 2252 for materials simultaneously possessed in the same place, and calling into doubt the precedential value of the handful of cases holding to the contrary).

170. 684 F.3d 265 (1st Cir.), *cert. denied*, 133 S. Ct. 589 (2012).

171. *Id.* at 272.

172. *Id.* at 274.

173. *Id.* at 273–74.

174. *Id.* at 274.

different "places," or alternatively that the separate rooms constituted separate "places," so as to support separate possession counts.[175]

In addition to § 2252's receipt unit of prosecution, the U.S. Court of Appeals for the Second Circuit in *Polouizzi* also addressed § 2252's possession unit of prosecution.[176] There, the defendant argued that his eleven counts of possession for eleven images and videos spread across three external hard drives were multiplicitous.[177] Because the defendant raised this multiplicity claim for the first time on appeal, the court only reviewed the claim for plain error.[178]

The court found these counts were multiplicitous[179] because the plain meaning of "[t]he language '1 or more' indicates that a person commits one violation of the statute by possessing more than one matter containing a visual depiction of child pornography."[180] Like the *Chiaradio* court, the *Polouizzi* court explained that the amendment from "three or more" to "one or more" merely indicated Congress's intent to punish the possession of even one item containing child

175. *See id.* at 275 ("The computers, while in separate rooms, were in the same house and were programmed so that files could move freely between them. If a defendant had multiple photo albums of images in his bedroom and living room and periodically swapped images between them, two convictions—one for each album—would not stand. This case, it seems to us, is the electronic equivalent of that situation.").

176. 564 F.3d 142 (2d Cir. 2009).

177. *Id.* at 148, 152. All eleven images and videos were different from the images charged in the receipt counts. *Id.* at 159. The defendant argued that he could not be convicted of both receipt and possession because possession was a lesser-included offense of receipt so the *Blockburger* test was not met. *Id.* at 157–58. The court, however, declined to decide whether possession is a lesser-included offense of receipt, and instead found no double jeopardy violation based on the fact that the receipt and possession counts were supported by different child pornography materials. *Id.* at 159; *see also supra* note 129 (explaining how, in circuits that have found possession of child pornography to be a lesser included offense of receipt, prosecutors avoid double jeopardy violations by basing possession and receipt counts on different images).

178. *Polouizzi*, 564 F.3d at 153–54; *see also* United States v. Lynn, 636 F.3d 1127, 1136 (9th Cir. 2011) ("Where, as here, a claim of a double jeopardy violation was not properly raised before the district court, we review for plain error." (citing United States v. Davenport, 519 F.3d 940, 943 (9th Cir. 2008))), *cert. denied*, 132 S. Ct. 220 (2011). Under plain error review, the court will only reverse the district court's judgment if the error is plain, affects substantial rights, and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Polouizzi*, 564 F.3d at 154; *see also* United States v. Gonzales, 339 F.3d 725, 728 (8th Cir. 2003) (noting that the error must be "clear under current law"); United States v. Thompson, 289 F.3d 524, 526 (8th Cir. 2002) ("To constitute a plain error, a district court's decision must be (1) an error, (2) which is clear or obvious, and (3) which affects substantial rights." (citing United States v. Olano, 507 U.S. 725, 733–35 (1993))); FED. R. CRIM. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.").

179. *Polouizzi*, 564 F.3d at 156–57.

180. *Id.* at 155 (citation omitted).

pornography; it did not indicate that Congress intended to allow separate punishment for each image possessed.[181]

Additionally, the court pointed to another provision in § 2252 that provides an affirmative defense to possession.[182] This provision states "[i]t shall be an affirmative defense to *a* charge of violating [§ 2252's possession provision] that the defendant . . . possessed less than three matters containing any [prohibited image]."[183] This defense indicated that possessing two such matters only constitutes *a* (*i.e.* one) charge.[184]

D. Current Interpretations of § 2252A's Possession Unit of Prosecution

The foregoing discussion on multiplicity jurisprudence regarding the interpretation of units of prosecution provides a foundation on which to review the current opinions on § 2252A's possession unit of prosecution. The Fifth and Eighth Circuits are the only federal courts of appeals to have conclusively addressed this issue. While these two circuit courts agree that, unlike under § 2252, a defendant can be charged under § 2252A with multiple counts of possession, the courts disagree on the exact allowable unit of prosecution.

1. Planck*'s unit of prosecution as each type of storage medium*

a. Majority opinion

In *United States v. Planck*, a panel of the Fifth Circuit held that each type of storage medium constituted a separate act of possession and therefore a separate violation of § 2252A.[185] The court upheld all three counts of possession—one for a desktop, one for a laptop, and one for a number of diskettes, all of which contained child pornography.[186] The defendant claimed that two of the counts were multiplicitous and should be dismissed because he was found in possession of all three types of media at the same time and in the same place (his home).[187]

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181. *Id.* at 156.
182. *Id.* at 154.
183. 18 U.S.C. § 2252(c)(1) (2006) (emphasis added).
184. *Polouizzi*, 564 F.3d at 155.
185. 493 F.3d 501, 504 (5th Cir. 2007).
186. *See id.* at 502 (stating that the desktop contained eighty-eight photographs and videos of child pornography, the laptop contained four images, and the 223 diskettes had a combined number of images in the thousands, bringing the total number of child pornography images to approximately five thousand).
187. *Id.* at 503.

As support for his multiplicity claim, the defendant cited a previous Fifth Circuit decision,[188] *United States v. Prestenbach*.[189] In *Prestenbach*, the court found that possessing four altered money orders inside one container (a bottle) could only amount to one violation of a statute that made it a crime to "[knowingly] possess[] . . . any such false, forged, altered, or counterfeited writing."[190] The *Prestenbach* court held that charging the defendant with a separate count for each money order was multiplicitous because he possessed all of the money orders at the same place and time, and the statute did not expressly make each counterfeited writing a separate unit of prosecution.[191]

The *Planck* court dismissed the defendant's reliance on *Prestenbach*, however, based on dicta in that case suggesting that proving separate acts leading to the possession of each money order may have rendered the counts non-multiplicitous.[192] The *Planck* court found this dicta applicable, presumably because the large quantity of images in the defendant's possession allowed for the inference that at least some of the images were acquired at separate times and thus by separate acts.[193] Notably, the government did not actually prove or allege separate acts leading to the possession of any of the images stored in the three types of media.[194] Nevertheless, the *Planck* court found *Prestenbach* inapplicable on the basis that there must have been separate transactions leading to the defendant's possession.[195]

The court then looked to its own case law interpreting a federal firearms possession statute because such case law lent support to *Prestenbach*'s dicta that acquisition through separate transactions can lead to separate possession counts.[196] The court noted three Fifth Circuit decisions interpreting a statute prohibiting the possession or receipt of "any firearm or ammunition."[197] The court found that these cases stood for the proposition that the simultaneous possession

188. *Id.*
189. 230 F.3d 780, 783 (5th Cir. 2000).
190. *Id.* at 781 n.1, 784.
191. *Id.* at 784.
192. *Planck*, 493 F.3d at 504 (stating that "had 'the government proved separate acts leading to . . . possession of the altered money orders, it [would be] . . . a different case'" (quoting *Prestenbach*, 230 F.3d at 784)).
193. *Id.*
194. *Id.* at 506–07 (Wiener, J., concurring) (agreeing with the majority's conclusion that such a failure to introduce evidence was not fatal to the government's prosecution).
195. *Id.* at 504–05 (majority opinion).
196. *Id.*
197. *Id.* (quoting 18 U.S.C. § 922(h) (2006)) (citing United States v. Berry, 977 F.2d 915 (5th Cir. 1992); United States v. Hodges, 628 F.2d 350 (5th Cir. 1980); United States v. Bullock, 615 F.2d 1082 (5th Cir. 1980)).

of firearms could support multiple counts of possession if the firearms were "'received at different times *or* stored in separate places.'"[198] Without explanation, the court took each type of storage medium (the laptop, the desktop computer, and the diskettes) as a "separate place" and upheld all the counts.[199]

Although the cited firearms cases stated the different times or different places requirements as alternative methods of supporting multiple counts of possession, the court seemed to articulate the rule for § 2252A's possession unit of prosecution such that the prohibited items had to be both received at different times *and* stored in separate places in order for multiple possession counts to stand.[200] The *Planck* court concluded that both prongs of this standard were met because there were images stored on three separate types of media and at least some of those images were presumably acquired at different times.[201] An underlying concern influencing the court was that an alternative interpretation of the unit of prosecution could allow "amassing a warehouse" of child pornography without increasing the offender's liability from one count of possession.[202]

Almost as an afterthought, the court dismissed as inapplicable its decision in *Buchanan*, which was decided only three months prior to *Planck*.[203] In *Buchanan*, the court struck down the defendant's four counts, for four different images, of *receiving* child pornography under § 2252 as multiplicitous.[204] In order to uphold separate counts of receipt, the *Buchanan* court held that the government needed to allege and prove that the four images had been acquired through separate transactions.[205] The *Planck* court, however, distinguished *Buchanan* because *Buchanan* dealt with the receipt provision of § 2252[206] rather than the possession provision.[207]

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198. *Id.* (emphasis added) (quoting *Hodges*, 628 F.2d at 352).

199. *See id.* at 502, 504 (stating only that each medium type was "capable of independently storing images of child pornography").

200. *See id.* at 504 ("[W]here a defendant has images stored in separate materials (as defined in 18 U.S.C. § 2252A), such as a computer, a book, and a magazine, the Government may charge multiple counts, each for the type of material or media possessed, *as long as* the prohibited images were obtained through the result of different transactions." (emphasis added)).

201. *Id.* at 505.

202. *Id.* at 504.

203. *See id.* at 505 (mentioning *Buchanan* in only one paragraph toward the end of the court's analysis of multiplicitous convictions).

204. 485 F.3d 274, 276–78 (5th Cir. 2007).

205. *Id.* at 282.

206. *See Planck*, 493 F.3d at 504–05 (explaining the "receipt/distribution" distinction rendering *Buchanan* inapposite). The receipt provision of § 2252 prohibits the knowing receipt of "*any* visual depiction" when "(A)the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." 18 U.S.C. § 2252(a)(2)

b. Concurring opinion

In a special concurrence, Circuit Judge Wiener addressed the multiplicity issue in greater detail. Judge Wiener stated that he agreed with the majority's rule, yet he described the rule as only requiring that the defendant *either* "(1) came into possession of different items of contraband at different times or (2) . . . stored some of the items in different places."[208] The majority, on the other, seemed to conclude that *both* prongs must be met to support separate possession convictions.[209]

Instead of focusing on the "different places" prong that the government had relied on, Judge Wiener dismissed this prong as "feckless" and focused on the first prong: whether the images were acquired at different times.[210] Judge Wiener strongly admonished the prosecution for failing to allege, argue, or acquire evidence that the defendant actually came into possession of the images at different times.[211] The majority and the concurrence simply assumed this prong was met because, "[g]iven the overwhelming number of images and movies stored on the computers and diskettes in [the defendant's] house, it would exceed credulity to conclude that [he] acquired, or could have acquired, all the images and movies at the very same time."[212] Judge Wiener counseled against such a blatant disregard of circuit precedent regarding multiple counts of contraband possession in the future.[213]

(2006) (emphasis added). The receipt provision of § 2252A prohibits the knowing receipt of "*any* child pornography" or "*any* material that contains child pornography." *Id.* § 2252A(a)(2) (emphasis added). Prosecutors have the discretion to charge defendants with either receipt or possession of child pornography. *See* Bacon, *supra* note 26, at 1030–31 (discussing the very different sentencing outcomes for possession and receipt offenses under § 2252).

207. *See Planck*, 493 F.3d at 505 (explaining that whereas in *Buchanan*, "each separate receipt of child pornography violates the statute," in *Planck* the actus reus is possession, so the government must only prove that the defendant possessed the child pornography "at a single place and time to establish a single act of possession").

208. *Id.* at 506 (Wiener, J., concurring).

209. *See supra* note 200 and accompanying text (stating that the majority combined both prongs of the different time/different place test established in the cited firearms cases).

210. *Planck*, 493 F.3d at 506 & n.1 (Wiener, J., concurring).

211. *Id.*

212. *Id.* at 506.

213. *See id.* at 507 ("I am even more disturbed by the government's and probation office's apparent failure to recognize the law in this circuit concerning multiple possession offenses in general. . . . Here, the government either failed to determine the applicable law before prosecuting [the defendant] or simply disregarded it.").

2. Hinkeldey's Unit of Prosecution as Each Physical Storage Device

In the 2010 case *United States v. Hinkeldey*, the Eighth Circuit became the second circuit to definitively address the unit of prosecution of § 2252A's possession provision. The defendant was charged with and convicted of six counts of possession in violation of § 2252A(a)(5)(B) for child pornography stored on a computer, a zip drive, and four computer disks, all of which were found in the defendant's home at the same time.[214] The defendant appealed on the grounds that the additional possession counts were multiplicitous,[215] but the court upheld all six counts.[216]

Rather than the de novo standard of review usually applied to multiplicity claims,[217] the court employed only a plain error review because the defendant failed to raise the multiplicity issue before the trial court.[218] Plain error review is a harder standard for a defendant to meet as the appellate court will not disturb the trial court's decision unless the error is plain enough that reasonable jurists would not disagree on whether an error existed.[219] The court's multiplicity analysis was brief. It first discussed *Planck* as case law supporting the district court's decision.[220] Then, the court pointed out that there was no case law specifically supporting the defendant's

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214. United States v. Hinkeldey, 626 F.3d 1010, 1011 (8th Cir. 2010) (noting that an Iowa law enforcement officer obtained a warrant to search the defendant's home after he traced child pornography files to the defendant's computer).

215. *Id.* at 1011.

216. *See id.* at 1014 (affirming the district court's judgment not to merge the six counts of possession of child pornography).

217. *See, e.g.*, United States v. Richards, 659 F.3d 527, 547–48 (6th Cir. 2011) (reviewing defendant's multiplicity claim de novo and concluding that "the use of distinct websites to transport child pornography . . . is not redundant for double jeopardy purposes"), *cert. denied*, 132 S. Ct. 2726 (2012); United States v. Planck, 493 F.3d 501, 503 (5th Cir. 2007) (asserting that de novo standards are used for multiple claims); United States v. Walker, 380 F.3d 391, 393 (8th Cir. 2004) (reviewing the district court's finding de novo).

218. *Hinkeldey*, 626 F.3d at 1012. Recall that under plain error review, the court will only reverse the district court's judgment if (1) the error is clear or obvious under the current law, (2) the error affected the defendant's substantial rights, and (3) the error significantly affected the fairness, integrity, or reputation of the proceeding. *Supra* note 178. Additionally, under plain error review, "the district court's ruling will be upheld if the statute and case law do not provide a clear answer." *Hinkeldey*, 626 F.3d at 1012–13.

219. *Id.* at 1014 (refusing to declare the defendant's counts multiplicitous because § 2252A(a)(5)(B)'s proper unit of prosecution "is, at a minimum, subject to reasonable dispute").

220. *Id.* at 1013. The court also cited *United States v. Anson* (*Anson II*), 304 F. App'x 1 (2d Cir. 2008), *modified after remand by* 429 F. App'x 61 (2d Cir. 2011), as support, *Hinkeldey*, 626 F.3d at 1015, but failed to mention that the multiplicity language in *Anson II* holds little, if any, precedential value since the Second Circuit subsequently remanded the issue to be reconsidered by the district court in light of a new case in that circuit. *See infra* text accompanying notes 232–241 (summarizing the complicated procedural history of the *Anson* cases).

argument that § 2252A's possession provision is ambiguous.[221] The court noted that a previous Eighth Circuit case, *United States v. Martin*,[222] had implicitly allowed two child pornography possession counts to stand.[223] In *Martin*, the Eighth Circuit upheld the district court's refusal to combine the defendant's two possession counts for purposes of sentencing.[224] However, no multiplicity claim was raised, so the court did not consider the issue. The *Martin* court merely noted that the defendant pleaded guilty to two counts of possession and stipulated to possessing more than one disk containing child pornography; therefore, it was within the district court's discretion to refuse to combine the counts for sentencing.[225]

Finally, without explanation, the *Hinkeldey* court rejected the claim that "any" is ambiguous.[226] The court reasoned that even if "any" was ambiguous, a more lenient reading of the statute could punish a defendant who possessed a significant number of images in the same manner as a defendant who only possessed one image.[227] The court concluded that it was not "clear" or "obvious" that Congress intended § 2252A's unit of prosecution for possession to encompass multiple storage devices.[228] Accordingly, the defendant failed to show plain error and the six counts were upheld.[229]

3. Anson IV

In addition to the Fifth and Eighth Circuits, the Second Circuit also briefly expressed an opinion on the issue of § 2252A's possession unit of prosecution in *United States v. Anson*[230] (*Anson III*). Given this case's complicated procedural history, however, the Second Circuit's opinion on the matter remains unclear. In *United States v. Anson*[231] (*Anson I*), the district court convicted the defendant of thirty-nine counts of possession of child pornography for images found on his

221. *See Hinkeldey*, 626 F.3d at 1013–14 (asserting that even if the court accepted the defendant's interpretation of the statute, for which there was no supporting authority, there was still a strong argument that the court should reject a reading of the statute in which possession of thousands of illicit images would result in the same number of counts as possession of only one image).
222. 278 F. App'x 696 (8th Cir. 2008).
223. *Hinkeldey*, 626 F.3d at 1013–14.
224. *Martin*, 278 F. App'x at 697.
225. *Id.* (citing United States v. Planck, 493 F.3d 501, 503–05 (5th Cir. 2007)).
226. *See Hinkeldey*, 626 F.3d at 1014.
227. *Id.*
228. *Id.* at 1013.
229. *Id.* at 1014.
230. 429 F. App'x 61 (2d Cir. 2011).
231. United States v. Anson (*Anson I*), 04-CR-6180 CJS, 2007 WL 119150, at *1 (W.D.N.Y. Jan. 10, 2007), *aff'd in part*, 304 F. App'x 1 (2d Cir. 2008), *modified after remand by* 429 F. App'x 61 (2d Cir. 2011).

computer and thirty-eight computer disks.[232] The defendant appealed his convictions to the Second Circuit in *United States v. Anson*[233] (*Anson II*), where he argued that the possession counts were multiplicitous.[234]

The Second Circuit correctly framed the question as "whether the facts underlying each count were intended by Congress to constitute separate 'units' of prosecution."[235] Then, without further explanation, the court concluded that the language of the statute lent itself to treating each storage device (e.g., each book, magazine, etc.) as a separate unit of prosecution.[236] The court affirmed the defendant's multiple convictions, but remanded for the sole purpose of allowing the district court to explain or reconsider why it ordered consecutive rather than concurrent sentences.[237]

On remand, the district court re-imposed the same sentences and the defendant again appealed, this time because he was inadvertently left without counsel at the second sentencing hearing.[238] The Second Circuit remanded once again to correct this "oddity."[239] On this appeal, the defendant again raised a multiplicity claim, but this time cited supporting language from *Polouizzi*, which the Second Circuit decided after *Anson I* but before the defendant's re-sentencing proceeding.[240] While the circuit court did not decide the merits of this claim, it instructed the district court to do so on remand.[241]

On remand for the second time in *United States v. Anson*[242] (*Anson IV*), the district court again dismissed the defendant's claim of multiplicity.[243] The court began by incorrectly framing the question in terms of the *Blockburger* test,[244] which only applies to multiplicity

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232. *Id.* at *1, 3. Oddly, the court stated that the thirty-nine counts were for violation of § 2252(a)(2), which does not prohibit possession, but rather prohibits receipt and distribution. 18 U.S.C. § 2252(a)(2) (2006); *see id.* § 2252(a)(4)(B) (criminalizing knowing possession).

233. 304 F. App'x 1 (2d Cir. 2008), *modified after remand by* 429 F. App'x 61 (2d Cir. 2011).

234. *Id.* at 3–4. This time the possession counts were correctly stated as violations of § 2252A(a)(5)(B) instead of § 2252(a)(2). *Id.* at 4.

235. *Id.* at 4 (internal quotation marks omitted).

236. *Id.*

237. *Id.* at 7.

238. *Anson III*, 429 Fed. App'x at 62–63.

239. *See id.* at 64 n.2 (describing the impact of the removal of the defendant's attorney).

240. *See id.* at 64 (reciting the appellant's argument that there had been an intervening "change in controlling law").

241. *Id.*

242. 04-CR-6180, 2012 WL 2873832 (W.D.N.Y. July 12, 2012).

243. *Id.* at *2–3.

244. *Id.* at *2 (citing Blockburger v. United States, 284 U.S. 299 (1932)); *see also supra* text accompanying notes 78–81 (explaining the Supreme Court's test for when

claims involving charges for the same conduct under two different statutory provisions, but then did not seem to actually apply this test.[245] Instead, the court addressed the defendant's claim in light of the newly-decided *Polouizzi*[246] case.[247] The *Anson IV* court quoted *Polouizzi*, a decision involving a multiplicity claim for child pornography receipt counts, as stating that the usage of "any" was ambiguous in terms of the unit of prosecution so the defendant could only receive one receipt count per transaction, not one per image as the defendant had been charged.[248] The *Anson IV* court, however, found the counts as not multiplicitous on the basis that § 2252A's language enumerating the various storage devices[249] allowed the statute to avoid the ambiguity normally associated with "any."[250] Consequently, the court affirmed the defendant's multiple possession counts.[251]

E. Relevant Canons of Construction

Interpreting any statutory offense's unit of prosecution is a matter of statutory construction.[252] The following are the most relevant canons for the analysis of § 2252A's possession provision. When interpreting statutory terms and provisions, discussion of a statute's language is often intertwined with discussion of the overall statutory scheme. For the sake of clarity, however, these two sources of guidance are separated here.

1. Plain meaning and analogous statutes

The first step in any exercise of statutory interpretation should always be looking to the plain meaning of the text itself.[253] The plain

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a multiplicity claim arises out of the overlap of two separate statutory provisions, which requires a determination of whether each provision requires an additional element that the other does not).

245. *See Anson IV*, 2012 WL 2873832, at *2 (applying the rule of lenity over the test established in *Blockburger*).

246. United States v. Polouizzi, 564 F.3d 142, 155 (2d Cir. 2009). For a greater discussion of *Polouizzi*, see *supra* text accompanying notes 128–134 (receipt counts) and 176–184 (possession counts).

247. *See Anson IV*, 2012 WL 2873832, at *2 (rejecting the defendant's reliance on *Polouizzi*).

248. *Id.* (quoting *Polouizzi*, 564 F.3d at 155) (internal quotation marks omitted).

249. *See supra* text accompanying note 62 (quoting 18 U.S.C. § 2252A (2006)).

250. *Id.* at *3.

251. *Id.*

252. *See supra* notes 83–86 and accompanying text (introducing the unit of prosecution test for multiplicity arising from the same statutory provision).

253. *See, e.g.*, United States v. Vig, 167 F.3d 443, 447 (8th Cir. 1999) ("In determining the meaning of the phrase 'other matter' as it is used in 18 U.S.C. § 2252(a)(4)(B), our starting point must be the plain language of the statute. . . . In such cases, we look to the ordinary, commonsense meaning of the words."); *see also*

meaning canon asks what the statutory language ordinarily means to a typical speaker of the language.[254] Courts may utilize dictionaries as a source of guidance on a word's plain meaning.[255] When the plain meaning of a statutory term is not clear on its face, courts may look to judicial interpretations of that term in similar statutes as well.[256]

2. Avoiding absurd results

In addition to referencing plain meaning and analogous case law, courts try to avoid interpretations of statutory provisions that would result in absurd outcomes.[257] The canon of avoiding absurdity expresses the presumption that Congress does not intend to pass absurd or irrational legislation.[258]

The Supreme Court applied this canon to a unit of prosecution issue in *Ladner v. United States*.[259] In *Ladner*, the Court was tasked with interpreting the allowable unit of prosecution in a statute prohibiting the assault of "any" federal officer.[260] The defendant had fired a shotgun once into the front seat of a vehicle where two federal officers were sitting.[261] The pellets from the shot wounded both of the officers and the defendant was convicted of two counts of assault.[262]

Relying on the canon of avoiding absurdity, the Court deemed one of the two counts multiplicitous.[263] As an example of an absurd outcome that would result from convicting a defendant with one count per officer, the Court described a hypothetical defendant who merely points a gun at five officers but doesn't fire.[264] This defendant could be charged with five counts and given consecutive ten-year sentences for each count, leading to fifty years imprisonment when

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Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.").

254. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 257 (2d ed. 2006).

255. *Id.*

256. *See id.* at 291–92 (reasoning that when a legislature borrows terminology from another statute, it is presumed to know the judicial interpretation of the statute from which it is borrowing from).

257. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2388 (2003) ("From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results.").

258. ESKRIDGE, JR. ET AL., *supra* note 254, at 267.

259. 358 U.S. 169 (1958).

260. *Id.* at 173.

261. *Id.* at 171.

262. *Id.*

263. *See id.* at 177, 178.

264. *Id.* at 177.

no officer was even injured.[265] Yet another hypothetical defendant who actually shoots and harms or even kills an officer could only receive one count, and thus only a single ten-year sentence.[266] The Court reasoned that such an interpretation of the unit of prosecution would lead to penalties "totally disproportionate" to the culpability of a defendant because the number of officers affected by one act often will not bear much relation to the magnitude of the harm caused and thus to the seriousness of the crime.[267]

3. Constitutional avoidance

When dealing with alleged multiplicitous counts, another important canon of construction to consider is the doctrine of constitutional avoidance, which provides that courts should only decide constitutional issues when it is essential to do so.[268] Referring to this doctrine, Justice Brandeis explained that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."[269] Elaborating, he stated, "'[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[270] This doctrine is premised upon a respect for Congress in that it presumes the legislature does not intend to pass unconstitutional laws and seeks to reduce "friction" that may result from the judiciary striking down an act of Congress.[271]

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265. *Id.*
266. *Id.*
267. *Id.*
268. *See* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343 (1999) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." (quoting Spector Motor Serv. v. McLaughlin, 323 U.S. 101, 105 (1944)); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *see also* ESKRIDGE, JR. ET AL., *supra* note 254, at 360 (describing this canon as a "fundamental principle of American public law").
269. Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).
270. *Id.* at 348 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)).
271. *See* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (suggesting that the constitutional avoidance canon seeks "to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections"); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 566 (2009) (Breyer, J., dissenting) (proposing that "[t]he doctrine assumes

NLRB v. Catholic Bishop of Chicago[272] illustrates an application of the constitutional avoidance doctrine by the Supreme Court. Prior to this case, the National Labor Relations Board (NLRB) interpreted its jurisdiction under the National Labor Relations Act[273] (NLRA) such that it had jurisdiction over schools that were "religiously associated" but not "completely religious" because they taught secular subjects in addition to religious ones.[274] The Court, however, rejected this interpretation and construed the NLRA as precluding the NLRB's jurisdiction over religiously associated schools.[275]

After first determining that neither the statute's language nor legislative history affirmatively permitted the NLRB jurisdiction over religiously associated schools,[276] the Court turned to the doctrine of constitutional avoidance. The Court noted that, if it was to agree with the NLRB's interpretation of its own jurisdiction, then the Court would have to decide whether that jurisdiction infringed upon the First Amendment's free exercise and establishment rights of those schools.[277] The Court refused to construe the NLRA in such a way because it would necessarily implicate the Religion Clauses, raising a serious risk that those clauses would be violated.[278] Absent clear and affirmative congressional intent to extend the NLRB's jurisdiction to religiously associated schools,[279] the Court would not resolve such a difficult and sensitive First Amendment question.[280] Finding no such expression from Congress, the Court construed the statute so as to preclude the NLRB's jurisdiction over these schools.[281]

4. Whole act rule

In addition to the text of the statute and substantive canons such as absurdity and constitutional avoidance, the overall statutory scheme can shed light on an ambiguous provision. In applying the whole act rule, courts may refer to other provisions in the same statute, as well as to other statutes that are part of the same legislative scheme.[282]

Congress would prefer a less-than-optimal interpretation of its statute" to the risk of the statute being set aside entirely as unconstitutional (*citing Almendarez-Torres*, 523 U.S. at 237–38)).

272. 440 U.S. 490 (1979).
273. 29 U.S.C. §§ 151–169 (2006).
274. *Catholic Bishop of Chi.*, 440 U.S at 492–93.
275. *Id.* at 507.
276. *Id.* at 504.
277. *Id.* at 499.
278. *Id.* at 507.
279. *Id.* at 504.
280. *Id.* at 507.
281. *Id.*
282. *See, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484

The "whole act rule" looks at how well different possible interpretations of an ambiguous term or provision fit within the statute or the code as a whole.[283] This rule "presume[s] that Congress uses terms consistently, intends that each provision add something to the statutory scheme, and does not want one provision to be applied in ways that undercut other provisions."[284] This presumption, however, does not always align with reality, as terms may be "inserted willy-nilly into the law" for various reasons, including simple oversight.[285] Further supporting this canon, the Supreme Court has stated that "[s]tatutory construction . . . is a holistic endeavor" and a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."[286]

II. THE POSSESSION UNIT OF PROSECUTION FOR § 2252A SHOULD BE INTERPRETED TO ENCOMPASS ALL ITEMS POSSESSED AT THE SAME PLACE AND TIME

After identifying the appropriate manner for interpreting the unit of prosecution of a criminal offense, and pinpointing relevant canons of construction, the reasoning—or lack thereof—behind the *Planck*, *Hinkeldey*, and *Anson IV* decisions can be addressed. All three courts stopped their analysis at the first step of looking to the statutory language, and concluded without much explanation that the language was unambiguous. The following sections elaborate on the analysis that these three courts should have followed in interpreting § 2252A by looking more critically at the relevant statutory language and various canons for construing that language, the statutory scheme, and the legislative history. Such analysis leads to the conclusion that the rule of lenity should have applied in all three cases, and the defendants should only have been convicted of one count of possession.

A. Interpreting the Statutory Language of § 2252A(a)(5)(B)

1. Plain meaning

The text defining child pornography possession under § 2252A prohibits the knowing possession of "*any* book, magazine, periodical, film, videotape, computer disk, or any other material that contains an

U.S. 365, 371 (1988) (determining the meaning of a specific term in one section of the Bankruptcy Code by analyzing its use in other sections of the Code).

283. ESKRIDGE, JR. ET AL., *supra* note 254, at 257.

284. *Id.* at 271.

285. *Id.*

286. *United Sav. Ass'n of Tex.*, at 371.

image of child pornography."[287] The plain meaning of "any" is ambiguous because it can be used to refer to items in the singular or items in the plural, unless its context clarifies its meaning. The Merriam-Webster Dictionary defines "any" as "one or some indiscriminately of whatever kind," "one, some, or all indiscriminately of whatever quantity," or "unmeasured or unlimited in amount, number or extent."[288] Similarly, the *American Heritage Dictionary* defines "any" to mean "[o]ne, some, every, or all without specification," and "[a]ny one or more persons, things, or quantities."[289]

Many courts have recognized the numerical ambiguity of "any" in unit of prosecution cases.[290] The Eighth Circuit, in *Kinsley*, stated that "any" "fails to unambiguously define the unit of prosecution in singular terms."[291] Likewise, in *Prestenbach*, the Fifth Circuit addressed the ambiguity of "any" and noted that it can mean either "one" or "some."[292] For further guidance on the plain meaning of "any," the *Prestenbach* court looked to a dictionary and found "any" defined as "one, a, an, or some; one or more without specification or identification."[293]

Such a discussion of the plain meaning of § 2252A's language, and more specifically the meaning of "any," is glaringly missing from both the *Planck*[294] and *Hinkeldey*[295] opinions. Dictionaries and a substantial amount of case law all acknowledge that "any" is numerically ambiguous, which causes particular problems when trying to identify a statute's allowable unit of prosecution.[296] Given this lack of an

287. 18 U.S.C. § 2252A(a)(5)(b) (2006) (emphasis added).

288. *Any Definition*, MERRIAM-WEBSTER NEW WORLD DICTIONARY, http://www.merriam-webster.com/dictionary/any (last visited Aug. 23, 2013).

289. THE AMERICAN HERITAGE DICTIONARY 81 (4th ed. 2000).

290. *See, e.g.*, United States v. Coiro, 922 F.2d 1008, 1014 (2d Cir. 1991) ("In cases in this and other circuits, 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." (quoting United States v. Kinsley, 518 F.2d 665, 668 (8th Cir. 1975))); *see also supra* note 163 (listing examples of phrases from a variety of criminal statutes where the usage of "any" proved ambiguous as to the allowable unit of prosecution).

291. 518 F.2d 665, 667 (8th Cir. 1975).

292. 230 F.3d 780, 783 (5th Cir. 2000).

293. *Id.* at 783 n.14 (citing RANDOM HOUSE COLLEGE DICTIONARY (rev. ed. 1982)).

294. *See* 493 F.3d 501, 503–04 (5th Cir. 2007) (discussing *Prestenbach* and firearms possession cases, but not the meaning of "any").

295. *See* 626 F.3d 1010, 1013 (8th Cir. 2010) (failing to respond to the defendant's reliance on *Kinsley*'s statement that "any" is ambiguous with regard to the unit of prosecution, and instead relying on the lack of clear case law to uphold the defendant's convictions under plain error review).

296. *See supra* text accompanying notes 288–289 (describing several dictionary definitions of the word "any").

obvious plain meaning, both the *Planck* and *Hinkeldey* courts should have acknowledged the ambiguity and explained why it was not problematic for the statute.

The *Anson IV* court, on the other hand, acknowledged the ambiguous nature of "any," but decided that the rest of the provision's language, which lists different containment objects, clarified that the unit of prosecution is each physical device.[297] The enumeration of various storage devices, however, does not support *Anson IV*'s interpretation as clearly as the court suggested. Congress could simply have intended that each image not be a separate unit of prosecution. After all, § 2252's possession provision also lists these storage devices[298] yet courts have held that its unit of prosecution is not each device, but rather all images on all devices possessed at the same place and time.[299] Since the plain meaning of § 2252A's possession provision is unclear, the next step should have been looking to other canons of construction.[300]

2. Possession units of prosecution in analogous contexts

Only *Planck* fully employed the analogous contexts canon of construction by looking to case law interpreting "any" in federal firearms possession statutes. As the concurrence in *Planck* noted, a case involving possession of child pornography charges is a contraband possession case at its heart.[301] This is likely why the *Planck* majority turned to cases interpreting firearms possession statutes for guidance.[302] These cases generally stated that if different firearms were acquired at different times or stored in separate places, then multiple counts of possession could stand.[303]

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297. Anson IV, 04-CR-6180, 2012 WL 2873832, at *3 (W.D.N.Y. July 12, 2012).

298. Section 2252 prohibits the knowing possession of one or more "books, magazines, periodicals, films, video tapes, or other matter." 18 U.S.C. § 2252(a)(4)(B) (2006).

299. *See, e.g.*, United States v. Chiaradio, 684 F.3d 265, 274 (1st Cir.) (finding § 2252 clear and unambiguous on its face), *cert. denied*, 133 S. Ct. 589 (2012); United States v. Polouizzi, 564 F.3d 142, 155 (2d Cir. 2009) (same).

300. *See supra* text accompanying notes 257–286 (describing the statutory interpretation process when the plain meaning is unclear).

301. United States v. Planck, 493 F.3d 501, 507 (5th Cir. 2007) (Wiener, J., concurring).

302. *See id.* at 503–04 (majority opinion) (looking to analogous precedent interpreting 18 U.S.C. § 922(h) to mean that defendants could be charged with multiple firearm possession counts if different firearms were obtained at different times or stored in separate places).

303. *See id.* at 504 (discussing the conclusions reached in United States v. Berry, 977 F.2d 915, 920 (5th Cir. 1992), United States v. Hodges, 628 F.2d 350, 352 (5th Cir. 1980), and United States v. Bullock, 615 F.2d 1082, 1085–86 (5th Cir. 1980)); *see also supra* notes 157–164 and accompanying text (summarizing *Kinsley*'s much-cited holding that the federal firearms possession statute at issue was ambiguous as to the

The *Planck* court interpreted each type of storage medium as a different "place," without explaining its reason for doing so.[304] The court implicitly analogized the different types of storage media to separate places where firearms could be stored.[305] The *Hinkeldey* court also impliedly followed this reasoning, except it analogized each physical storage device to a separate "place."[306] Neither analogy works, however, because each storage device is essentially a container for the digital prohibited images. It is unlikely that the firearms cases cited in *Planck* would have upheld multiple counts of possession if the defendant in each had stored groups of firearms in separate containers around the same residence.

Indeed, some courts have expressly rejected the idea that separate rooms, let alone separate containers, can constitute separate "places" for purposes of defining possession offenses.[307] The same circuit that decided *Planck* also decided a prior firearms possession case that *Planck* did not mention: *United States v. McCrary*.[308] In that case, the court disallowed separate sentences for weapons stored in a trailer home and in an outbuilding that was utilized by the trailer's residents as an extension of their home.[309] The court declared it "untenable" to hold that items stored in the same home in different rooms could support separate possession charges based on being stored in different "places," even if the rooms were physically separated.[310]

The First Circuit agreed in *Chiaradio* and explicitly rejected the view that two different computers (one a desktop and one a laptop)

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allowable unit of prosecution, as well as similar cases from other circuits interpreting federal firearms possession statutes).

304. *See Planck*, 493 F.3d at 504–05 (upholding one count of possession for the desktop, one count for the laptop, and one count for all of the diskettes because they constituted different types of media).

305. *See id.* at 504 (emphasizing that the three types of storage media utilized by the defendant were "each capable of independently storing images").

306. *See* United States v. Hinkeldey, 626 F.3d 1010, 1013–14 (8th Cir. 2010) (citing *Planck* as support for the district court's judgment, but upholding separate counts for the same type of storage medium (disks)).

307. *See, e.g.*, United States v. Chiaradio, 684 F.3d 265, 273–75 (1st Cir.) (discrediting the argument that two separate electronic storage media in two separate rooms could constitute two different "places" when they were in the same house), *cert. denied*, 133 S. Ct. 589 (2012); United States v. McCrary, 643 F.2d 323, 327–28 (5th Cir. 1981) (finding that two rooms that were not technically in the same building still constituted one "place" for purposes of the possession counts).

308. 643 F.2d 323 (5th Cir. 1981).

309. *See id.* at 327–28 ("It is true that some of the firearms were found in an outbuilding employed by appellant as a storage/laundry facility while the remaining weapons were discovered in the bedroom of the trailer . . . . The outbuilding was for all practical purposes a part of the residential dwelling. . . . [It] constituted an integral part of the dwelling unit. It was constructed upon the same residential lot and was used for ordinary household purposes, i.e., as a storage and laundry room.").

310. *Id.*

in the same home, or the two different rooms where the computers were located, could constitute different "places" for purposes of counting possession offenses under § 2252.[311] Even the *Planck* concurrence harshly condemned the idea that different types of storage devices can constitute different places.[312] Therefore, the *Planck* and *Hinkeldey* courts' conclusions that each storage device or type of medium constitutes a separate "place" is not supported by the analogous case law across the circuits.[313]

Setting the unit of prosecution as the type of storage medium, as did the *Planck* court, is arguably more problematic than setting the unit of prosecution as each individual device. What makes the *type* of device more analogous to a separate "place" than each storage device itself? The only inferable explanation from *Planck* is that the court did not want to invite future prosecutions to charge defendants with one count for each device because the number of counts could quickly get out of hand. The defendant in *Planck*, for instance, possessed 223 diskettes containing child pornography.[314] The court was unable to point to a single reference that supported its holding that Congress's intended unit of prosecution for possession was the type of storage device.[315]

Interpreting § 2252A's possession unit of prosecution as each type of medium creates the additional problem of determining what constitutes different media types. It is unclear what led the *Planck* court to determine that a desktop computer constituted a different

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311. *See Chiaradio*, 684 F.3d at 275 ("[The government] has consistently argued the significance of dual computers in separate rooms. We find this supposed distinction unconvincing. The computers, while in separate rooms, were in the same house . . . .").

312. *See* United States v. Planck, 493 F.3d 501, 506 n.1 (5th Cir. 2007) (Wiener, J., concurring) ("Although the desktop computer was found in [the defendant's] living room, the laptop computer in his dining room, and the diskettes in his bedroom, all were stored in his house at the same time. Under these facts, it is *feckless* to contend that these items were stored in different places. *Possession of all items within [the defendant's] home was storage in the same place.*" (emphasis added)).

313. Additionally, the court in *Anson IV* is not clear as to its basis for upholding the defendant's thirty-nine possession counts for thirty-nine disks. It states that "each pornographic image possessed could constitute a separate 'unit' of prosecution." 04-CR-6180, 2012 WL 2873832, at *3 (W.D.N.Y. July 12, 2012). But it also pointed out the enumeration of physical storage devices in § 2252A and stated that this enumeration avoids the ambiguity associated with "any," *id.*, which could mean that separate images can only support separate possession counts when they are stored on different physical devices (as the *Hinkeldey* court concluded).

314. *See* 493 F.3d at 502 (recounting the results of the government's search that found over 5,000 images contained on a laptop computer, a desktop computer, the diskettes, and other still photographs).

315. *See id.* at 503–05 (asserting that the matter is one of first impression and exploring precedent in analogous cases, but failing to identify a case sufficiently similar to the present circumstances).

type of storage medium than a laptop computer. As the *Chiaradio* court pointed out, computers can easily be set up to allow the free transfer of files between them.[316] If files can freely move between the two computers, it is an arbitrary distinction to consider each computer a different type of medium merely because one is stationary and the other portable.

While the firearms possession cases hold that storage in separate places can support separate possession offenses, they also hold that acquiring possession of different items at different times is an independent method of establishing separate possession counts.[317] The *Planck* majority seemed to hold that both of these factors must be (and were) met.[318] *Planck*'s concurrence clearly stated that only one of these two factors needed to be met to support separate possession offenses, and in that case, the second factor was met.[319] The *Hinkeldey* court did not decide whether separate acquisitions must be proven in addition to separate storages; instead it held only that the district court's failure to require separate acquisitions did not constitute plain error.[320] *Anson IV* did not address the separate acquisitions theory.[321]

Both the *Planck* court (majority and concurrence) and the *Hinkeldey* court missed a key factor in relying on separate acquisitions to support separate possession counts in those cases: actual evidence that there were at least as many separate acquisitions of illicit materials as there were possession convictions. In the firearms possession cases where multiple possession counts were upheld based on separate acquisitions of different firearms, the government

316. *See* 684 F.3d at 275 (noting that the desktop and laptop at issue were "programmed so that files could move freely between them").

317. *See, e.g.*, United States v. Berry, 977 F.2d 915, 920 (5th Cir. 1992) (vacating defendant's sentences as multiplicitous because the government had failed to produce evidence that he had obtained the firearms at different times); United States v. Hodges, 628 F.2d 350, 352 (5th Cir. 1980) (stating that it is "well-established" that simultaneous possession of more than one firearm only warrants one punishment, "*unless* they were received at different times" (emphasis added)).

318. *See supra* text accompanying notes 200–201 and accompanying text (quoting the *Planck* majority as stating that defendants can be convicted of separate possession counts for separate types of media "*as long as* the prohibited images were obtained through the result of different transactions" (emphasis added)).

319. *See* 493 F.3d at 506 (Wiener, J., concurring) (stating the possession test in either/or terms).

320. 626 F.3d 1010, 1014 (8th Cir. 2010) ("This court has not addressed this 'different transactions' standard, but even assuming that it is clearly dictated by the statute, the district court's refusal to merge the counts was not plain error.").

321. *See* Anson IV, 04-CR-6180, 2012 WL 2873832, at *3 (W.D.N.Y. July 12, 2012) (purporting to require separate storage devices for separate possession counts, but not mentioning the common contraband possession test of whether the illicit items were stored in separate places or acquired at separate times).

provided adequate evidence at trial as to which firearms were acquired when (or where).[322] No such evidence was presented in *Planck*[323] or *Hinkeldey*.[324]

Instead, both courts relied on the bald assumption that, given the large number of images each defendant possessed, they simply could not have acquired all the images at once.[325] When relying solely on separate acquisitions to support multiple possession offenses, this assumption makes the number of counts wholly arbitrary because they are unrelated to any discrete transactions through which the government showed the defendant acquired different images. If, as the *Planck* concurrence proposed, the multiple counts were supported because the images were obtained at different times—rather than because they were stored in different places—then each count would have to be supported by evidence of a specific, separate transaction leading to the defendant's possession of separate illicit materials. But, as the *Planck* concurring judge identified, the prosecution failed "to present any affirmative evidence or assert any discrete facts to support the requirement of [the defendant's]having acquired the images and movies at more than one time."[326]

Finally, other cases interpreting the use of "any" in other federal criminal statutes stress that a statute making a single act (or result of that act) an offense does not necessarily mean that multiple such acts, or results, constitute multiple offenses.[327] Thus, under

322. *See, e.g.*, United States v. Szalkiewicz, 944 F.2d 653, 654 (9th Cir. 1991) (vacating multiple firearms possession counts because the jury made no finding that the counts were based on separate acquisitions); United States v. Valentine, 706 F.2d 282, 294 (10th Cir. 1983) (vacating multiplicitous convictions because the jury did not find, and was not even asked to find, separate acquisitions, regardless of the "uncontroverted evidence" in the record that the defendant acquired the firearms at separate times); United States v. Steeves, 525 F.2d 33, 39 (8th Cir. 1975) (upholding two firearms possession counts based on different firearms because the government "*proved satisfactorily*" that the firearms were received at different times (emphasis added)).

323. 493 F.3d at 507 (Wiener, J., concurring) ("I remain troubled, however, by the government's failure to present any affirmative evidence or assert any discrete facts to support the requirement of Planck's having acquired the images and movies at more than one time.").

324. 626 F.3d at 1014 (declining to address the defendant's argument that he could only be charged with multiple counts of possession if the images were acquired through different transactions).

325. *See supra* text accompanying note 212 (recounting Judge Wiener's remarks that "it would exceed credulity to conclude that [the defendant] acquired, or could have acquired, all the images and movies at the very same time").

326. 493 F.3d at 507 (Wiener, J., concurring).

327. *See, e.g.*, United States v. Polouizzi, 564 F.3d 142, 156 (2d Cir. 2009) ("That Congress . . . intended to prohibit possession of even one item or image containing child pornography [under § 2252] does not indicate that Congress intended to permit separate prosecution and punishment for each such item or image possessed." (citation omitted) (internal quotation mark omitted)); United States v.

§ 2252A(a)(5)(B), although possession of images on a single computer is sufficient to constitute one offense, it does not necessarily follow that possession of images on two different devices in the same home constitutes two offenses. Whether the latter constitutes one or two offenses depends on what Congress intended to make the allowable unit of prosecution, if it considered the unit of prosecution at all.[328] Therefore, a much clearer indication of congressional intent is needed before reaching such a conclusion.

While the *Planck*, *Hinkeldey*, and *Anson IV* opinions assume that each device or type of medium constitute a separate unit of prosecution may or may not be reasonable, there is not enough support for either assumption in the language's plain meaning or in a comparison to the usage of "any" in other federal criminal possession statutes. Thus, further analysis is necessary to try to discern § 2252A's allowable unit of prosecution for possession.

3. Avoiding absurd results

In order to a avoid absurdity, the approaches taken in *Planck*, *Hinkeldey*, and *Anson IV* should not be followed. Interpreting the unit of prosecution as each device or type of medium can lead to absurd outcomes and result in punishments that are disproportional to the culpability of the defendants. Both the *Planck* and *Hinkeldey* courts supported their interpretations of § 2252A's possession unit of prosecution by emphasizing the unfairness of allowing a person who "amass[es] a warehouse"[329] of child pornography to receive only one count of possession, especially when a person who possesses just a handful of images on one computer also receives one count.[330]

This rationale, however, seems to be based on an emotional inclination to issue as many counts as possible to possessors of child

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Kinsley, 518 F.2d 665, 669 (8th Cir. 1975) ("It does not necessarily follow that, because possession of a single firearm is sufficient to constitute the evil legislated against, Congress thereby intended that felons in simultaneous possession of more than one firearm should be deemed to have committed multiple offenses."); United States v. Corbin Farm Serv., 444 F. Supp. 510, 529–30 (E.D. Cal.) ("Section 703 makes it clear that killing a single bird is sufficient to create criminal liability; the section does not, however, indicate that killing more than one bird constitutes more than one criminal offense. Standing alone, the language could be interpreted either way. In such a case, the court should examine congressional intent."), *aff'd per curiam*, 578 F.2d 259 (9th Cir. 1978).

328. *See Kinsley*, 518 F.2d at 669 (announcing that, after reviewing the legislative history, the "allowable unit of prosecution under the statute is simply not addressed").

329. Planck, 493 F.3d at 504.

330. *See supra* text accompanying notes 202, 227 (describing the *Planck* and *Hinkeldey* courts' usage of the "amassing a warehouse" argument, despite the fact that this argument directly contravenes the rule of lenity).

pornography, rather than on a reasoned decision to link the number of counts to a defendant's level of culpability. Neither court's definition of the unit of prosecution successfully avoids the "amassing a warehouse" problem: a defendant who has thousands of images saved on one device can only be convicted of one count of child pornography possession, while a defendant who has a very small number of images spread across a desktop, a laptop, and a computer disk can be convicted of three counts of possession under either court's reasoning.

Ironically, both courts' usage of the "amassing a warehouse" argument implies that defendants who possess more images are more culpable than defendants who possess fewer images, yet the courts' interpretations of the unit of prosecution center on the number of storage devices (or types of media) rather than on the number of images.[331] Just as the number of officers in *Ladner* had "little bearing" on the gravity of the offense,[332] the number or types of storage media that a defendant possesses does not bear a rational relationship to that defendant's culpability. The Guidelines, which courts are required to take under advisement,[333] call for enhanced sentences based on higher ranges of the total number of images possessed.[334] This avoids the "amassing a warehouse" dilemma because a person possessing a thousand images—regardless of the devices on which the images are stored—receives a longer sentence than a person possessing ten images.

4. Constitutional avoidance

Before turning to the overall statutory scheme, the application of the doctrine of constitutional avoidance is important to address because double jeopardy concerns are at the forefront of unit of prosecution multiplicity claims.[335] The Supreme Court stated in

331. *See supra* text accompanying notes 185–186, 214–216 (discussing how each court upheld separate counts for separate devices or types of devices, regardless of how many images each device contained).

332. *See supra* text accompanying notes 264–267 (describing the Court's hypothetical where, under a different reading of the statute's unit of prosecution, a defendant could receive a fifty-year sentence for assault when no actual injury occurred, but only a ten-year sentence when one person is actually injured).

333. *See* United States v. Booker, 543 U.S. 220, 245–46 (2005) (holding that the mandatory Guidelines were incompatible with the Sixth Amendment right to a jury trial, but still requiring courts to calculate the now-advisory Guidelines range for each defendant before finalizing the sentence).

334. *See supra* note 36 (quoting the Guidelines' incremental increases for higher ranges of total images).

335. *See supra* notes 68–71 and accompanying text (explaining that the Double Jeopardy Clause prohibits multiple punishments in the same proceedings, for violations of a single statute, based on the same conduct).

Brown v. Ohio[336] that "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."[337] But this is exactly the approach that the prosecutions took—and the Fifth and Eighth Circuits approved—in *Planck* and *Hinkeldey*, as did the district court in *Anson IV*. The possession counts in all three cases were based on the number or type of storage media, both of which are spatial units. The prosecutions in *Hinkeldey* and *Anson IV* went even farther by charging separate counts for each storage device, rather than just the type of storage medium.[338]

These three courts should have addressed the doctrine of constitutional avoidance. Just as construing the NLRA in accordance with the NLRB's wishes would have required the Court to decide whether such a construction infringed on First Amendment rights in *Catholic Bishop of Chicago*,[339] construing § 2252A's possession unit of prosecution in accordance with the prosecutions' wishes caused the courts to face Fifth Amendment double jeopardy issues.[340] Because the Fifth Amendment does not completely preclude punishing a person more than once in the same proceeding for the same conduct, but instead allows Congress to delineate the circumstances under which such multiple punishment is authorized,[341] the courts were required to discern the legislative intent on this issue. The defendants' Fifth Amendment double jeopardy rights were violated if Congress did not intend to allow the units of prosecution that the courts sanctioned under § 2252A.

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336. 432 U.S. 161 (1977).

337. *Id.* at 169.

338. *Compare* United States v. Hinkeldey, 626 F.3d 1010, 1012 (8th Cir. 2010) (charging the defendant with one count for each of four computer disks, in addition to one count for a computer and one count for a zip drive), *with* United States v. Planck, 493 F.3d 501, 502 (5th Cir. 2007) (charging one count for all 223 diskettes combined, in addition to one count for a desktop computer and one count for a laptop computer).

339. *See* 440 U.S. 490, 490 (1979) (holding that the NLRB did not have jurisdiction, under the NLRA, over religiously-associated private schools because such jurisdiction would implicate First Amendment rights under the Religion Clauses); *see also supra* text accompanying notes 272–281 (illustrating an application of the constitutional avoidance doctrine in the context of the NLRA and the First Amendment).

340. *See supra* text accompanying notes 272–281 (noting that the Court refused to construe a statute in a manner that risked violating a constitutional right).

341. *See* SALTZBURG & CAPRA, *supra* note 26, at 1546 (discussing how the Double Jeopardy Clause is more limited when addressing multiplicity within one case than when dealing with successive prosecutions because the Clause does not prevent legislatures from imposing multiple punishments in one case based on how they choose to define the offenses).

Rather than deciding that Congress intended § 2252A's possession unit of prosecution to be singular as to the number or type of storage devices, the *Planck*, *Hinkeldey*, and *Anson IV* courts should have acknowledged the doctrine of constitutional avoidance and construed the statute to encompass all storage devices in one count of possession, thereby avoiding the double jeopardy question altogether. Because the allowable unit of prosecution for possession under § 2252A is unclear, as demonstrated by the application of the foregoing canons of construction and the following discussion of the statute's scheme and legislative history, it was not necessary for these courts to accept the prosecutions' interpretations of the unit of prosecution and decide whether such interpretations violated the Fifth Amendment.

5. Whole act rule

Because § 2252A's possession language is not clear on its face or after employing common canons of construction, courts should look to the statutory scheme as a whole to shed light on the ambiguous unit of prosecution. The whole act rule widens the scope of review of § 2252A to encompass the overall federal child pornography legislative scheme including § 2252, as well as § 2252A's other provisions.

a. Comparison to § 2252

Both § 2252 and § 2252A are part of the chapter entitled "Sexual Exploitation and Other Abuse of Children" in Title 18 of the United States Code, and § 2252A is modeled after § 2252.[342] Because § 2252 and § 2252A are part of the same federal child pornography regulatory scheme and are so closely connected to each other, § 2252A should be interpreted in congruence with § 2252, rather than in a way that causes a disjoint between the two sections.

As *Polouizzi* and *Chiaradio* illustrate, the possession unit of prosecution under § 2252 is generally interpreted as encompassing in one count all storage devices the defendant is found to possess in one place.[343] The test for whether multiple possession counts are

342. *See supra* Part I.A (providing the historical background and context of § 2252A); *see also* Lorillard v. Pons, 434 U.S. 575, 581 (1978) ("[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

343. *See supra* Part I.C.3 (briefly relating the courts' reasoning, which is largely based on the unambiguous language of the statute, for interpreting § 2252 as only allowing one conviction for illicit material simultaneously possessed).

permissible is articulated uniformly under both § 2252 and § 2252A: were the prohibited images possessed at the same time and in the same place? The simple wording change from "1 or more" to "any" led the *Planck*, *Hinkeldey*, and *Anson IV* courts to apply this test more narrowly under § 2252A, such that each device or medium type is a separate "place" and thus a separate possession offense. Given § 2252A's similarity to § 2252, with the main difference being § 2252A's focus on virtual child pornography,[344] this change in interpretation is unwarranted.

The fact that the penalty provision for possession under § 2252A did not change from § 2252 is evidence that Congress did not intend higher penalties under § 2252A.[345] Despite the penalty provision for possession being equivalent under both statutes, the *Planck*, *Hinkeldey*, and *Anson IV* courts essentially changed the penalty for possession under § 2252A by changing how the unit of prosecution is interpreted. Under § 2252, simultaneous possession of illicit images on a computer and on a disk constitutes only one count of possession, and thus only garners one punishment. In contrast, this same act of possession can be charged as two counts under § 2252A[346] and so garners two punishments. A court can choose to run the two sentences consecutively, which increases the defendant's punishment based solely on the interpretation of the unit of prosecution as each device or medium type.

In *Prince v. United States*,[347] the Supreme Court refused "to make drastic changes in authorized punishments" because if "Congress had so intended, th[at] result could have been accomplished easily with certainty rather than by indirection."[348] But the *Planck*, *Hinkeldey*, and

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344. *See supra* note 61 and accompanying text (relating the passage of the PROTECT Act of 2003, which included the current version of § 2252A).

345. Sections 2252A(b)(2) and 2252(b)(2) both state:

> Whoever violates, or attempts or conspires to violate, [the possession provision] shall be fined under this title or imprisoned not more than 10 years, or both, but if such person has a prior conviction . . . 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, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

18 U.S.C. § 2252(b)(2) (2006); *id.* § 2252A(b)(2) (omitting a comma following the first "but" in § 2252A that does not alter the meaning of the provision).

346. This act of possession can be charged as two counts under *Planck* because each device is a different type of storage medium and thus a separate count and also as two counts under *Hinkeldey* and *Anson IV* because each device constitutes a separate count.

347. 352 U.S. 322 (1957).

348. *Id.* at 328.

Anson IV courts did just this; they made "drastic changes in authorized punishments" from § 2252 to § 2252A even though Congress did not clearly indicate that it intended such a result. If Congress intended to change the possession unit of prosecution between § 2252 and § 2252A, the two statutes would likely have different penalties for possession to reflect the different nature of the crimes.

b. Section 2252A's other provisions

Viewing § 2252A's possession provision in the context of § 2252A's other provisions provides a better picture of the whole statute and sheds light on the ambiguous unit of prosecution.[349] Sections 2252A and 2252 include an affirmative defense to possession;[350] both of which focus on the number of images rather than the number or type of storage devices.[351] Congress would have focused on the number of devices or media instead of on the number of images if it intended the unit of prosecution to be each device or type of storage medium. Moreover, according to the unambiguous language of § 2252A(d), a defendant who possesses two images, even if they are on two separate devices, is entitled to an affirmative defense, so long as the defendant promptly destroyed the images or reported them to law enforcement officials.[352]

Additionally, the wording change from "1 or more" to "any" may have been aesthetic rather than substantive. In *Corbin Farm Service*, the court reasoned that the change from the usage of a plural to a singular noun was not meant to affect the substance of the statute, but was merely intended to make the language more uniform

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349. *See* ESKRIDGE, JR. ET AL., *supra* note 254, at 278 ("A structure-of-the-statute argument shows how a statute can be read holistically. Not only does each provision play a role in constructing a coherent policy, but the role played by each provision helps us see more precisely what role to assign the ambiguous provision.").

350. 18 U.S.C. § 2252A(d) states:

> It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—(1) possessed less than three images of child pornography; and (2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—(A) took reasonable steps to destroy each such image; or(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

351. This affirmative defense for both § 2252A and § 2252 is for possessing less than three *images*. *Id.*; *see also id.* § 2252(c) (affirmative defenses).

352. *Id.* § 2552A(d)(2)(B). The *Polouizzi* court found § 2252(c)'s similar affirmative defense to be persuasive in striking down a possession count under § 2252's possession provision. United States v. Polouizzi, 564 F.3d 142, 155 (2d Cir. 2009).

throughout the Act at issue.[353] In § 2252, the possession provisions are the only provisions that provide a numerical value. The other offenses are all described with relation to "any visual depiction."[354] The drafters of § 2252A may have simply thought to get rid of the numerical value and replace it with "any" to conform the language of the possession provision to the language of the other provisions, which all refer to either "any child pornography"[355] or "any material that contains child pornography,"[356] in accordance with their § 2252 counterparts.

B. Legislative History

After employing various canons of construction to interpret § 2252A's language and looking at § 2252A's overall statutory scheme, the *Planck*, *Hinkeldey*, and *Anson IV* courts should have looked to § 2252A's legislative history for two reasons: (1) to resolve the ambiguity in the unit of prosecution, and (2) to ensure their interpretations were not contrary to Congress's intent. The legislative history of § 2252A clarifies that the statute was enacted specifically to close the virtual child pornography loophole left open in § 2252.

The findings published in the CPPA, which included the original version of § 2252A, focus almost entirely on the effects of technology on the child pornography market.[357] Additionally, a Senate Report

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353. *See* 444 F. Supp. 510, 529 (E.D. Cal.) (according little weight to the change from "bird(s)" to "bird" in the statute's language), *aff'd per curiam*, 578 F.2d 259 (9th Cir. 1978); *cf.* United States v. Taylor, 640 F.3d 255, 258 (7th Cir. 2011) (finding that Congress changed a statutory term solely to "achieve semantic uniformity of substantively identical prohibitions, rather than to broaden the offense").

354. Section 2252(a)(1) prohibits "transport[ing] . . . any visual depiction[.]" 18 U.S.C. § 2252(a)(1). Section 2252(a)(2) prohibits "receiv[ing], or distribut[ing], any visual depiction[.]" *Id.* § 2252(a)(2). And § 2252(a)(3) prohibits "sell[ing] or possess[ing] with intent to sell any visual depiction[.]" *Id.* § 2252(a)(3)(B).

355. Section 2252A(a)(1) prohibits "transport[ing] . . . any child pornography[.]" *Id.* § 2252A(a)(1). Section 2252A(a)(2)(A) prohibits "receiv[ing] or distribut[ing] . . . any child pornography[.]" *Id.* § 2252A(a)(2)(A).

356. Section 2252A(a)(2)(B) prohibits "receiv[ing] or distribut[ing] . . . any material that contains child pornography." *Id.* § 2252A(a)(2)(B).

357. Congress reported the following findings in the CPPA:

> (5) new photographic and computer [imaging] technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct; (6) computers and computer imaging technology can be used to—(A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using

discussing the original version of § 2252A states:

> This legislation is needed due to technological advances in the recording, creation, alteration, production, reproduction, distribution and transmission of visual images and depictions, particularly through the use of computers. Such technology has made possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.[358]

This purpose indicates nothing to the effect of changing the unit of prosecution, but rather only of addressing a new issue—virtual child pornography—that was not addressed in § 2252.

Lastly, when the Supreme Court in *Free Speech Coalition* struck down parts of the CPPA for being unconstitutionally vague and overbroad,[359] Congress responded by enacting the current version of § 2252A to bring its virtual child pornography provisions in line with the Court's holding. The legislative history of the revised version of § 2252A focuses entirely on addressing the Supreme Court's constitutional concerns while continuing to battle virtual child pornography.[360]

The unit of prosecution is never mentioned in § 2252A's legislative history.[361] Such inattention is not an uncommon occurrence. In *Kinsley*, the court found that the "allowable unit of prosecution under the statute [was] simply not addressed" in the legislative history and that there was no guidance in the statute's scheme or language.[362]

> children; (B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and (C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct

Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, § 121, 110 Stat. 3009-26, 3009.

358. S. REP. NO. 104-358, at 7 (1996) (emphasis added), *available at* http://www.gpo.gov/fdsys/pkg/CRPT-104srpt358/pdf/CRPT-104srpt358.pdf.

359. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 241 (2002) (striking down 18 U.S.C. § 2256(8), which defined "child pornography" as "'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture,' that 'is, *or appears to be*, of a minor engaging in sexually explicit conduct.'" (emphasis added) (quoting 18 U.S.C.§ 2256(8)(B) (2000))).

360. *See, e.g.*, 148 CONG. REC. 7829 (2002) (statement of Sen. Hatch) ("We were disappointed some weeks ago, when a majority of the Supreme Court struck down some key provisions of the [Child Pornography Prevention Act] under the first amendment. . . . [T]he decision left some gaping holes in our nation's ability to prosecute child pornography effectively. We must now act quickly to repair our child pornography laws to provide for effective law enforcement in a manner that accords with the Court's ruling.").

361. *See id.* (containing no reference to the unit of prosecution).

362. United States v. Kinsley, 518 F.2d 665, 669 (8th Cir. 1978).

Accordingly, the court concluded that the rule of lenity must apply.[363] The *Planck*, *Hinkeldey*, and *Anson IV* courts did not look to the legislative history of § 2252A.[364] Thus, the courts could not address Congress's lack of discussion of the unit of prosecution and explain why imputing a singular unit of prosecution, as to each device or type of medium, to congressional intent was the correct decision.

C. Rule of Lenity

Courts have applied the rule of lenity[365] in numerous unit-of-prosecution cases. As stated in *Bell*, where there is not sufficient support for a particular interpretation of an offense's unit of prosecution, the rule of lenity should apply to prevent courts and overzealous prosecutors from prescribing greater punishment than Congress intended.[366] As discussed in the foregoing sections, nothing in § 2252A's language, statutory scheme, or legislative history clearly indicates that Congress intended the unit of prosecution in the possession provision to be singular as to either the number or type of device.[367] There are, however, indicators that Congress did not intend to change the substance of § 2252A's possession provision when it switched from "1 or more" to "any." Therefore, the *Planck*, *Hinkeldey*, and *Anson IV* courts should have applied the rule of lenity.

Not only was the rule of lenity *not* applied in these cases, but *Hinkeldey* intentionally chose the harsher of the available interpretations. The court stated that "even assuming [the term 'any'] is ambiguous, there is a substantial argument that the court should reject a reading that would punish an offender in possession of thousands of illicit images in the same manner as an individual in possession of a single image."[368] This "amassing a warehouse" theory

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363. *See id.* at 670 (invoking the rule of lenity because concluding otherwise would impermissibly require a court to rely on an assumption of congressional intent).

364. Rather than attempt to interpret the statute using conventional means of statutory interpretation, *Planck* looked to analogous precedent in its own circuit, 493 F.3d 501, 503 (5th Cir. 2007); *Hinkeldey* mainly relied on *Planck*, United States v. Hinkeldey, 626 F.3d 1010, 1013 (8th Cir. 2010); and *Anson IV* barely gave any explanation at all, 04-CR-6180, 2012 WL 2873832, at *3 (W.D.N.Y. July 12, 2012).

365. *See generally* ESKRIDGE JR. ET AL., *supra* note 254, at 375–82 (reviewing and comparing cases where the Supreme Court either decided to or refused to apply lenity).

366. *See* Bell v. United States, 349 U.S. 81, 83–84 (1955) ("[T]his is not out of any sentimental consideration, or for want of sympathy . . . [i]t merely means . . . doubt will be resolved against turning a single transaction into multiple offenses.").

367. *See supra* text accompanying notes 342–364 (discussing the ambiguity of prohibiting possession of "any" material containing child pornography, especially in relation to § 2252's clearer "one or more" language).

368. *Hinkeldey*, 626 F.3d at 1014.

has already been debunked above,[369] but even if the theory had merit, it still would not warrant a court's choice of a harsher punishment without Congress having indicated much more clearly that the statute authorized such punishment.

These three decisions did not engage in the full analysis that the unit of prosecution test requires. All three decisions stopped far short of the proper analysis and assumed that § 2252A's possession unit of prosecution was either each device or each type of medium. The repulsive nature of the crimes may have influenced the courts. However, the Supreme Court has found generalized arguments about the magnitude of the evil sought to be prevented as insufficient to avoid the application of the rule of lenity.[370] While the courts' presumed units of prosecution may or may not have been reasonable, the rule of lenity is meant to preclude exactly such a "substitution of assumptions for an undeclared congressional intent."[371]

D. Punishment Goals Are Not Better Served by Separate Convictions for Each Device or Medium Type

According to a 2010 survey, 71% of federal district court judges believe that the Guidelines are too severe for possession and receipt offenses.[372] Defining § 2252A's allowable unit of prosecution as each device or type of medium is not only unsupported by the statute, but will lead to even more severe and disparate sentences among child pornography possessors. This definition does not better achieve the purposes of punishment. Thus, defining 2252A's possession unit of prosecution in line with the *Planck*, *Hinkeldey*, or *Anson IV* courts will likely cause more harm than good.

The purposes of punishment are retribution, deterrence, incapacitation, and rehabilitation.[373] Allowing a separate conviction

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369. *See supra* text accompanying notes 329–334 (explaining that under *Planck*'s or *Hinkeldey*'s reasoning, a defendant can still "amass a warehouse" and receive a single possession count by simply keeping all illicit images stored on one device, while a defendant who has a very small number of images spread across a few devices can receive multiple possession counts).

370. *See* United States v. Kinsley, 518 F.2d 665, 669 (8th Cir. 1975) (discussing United States v. Bass, 404 U.S. 336, 344 (1971), *superseded by statute*, Firearms Owners Protection Act, Pub. L. No. 99–308, 100 Stat 449 (1986), *as recognized in* United States v. Holland, 841 F. Supp. 143, 145 n.3 (E.D. Pa. 1993), a case in which the Court rejected the government's argument for a broad interpretation of the firearm possession statute).

371. *Id.* at 670.

372. U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 5 (2010), http://www.ussc.gov/Research/Research_Projects/Surveys/20100608_Judge_Survey.pdf.

373. *See* 18 U.S.C. § 3553(a)(2)(A)–(D) (instructing a court to consider these purposes when imposing a sentence); *see also* Hamilton, *supra* note 39, at 553

for each device does not substantially further these purposes. The number or types of devices used for storage have very little correlation to a defendant's culpability, and thus do not fairly further the purpose of retribution.[374] Deterrence is not furthered by basing counts on devices because most individuals would not think that they could receive two convictions instead of one simply by moving images that are already in their possession between devices. These individuals are more likely to think that amassing a large collection of illegal images could lead to harsher punishments. Defining storage devices as separate units of prosecution could deter the use of multiple devices, but it would not deter collecting large amounts of illicit images onto one device. Breaking up possession offenses based on storage devices can lead to longer sentences due to the greater number of counts defendants can be convicted of. But incapacitation is more harmful than beneficial to society when individuals are incapacitated longer than necessary because public resources are expended on needless incapacitation.[375]

Defining possession by the number or types of devices will exacerbate the already-serious problem of disparate sentencing.[376] Sentencing disparities are further exacerbated by prosecutorial discretion to charge under either § 2252 or § 2252A and to charge defendants with however many counts the prosecutor wishes.[377] Such

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(explaining the Guidelines and their objectives of proportionality and uniformity).

374. *See* BLACK'S LAW DICTIONARY, *supra* note 72, at 1431 (defining retributivism as the "legal theory by which criminal punishment is justified, as long as the offender is morally accountable, regardless of whether deterrence or other good consequences would result"). Therefore, under a retributive theory of punishment, offenders should only be punished to the extent that they are culpable; punishment that exceeds the offense goes beyond retribution. Retribution, therefore, does not support treating possessors of child pornography with sentences disproportionately larger than their culpability.

375. *See* Hamilton, *supra* note 39, at 546 ("[If child pornographers] are subjected to longer prison sentences than necessary for the purposes of public safety, public monies and resources expended upon incarceration are wasted.").

376. *See* Krohel, *supra* note 29, at 636–37 (providing case illustrations of the "reluctant rebellion" and criticizing judges for imposing sentences below what was called for in the Guidelines).

377. *Compare* United States v. Maupin, 520 F.3d 1304, 1304 (11th Cir. 2008) (per curiam) (affirming the conviction of a defendant charged with only one possession count under § 2252A for, according to his brief to the court, "hard drives and other forms of digital media storage containing in excess of 110,000 images of child pornography" (quoting Initial Brief of Appellant at *4, *Maupin*, 520 F.3d 1304, (No. 07-13341), 2007 WL 3168383)), *and* United States v. Sherman, 268 F.3d 539, 541 (7th Cir. 2001) (charging a defendant with only one possession count under § 2252A for eight separate videotapes containing child pornography) *with* Anson IV, 04-CR-6180, 2012 WL 2873832 (W.D.N.Y. July 12, 2012) (upholding thirty-nine counts of possession under § 2252A for a computer hard drive and thirty-eight computer disks containing child pornography).

disparities call into question the fairness and legitimacy of the criminal justice system.[378]

Better indicators of culpability, and thus better indicia on which to base punishment, include the number of images possessed,[379] the nature or content of the images, the defendant's length of involvement in the child pornography market, the extent to which the defendant tried to cover up his possession crimes, and the defendant's criminal history. All of these factors are already taken into account by the Guidelines, and consequently by sentencing courts[380] because these courts must calculate each defendant's Guidelines' range and take that range into consideration.[381] Therefore, it is unnecessary and even harmful to interpret § 2252A's possession unit of prosecution as each device or type of medium.

CONCLUSION

The *Hinkeldey*, *Planck*, and *Anson IV* courts failed to follow the well-established method of discerning congressional intent in unit of prosecution multiplicity claims. This method includes analyzing the statute's plain language, statutory scheme, and legislative history. If ambiguity remains after this inquiry, then courts should apply the rule of lenity and construe the statute in a manner that avoids assigning more punishment for an offense than Congress intended. Accordingly, the three courts' bare-bones analyses did not live up to this standard.

Section 2252A's "any" language is ambiguous and neither the statutory scheme nor the legislative history support the holdings of *Planck*, *Hinkeldey*, and *Anson IV* that the unit of prosecution is each type of storage medium or each individual storage device. Therefore, § 2252A's possession provision should be interpreted analogously to

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378. *See* Chemerinsky, *supra* note 10, at 735–36 (discussing how ambiguity as to the allowable unit of prosecution can lead to inconsistent sentencing, threatens the appearance of fairness and actual fairness, and weakens confidence in the criminal justice system).

379. *But see* U.S. SENTENCING COMM'N, STATEMENT OF HON. RICHARD J. ARCARA UNITED STATES DISTRICT COURT JUDGE WESTERN DISTRICT OF NEW YORK BEFORE THE UNITED STATES SENTENCING COMMISSION 8–9 (July 9, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Arcara_Testimony.pdf ("Is the person who downloads hundreds of images indiscriminately more dangerous than one who downloads 50 or 60 specific kinds of images? I don't know.").

380. *But see* Krohel, *supra* note 29, at 642–56 (2011) (explaining the enumerated statutory sentencing factors and arguing that they are not applied consistently enough).

381. *See* United States v. Booker, 543 U.S. 220, 245 (2005) (holding that the Guidelines are merely advisory, meaning a court must "tailor" a sentence "in light of other statutory concerns as well").

§ 2252's possession provision, such that the unit of prosecution is not dependent on the number or type of physical storage devices.

There is little efficacy in counting the devices as the unit of prosecution. Instead, sentence enhancement should be based on the number of images, as is suggested in the Federal Sentencing Guidelines, along with the myriad of other factors described by the Guidelines. The number of devices and types of storage media should be irrelevant to both the unit of prosecution and sentencing. Courts should more closely follow these advisory guidelines when it comes to sentencing for possession in order to adequately punish offenders while simultaneously protecting against egregiously disparate sentences for offenders in possession of similar collections of illicit materials.

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